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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1865:

COMPRISING
REPORTS OF CASES

In the House of Lords,

AND IN THE COURTS OF

**Chancery and Appeal in Bankruptcy,
Probate, Divorce and Matrimonial Causes, Admiralty,
Queen's Bench and the Bail Court,
Common Pleas, Exchequer, Exchequer Chamber, and
Crown Cases Reserved.**

FROM
MICHAELMAS TERM 1864, TO TRINITY TERM, 1865,
BOTH INCLUSIVE.

The House of Lords Cases are given in the Chancery and Common Law Courts respectively; Decisions in Error and on Appeal in the Exchequer Chamber will be found in the respective Courts from which the Errors and Appeals come; the Common Pleas includes the Appeals from Revising Barristers; and the County Court Appeals are in the Queen's Bench, Common Pleas, and Exchequer respectively.

THESE CASES FORM PARTS I. AND II. OF THE WORK.

THE CASES RELATING TO THE POOR LAWS, THE CRIMINAL LAW AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM PART III. OF THE WORK.

THE DECISIONS IN THE PROBATE COURT, THE DIVORCE AND MATRIMONIAL CAUSES COURT, AND THE HIGH COURT OF ADMIRALTY, WITH THE CASES DECIDED ON APPEAL FROM THOSE COURTS, ARE SEPARATELY ARRANGED, AND FORM PART IV. OF THE WORK.

EDITED BY

MONTAGU CHAMBERS, ESQ. ONE OF HER MAJESTY'S COUNSEL,

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CASES

ARGUED AND DETERMINED

IN THE

Court of Queen's Bench,

REPORTED BY

WILLIAM MILLS, Esq. AND ROBERT SAWYER, Esq.

BARRISTERS-AT-LAW,

AND IN THE

Bail Court, and Exchequer Chamber

ON ERROR AND ON APPEAL FROM THE QUEEN'S BENCH,

REPORTED BY

FRANCIS RUSSELL, Esq. BARRISTER-AT-LAW.

28 & 29 VICTORIÆ.

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CASES ARGUED AND DETERMINED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN QUEEN'S BENCH CASES.

MICHAELMAS TERM, 28 VICTORIÆ.

1864. } STIRLING v. MAITLAND AND
Nov. 15. } ANOTHER.

Master and Servant—Covenant not to "displace" from Employment—Implied Covenant.

S, the agent of an insurance company, being indebted to the company, and being pressed for payment, it was arranged that the plaintiff should pay the money to the company, and that the company should appoint him and S. as joint agents, with the same rates of payment and remuneration as before. A deed was executed, containing a covenant that in case the company should at any time hereafter "displace" S. from his appointment as agent, then that they should and would forthwith repay to the plaintiff the money so paid by him. Subsequently, the company transferred the whole of their business and liabilities to another company, and refused to pay the plaintiff the money so advanced by him:—Held, in an action to recover the amount, that there was an implied covenant on the part of the company that they would not do anything of their own voluntary act, by which it should be impossible for them to keep S. in their employ any longer, and therefore that they were liable in the action by the plaintiff.

The declaration was in covenant to re-
NEW SERIES, 34.—Q.B.

cover 1,449*l.* 10*s.* 9*d.*; and at the trial, before Cockburn, C.J., at the Sittings in London after Trinity Term, 1863, a verdict was entered for the plaintiff, subject to the opinion of the Court upon a case, which was substantially as follows:

The United Kingdom Life Assurance Company were established under a deed of settlement, and were registered under section 58. of the 7 & 8 Vict. c. 110.

In 1842 the company, of whom the defendants were trustees, appointed A. B. Seton to be their sole agent at Glasgow. His business was to procure persons to effect policies with the company, and otherwise to bring business to the office; by way of remuneration he was to receive, and did receive, 10*l.* per cent. upon the first premium, and 5*l.* per cent. on the succeeding premiums in respect of all policies effected with the said company through his introduction, and 5*l.* per cent. on all premiums which, by direction of the company, he might collect from them, and also an allowance of 130*l.* for office rent; in addition to which, the company paid the rates and taxes and other incidental expenses connected with the office.

In the year 1848 they advanced to him, on loan, 2,000*l.*, on the security of the joint and several promissory note of himself, his son and the plaintiff. In December 1852

he became further indebted to them in the sum of 1,449*l.* 10*s.* 9*d.*, and for this debt the company had no security whatever. They pressed him for payment of both amounts; and an arrangement was made that the plaintiff should pay off both sums upon the terms and conditions of a deed hereinafter referred to. The plaintiff did accordingly pay to the company the said two sums, and they appointed him their agent at Glasgow jointly with Seton.

A deed was entered into, on the 17th of December 1852, between the defendants and two other persons, as trustees of the company, of the first part, the said A. B. Seton of the second part, and the plaintiff of the third part, which, after reciting that the plaintiff had agreed to pay off the 2,000*l.* upon having the securities first transferred to him, and to pay off the 1,449*l.* 10*s.* 9*d.* on the company appointing him co-agent with Seton, the trustees, in consideration of these payments, assigned to the plaintiff the securities for the 2,000*l.*, and covenanted with him that "in case the said company shall at any time hereafter displace the said A. B. Seton from his appointment as agent of the said company at Glasgow, then the said company shall and will forthwith thereafter repay unto the said William Stirling, his executors, administrators and assigns, the said sum of 1,449*l.* 10*s.* 9*d.*, or so much thereof as shall not have been previously repaid to the said W. Stirling, or otherwise recovered or received by him." Then followed a provision, that in the event of the joint agency at Glasgow being determined by the company by the displacement of Seton, the company reserved the right of appointing the plaintiff as their agent at Glasgow or discontinuing his services; and, if they should appoint him, of compensating him in such manner as they might think proper.

After the deed had been executed, the business at Glasgow was carried on by Seton, in the name of Seton & Stirling, but in the same manner as it had previously been, and the same remuneration and allowances continued to be paid. The plaintiff himself took no active part in the said agency, though he occasionally called at the office, and conversed with Seton upon the business of the company. On the 29th of July 1862 certain heads of agreement

were entered into between the company and the North British and Mercantile Assurance Company for the sale and transfer of the business, goodwill and property of the company to the North British Company. No notice was given to the plaintiff of this intended transfer till the 15th of July 1862; and on the 8th of September a letter was written to the plaintiff and Seton by one of the defendants, informing them that the agreement had been entered into, and containing the following passage: "In returning you the cordial thanks of the board of directors of this company for your influential introduction and valuable services, I am desired to express their earnest hope that you will continue to extend your influence and service to the North British and Mercantile Assurance Company, who will carry on business at this office as a branch, and who will, I feel assured, give prompt and particular attention to all matters affecting the interest of the agents and the constituents. I have the pleasure to inclose you a prospectus of the British and Mercantile Assurance Company, shewing the terms upon which they grant new insurances, and at the same time to inform you that Mr. David Smith, the general manager, will communicate with you in a few days."

The transfer to the North British Company was effected on the 1st of October, and no part of the sum of 1,449*l.* 10*s.* 9*d.* was paid by the company. The partnership between the plaintiff and Seton was dissolved in January 1863, and the present action was then brought.

M. Smith (*Murray* with him), for the plaintiff.—The defendants are liable in this action, for they have displaced Seton from the agency. They have bound themselves to pay the money in a certain event, and that event having happened they can have no defence to the action, especially as it has happened through their own voluntary act by putting an end to their business and transferring it to the North British Company. If a man covenants not to displace another from his chair, it would make no difference whether he pushed him off the chair or pulled the chair from under him.

[*CROMPTON, J.* referred to *Charnley v. Winstanley* (1).]

(1) 5 East, 266.

It cannot be contended that the defendants were bound to carry on their business under all circumstances, but it is submitted, that beyond all doubt, if they choose of their own act to put an end to it, they are bound to pay the plaintiff.—He referred to *Tasker v. Shepherd* (2) and *M'Intyre v. Belcher* (3).

Coleridge (*H. Lloyd* with him), for the defendants.—The parties, in entering into this covenant, only contemplated the agent being displaced while the business of the company was continued. It was supposed that the company was in a prosperous condition, and that the arrangement would be an advantage to both parties. If the plaintiff's contention be the right one, the company would be liable if they had carried on the business for twenty years, although he had been receiving commissions during the whole of that time. The duties and remuneration of Seton came to an end only by the company ceasing to carry on business, winding up their affairs and dissolving. Under such circumstances, they are not liable upon their covenant.

M. Smith, in reply.—Suppose the manager of a theatre covenanted that he would pay money if he dismissed an actor, and then gave up the occupation of the theatre, he would surely be liable. That is just the same as the present case.

[*SHEK, J.*—Is not the letter of the 8th of September a displacement of itself?]

Yes it is.

COCKBURN, C.J.—I am of opinion that our judgment ought to be for the plaintiff. When we come to look at the terms of the deed, and the recitals in it, the nature of the arrangement and the intention of the parties become plain. Seton being the agent of the United Kingdom Life Assurance Company became indebted to them in the sum of 1,449*l.* 10*s.* 9*d.* The plaintiff, finding that the company were pressing their agent, was minded to pay off the debt due from him, and then the question arose, how was the repayment of the money to be secured to the plaintiff; and the deed was entered into, according to the covenants of which he was to be a co-agent with Seton,

the object being to give him a control over the money received by Seton, and then inasmuch as the whole object of the arrangement would have been defeated if Seton had been displaced, the covenant in question was inserted. After a time the company found that their affairs were not prosperous, and an arrangement was entered into with the North British and Mercantile Assurance Company that their business should be transferred to them. Of course, when this took place, and the transfer was effected, there was a dissolution of the defendant's company, and there being no further business of the company, there would be no further agency, and the whole thing would fall to the ground. I think this comes within the terms of the covenant, and that the meaning of the company in entering into the covenant was this: "We, being the United Kingdom Company, and Seton being our agent, we, in order to secure to you the repayment by Seton of the sum which you have paid for him, will engage that we will continue him in that employment which he has hitherto held," and adopting Mr. Coleridge's construction, "so long as we continue to be a company." Then I think that a covenant is implied that they would do nothing of their own accord to put an end to the existence of the company, or the employment of Seton as their agent. I think that effect can only be given to the covenant by the continuance of a given state of things, and there is an implied covenant that the covenantors would do nothing of their own act which would put an end to the continuance of that, without which the object of the arrangement could not be attained. While, therefore, I agree with Mr. Coleridge, that if the company should come to an end by reason of any external cause, which could not be considered an act of their own, it would not have the effect of displacing the agent, I also think that where it is done by their own voluntary act, there is a breach of covenant for which the plaintiff is entitled to bring his action against them. By their own act the company have put an end to that state of things which alone could enable them to continue him in their employment. I quite feel that the effect of our decision may, morally speaking, be that an injustice will be done; but that is not the

(2) 6 Hurl. & N. 575; s. c. 30 Law J. Rep. (N.S.) Exch. 207.

(3) 32 Law J. Rep. (N.S.) C.P. 254.

question which we have to determine, and it may possibly be that the company may obtain relief by a proceeding in equity. We have only to consider whether there has been such a displacement of Seton from his employment as will amount to a breach of the covenant, and entitle the plaintiff to maintain this action.

CROMPTON, J.—I am of the same opinion. The plaintiff declares against the defendants, who are the trustees of the company, upon the covenant to pay money which may become due upon the contingency of their displacing Seton, who was their agent, from his situation. The defendants plead that he was not so displaced, which raises the simple question which we have to decide, whether what has been done brings them within the meaning of the covenant, which is not that they will not turn him away, which is what I understand by "displace"; but that if they do displace him, they will pay the money; and I think that when they did an act which necessarily had the effect of displacing him, they became liable to an action. I referred during the argument to *Charnley v. Winstanley* (1), where a woman had before her marriage covenanted to leave certain matters in difference between herself and the plaintiff to arbitration, and to abide the award; the arbitrator made the award after the marriage, in favour of the plaintiff, and an action having been brought against the husband and wife, it was held that inasmuch as by the marriage she had by her own act put it out of her power to perform the award, the covenant to abide the award was broken. The step which she took was a very natural one, but as it was an act done of her own accord, the action was maintainable. In the present case no technical words are used; and I construe the meaning of the parties to be, that Seton was not to be put out of his place; and then if the company by their own voluntary act cease to exist, he cannot any longer remain in the place. The plain meaning seems to be this: the plaintiff says, "I will pay the money which Seton owes, but I must have the security of your keeping him in his situation, and you must give me a pledge that you will not by your own voluntary act displace him; I take the chance of his dying, or of his becoming paralyzed, or of his being guilty of such misconduct

as would lead to his dismissal, but you must not dismiss him of your own heads." It seems to come within the rule that an indirect act is the same as a direct one, if the necessary consequence is that he is displaced. Perhaps this is a direct act of the company. The argument that they have a right to dissolve the company, would apply equally to the case of an agreement of this sort with a common firm or partnership, which would displace the people employed by them if they put an end to their trade and business. I think the company did displace the plaintiff within the meaning of their covenant, and that the plaintiff is entitled to recover.

MELLOR, J.—I am of the same opinion. Mr. Coleridge has contended that the company could not "displace" Seton by anything which they did, except while they were carrying on the business in which he was employed by them; but upon looking at the whole of the circumstances and the deed, it seems to me to be far more reasonable to construe them to mean that they should not do anything which would have the effect of displacing him. By this arrangement the plaintiff, the agent, and also the company, were to gain some advantage, and the latter bind themselves not to displace Seton, because the plaintiff wanted the security which his remaining in his employment afforded him. The company had no right to put an end to the employment by the voluntary transfer of the business to the North British Company, by their own purely voluntary act, and at the same time to deny their liability to pay the money to the plaintiff.

SHEE, J.—I had some doubt at first whether the meaning of this covenant was not that the company would not displace Seton while they continued to carry on their business; but I have now come to the same conclusion as the rest of the Court, and I think with my Brother Crompton that Seton was displaced by the dissolution of the business which the company carried on. That this is the meaning appears more certainly from the second covenant, in which they appear to contemplate the event of the employment of the plaintiff, and to reserve to themselves the right of appointment and compensation.

Judgment for the plaintiff.

1864. } ALLDAY v. THE GREAT WESTERN
Nov. 2. } RAILWAY COMPANY.

Carriers by Railway—Cattle—Unreasonable Conditions—Special Contract—"Injury"—Over-carriage—17 & 18 Vict. c. 31. s. 7.

The defendants, a railway company, received certain cattle to be carried for the plaintiff to B. station. They induced him to sign a ticket containing certain "special conditions," among others that the defendants were not to be answerable for "any consequences arising from over-carriage, detention or delay in, or in relation to the conveying or delivering of the said animals, however caused." The cattle were sent to the H. station, which was a more distant station than the B. station, and where they remained for some hours until they were found by the plaintiff. In consequence of the delay, and from want of food and water, the cattle were injured. There was no consideration for the special contract by charging the plaintiff a smaller rate of charge, or anything of the kind:—Held, that the cattle were injured within the meaning of 17 & 18 Vict. c. 31. s. 7, and also that the condition in the ticket was unreasonable within the meaning of that section.

The first count of the declaration alleged that the plaintiff delivered to the defendants certain beasts, to be by the defendants carried from Oxford to Bordesley Station, Birmingham, and there delivered for the plaintiff in a reasonable time then next following, for reward to the defendants; that the defendants received from the plaintiff the said beasts for the purpose aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said beasts delivered by the defendants at the last-mentioned place, yet the defendants so carelessly and negligently conducted themselves in and about effecting the purpose for which the said beasts were so bailed to them as aforesaid, that by reason of the said negligence and carelessness of the defendants they did not within the said reasonable time deliver the said beasts to the plaintiff at Bordesley Station, Birmingham, as aforesaid, by reason whereof the

plaintiff lost the use of the same for a long time, and was put to great trouble and inconvenience, and did and performed work, labour and journeys in and about finding and regaining possession of the said beasts, and was deprived of the opportunity of selling the same, and for a long time was forced to expend food and labour in feeding and taking care of them for that time, and the beasts were not at the time and place when he regained possession of them so valuable as they would have been at the time and place when and where the beasts ought to have been delivered to him as aforesaid. The second count was trover for the beasts.

First plea, not guilty; second, to the first count, that the plaintiff did not deliver to them, nor did they receive from the plaintiff the said beasts, or any of them, for the purpose and on the terms alleged.

At the trial, which took place at the last Warwick Summer Assizes, before Keating, J., it appeared that in 1861 the plaintiff bought some beasts at Oxford market, and delivered them to the station-master at the Oxford station of the defendants, with directions to send them to Birmingham for the market which was to take place the next day. At the time of delivering, a ticket was given to and signed by the plaintiff, which was in the following form:

"Cattle, Sheep and Pigs (reduced rates).

"To the Great Western Railway, Oxford Station,

"Nov. 13, 1861.

"Received from Allday, of —, the under-mentioned animals on the conditions stated below, and at special reduced charge below the rates authorized by law.

"To be sent to Bordesley Station.

"Special Conditions.

"The loading and unloading is to be performed by the sender, and any assistance voluntarily given by the company's servants to be at the risk of the owner. The company are not to be subject to any risk in the receiving, loading, forwarding, in transit and unloading, nor to be amenable for any damage actual or consequential, arising from suffocation, from being trampled on, bruised or otherwise injured from fire or any other cause whatsoever, nor from any consequences arising from over-carriage, detention or delay in, or in relation to the

conveying or delivering of the said animals, however caused."

It was not proved that the rates charged were not the rates usually charged. The company have two stations for the delivery of cattle for the Birmingham market, one, that at Bordesley, for the cattle from Oxford and places south of Birmingham, which is the one mentioned in the ticket; the other, Hockley, north of Birmingham, which would not be the proper one for the plaintiff's cattle to be sent to. The plaintiff made inquiries for them the next morning at the Bordesley station, but inasmuch as they had been carried to the Hockley station, he did not get them till the middle of the day, and when the market was nearly over. The proper time for him to have received them would have been early in the morning, and at the Bordesley station. By reason of the delay which took place he lost the market; and in addition it was proved that the cattle had become injured by having been kept in the trucks without food or water. The defendants refused to make any compensation, and the action was brought at the time, though proceedings were afterwards stayed.

In consequence, however, of the decision of the House of Lords in *Peck v. the North Staffordshire Railway Company* (1) the plaintiff went on with the action. The defendants insisted that they were protected by the condition in the ticket, and that they were not liable in respect of over-carriage.

The learned Judge, however, was of opinion that the condition was unreasonable, and a verdict was found for the plaintiff for 15*l.*, leave being reserved to the defendants to move to enter the verdict for them.

Field (Manley Smith with him) now moved accordingly.—The plaintiff was not entitled to recover in this action; he has entered into a special contract with the defendants as to the terms upon which they were to carry the cattle. There is nothing unreasonable in the conditions set out in the ticket, nor is there anything in the 17 & 18 Vict. c. 31. s. 7. which can shew that the contract would not be binding upon the plaintiff. The difficulty of making arrangements for the carriage of cattle is very great, and there is always a possi-

bility that they may be carried beyond the particular station to which they were destined.

[COCKBURN, C.J.—You must go the length of arguing that if the cattle had been carried 200 miles beyond Bordesley station, the defendants would have been protected from liability.]

If that be so, the defendants may be protected on the ground that what has happened only amounted to delay, for if the plaintiff had not accepted the cattle at the Hockley station, they would have been sent back to Bordesley and delivered to him there. Next, there was "no loss of or any injury done to" the cattle within the meaning of 17 & 18 Vict. c. 31. s. 7, and therefore the defendants have a right to limit their liability as they would be able to do at common law. Admitting that the condition of the cattle had fallen off in consequence of the want of food and water, that would not amount to "injury" within section 7. of the above act.

COCKBURN, C.J.—I am of opinion that there ought not to be any rule in this case. It is admitted that there had been loss of condition to the cattle, and it is clear that that amounts to "injury" within the meaning of the 7th section. I am also of opinion that the condition expressed in the ticket is unreasonable. The defendants claim complete immunity from liability in respect of all delay, over-carriage, &c. They talk of reduced rates, but there is no proof that they charged the plaintiff anything less than the ordinary rates of charge. It might perhaps be reasonable if they had given the plaintiff the choice of two classes of rates, and had made a special contract limiting their liability in consideration of the lesser rate being charged. But no such thing has been done here.

CROMPTON, J.—I am of the same opinion. It is clear that the cattle sustained injury by reason of the conduct of the defendants. It is also clear that the condition was an unreasonable one; it was compulsory upon the plaintiff, no option being given to him, and the defendants cannot in such a manner protect themselves from liability.

MELLOR, J. and SHEE, J. concurred.

Rule refused.

(1) 32 Law J. Rep. (N.S.) Q.B. 241.

1864. }
Nov. 4. } *Ex parte A. S. DE JIVAS.*

Arbitration—Attorney—Articled Clerk—Illness—Discharge from Articles.

Where an articled clerk had served for nineteen months under his articles, and had then been compelled from illness and other causes to be absent for more than sixteen months, this Court permitted him to be discharged from the old articles and to serve the same master under new ones, for such a period as with the time during which he had already served would make up the full period of five years.

This was an application to the Court for an order that A. S. De Jivas might be discharged from articles of clerkship then current, and that he might be allowed to enter into fresh articles for the remainder of the time necessary to complete the five years.

It appeared from an affidavit made by the clerk that articles of clerkship, dated the 18th of November 1861, had been entered into for the period of five years, and that he had served the attorney with whom the articles were made for a period of nineteen months and twelve days from their date; that on the 1st of July 1863 he was compelled from ill-health and other causes to leave his occupation, and from that time to the present, a period of more than sixteen months, he had been absent; that he was now desirous of continuing his service with the same master.

Peter Williams, in support of the application.—The clerk wishes to be allowed to enter into fresh articles, and that the time of actual service under the old articles may be allowed to count as good service.

[COCKBURN, C.J.—He does not ask that the time he was absent should count?] No.

[CROMPTON, J.—Why cannot he continue to serve under the old articles till they have expired?]

Even if he did, he would be obliged to come to this Court at the expiration of his articles—*Ex parte Smith* (1). It is perhaps more prudent that he should get rid of the

difficulty at once by making the present application.

Per Curiam (2).—He may have leave to enter into fresh articles to serve for such time as will be necessary to make up the five years with the time actually served under the old articles; he being discharged from the old articles.

Order accordingly.

1864. }
Nov. 10. } *ROBERTS v. EVANS.*

Award—Arbitrator—Enlargement of Time—Jurisdiction.

Where there was cause to believe that an arbitrator had failed to enlarge the time for making his award within the time provided by the order of reference, and he had refused to give any information as to whether the enlargement had been duly made or not, this Court, upon the application of one of the parties who wished to make the order of reference a rule of Court, ordered the arbitrator to attend before the Master to be examined upon the matter, in order that the order of reference might be made a rule of Court.

Rule calling upon the defendant to shew cause why a rule obtained to make an order of reference a rule of Court should not be discharged on the ground that the affidavits did not verify the time at which the enlargements of time were made.

It appeared that, by an order of Blackburn, J., all matters in difference in a cause of *Roberts v. Evans* were referred to an arbitrator, who, on the 5th of February 1864, made and published his award in writing. The proper time for making the award, supposing there had been no enlargement, was on or before the 11th of January. The award on the face of it shewed an enlargement to the 1st of February, and another to the 1st of March. It was sworn that the latter enlargement was not made till the 5th of February, when the award and order of reference were delivered. The arbitrator refused to make an affidavit or

(2) Cockburn, C.J., Crompton, J., Mellor, J. and Shee, J.

(1) 28 Law J. Rep. (N.S.) Q.B. 263.

to state whether the enlargements were made in due time.

Mellish shewed cause against the rule, and contended that the arbitrator had no right to refuse to give the party the information which he asked for.

[COCKBURN, C.J.—What ground can he have for refusing?]

Some strange notion of the dignity of his office.

[COCKBURN, C.J.—Surely this Court has power, under either section 46. or section 48. of the Common Law Procedure Act, 1854, to order him to appear and be examined?]

Yes; he may be ordered to appear in Court for the purpose, or he may be ordered to attend before a Judge or a Master, and be examined on oath. The party has a clear right to get the information he requires.

Per Curiam (1). — Let a peremptory order issue that he shall attend before the Master to be examined on oath, and let the rule be enlarged until next term.

Order accordingly.

[IN THE EXCHEQUER CHAMBER.]
(*Appeal from the Court of Queen's Bench.*)

1864. }
June 14. } DAVIES v. PRICE.*

Arbitration — Objecting to Arbitrator's Authority — Attending before Arbitrator under Protest.

If a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them, and protests against it, and the arbitrators nevertheless go into the question and receive evidence on it, and the party, still under protest, continues to attend before the arbitrators and cross-examines the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that

(1) Cockburn, C.J., Crompton, J., Mellor, J. and Shee, J.

* Decided in the Sittings after Trinity Term, coram Pollock, C.B., Williams, J., Willes, J., Bramwell, B. and Channell, B.

the arbitrators have exceeded their authority by awarding on the matter.

This was an appeal, by the plaintiff, against the decision of the Court of Queen's Bench in favour of the defendant.

The action was on an award for 2,000*l*.

The declaration alleged that, in pursuance of the terms of a lease between the plaintiff and the defendant, by which it was agreed that in case of differences respecting the construction of the lease or anything therein contained, or respecting any other matter or thing connected with or relating to one or more of the subjects thereof, such differences should be referred to the arbitration of three indifferent persons,—one to be chosen by each of the parties and the third by such two persons; and it averred that, differences and disputes having arisen, the plaintiff appointed A. and the defendant appointed B. as the two arbitrators, and that A. and B. not agreeing in appointing a third arbitrator, C. was appointed third arbitrator by a Judge under the provisions of the Common Law Procedure Act, 1854, and that the award was made by A. and C.

The defendant, by his seventh plea, pleaded that he did not choose B. to be such second arbitrator to whom the said differences and doubts should be referred, as alleged in the declaration.

The appointment of B. by the defendant in fact was not to determine all the matters in difference alleged in the declaration, but conferred only a limited authority to decide on the construction of the lease.

On the reference, the defendant objected to the arbitrators going into any question of the amount of damages or anything beyond the construction of the lease; but he did, under protest, attend meetings of the arbitrators, when the question of damages was gone into, and cross-examined some of the witnesses.

The Court below thought by thus appearing under protest to contest the question of the damages, the defendant did not waive the substantial objection that he had taken to their authority, and gave judgment in his favour.

H. Lloyd, for the plaintiff, the appellant. —The arbitrators clearly had power over the construction of the lease, and therefore the award is good as to that part.

But the power to decide on the lease incidentally gives a power to award damages. The defendant's protest and objection was practically a nullity, as he continued his attendance before the arbitrators and cross-examined the witnesses on the question of damages. This conduct on his part was a waiver of all objection to the arbitrators' authority over damages.

[WILLIAMS, J.—If the parties attend and so give the arbitrators power, is it not a new submission?]

No; a waiver acts only by way of estoppel. The defendant cannot be held to say that the arbitrators had not originally authority to decide on the question of damages after he has discussed the question before them. *Ringland v. Lowndes* (1) is a clear authority that if a party protests and yet attends before an arbitrator his protest comes to nothing, and his objection fails.

[POLLOCK, C.B.—I cannot distinguish, in my own mind, between a man being a Judge and a man being a Judge *quoad hoc*. I do not see why—if an arbitrator deals with a matter beyond his jurisdiction, and the party protests, doubting the arbitrator's authority, and yet goes on to take care of his own interests as he best can, saying, I am not sure that you are right—he is to be bound by the award. Why is he disentitled to protect himself from the consequences of his own view as to the arbitrator's authority being wrong? I think it a much more difficult question whether the defendant could have availed himself of a decision in his favour.]

Lush (*J. Brown* with him), for the defendant, was not called upon.

POLLOCK, C.B.—We are of opinion that the plea is proved, and that the judgment of the Court below ought to be affirmed.

The other JUDGES concurred.

Judgment affirmed.

BAIL COURT. }
1864. } THE QUEEN v. COLLINGRIDGE.
June 11.* }

Merchant Shipping Act—Local Marine Board—Duty of summoning Witnesses for the Defence—Stat. 17 & 18 Vict. c. 104. ss. 15, 241.

A local marine board, appointed under the *Merchant Shipping Act*, 1854, to inquire into a charge of alleged misconduct against the master or mate of a vessel, has a discretionary power as to granting summonses for witnesses for the defence.

It is a proper course for such Court before granting the summonses, to inquire who the witnesses are, and what they are expected to prove; and to refuse the summons in respect of any witness who can only speak to matters clearly irrelevant.

The witnesses summoned for the defence are witnesses of the Court, and their expense is borne not by the defendant but by the public.

This was a motion for a *certiorari* to the local marine board of London, to bring up a conviction or finding of the local marine board, on a summons for an inquiry into the conduct of the defendant.

By the *Merchant Shipping Act*, 17 & 18 Vict. c. 104. ss. 241, 242, the local marine board have power of inquiring into any charges of misconduct of any master or mate on board of merchant vessels, and of suspending or cancelling any master's or mate's certificates. The defendant, a duly certificated master, was prosecuted before the local marine board for alleged misconduct, under section 241. According to the affidavits in support of the motion, the defendant, two days before the hearing, required the secretary of the board to cause certain witnesses for him to be summoned, giving the secretary a list of them. The secretary told the defendant the board could not summon witnesses for the defence. It was stated also in the same affidavit that, on the day appointed, the defendant appeared with his solicitor to answer the charge, but that an officer of the court refused to allow the attorney to enter the board-room, and that the case was heard without him, and the defendant was convicted of misconduct in the absence of his

* Decided in Trinity Term.

C

(1) 33 Law J. Rep. (N.S.) C.P. 25. But see the case reversing the judgment below, *ibid.* p. 337.

NEW SERIES, 34.—Q.B.

solicitor, and had his certificate suspended for three months.

By the affidavits in answer, it appeared that the defendant on entering the room was asked whether he had an attorney, and that in answer he said that he could conduct the case himself; that at the commencement of proceedings the board offered to adjourn the hearing, and give the defendant an opportunity to insure the attendance of his witnesses; that the defendant answered that he wished the inquiry then to proceed; that the inquiry then proceeded and witnesses were heard for the prosecution, and the defendant made a statement; that he was then asked to furnish a list of witnesses whom he required, and to inform the board what they were likely to prove, that the Court might exercise a discretion whether they should be called, and that an adjournment should be granted for the further hearing; that the defendant, in reply, stated that he would have the case decided then, and that it was decided accordingly.

H. Giffard shewed cause.—These proceedings are under the Merchant Shipping Act, 1864, stat. 17 & 18 Vict. c. 104, and are perfectly regular. By section 242. the local marine board has power to suspend or cancel a master's certificate. The objections proposed to be urged fail in point of law, and are not grounded on fact. First, the board was not bound to summon the defendant's witnesses. Section 241. gives the board all the powers of inspectors, and section 15. gives the inspector power to summon all such witnesses as he may think fit. The board has the same discretionary powers as to what witnesses it will require to attend, and may decline to summon any when it is not satisfied that their evidence will be of importance. Further, the defendant never put the board into a position to decide on the propriety of summoning the witnesses. With regard to the objection respecting the exclusion of the attorney, the affidavits in answer shew clearly that the defendant did not complain of his attorney being excluded, but said that he would conduct his case himself.

Joyce and Gibbons, in support of the rule.—The defendant had a right to have his witnesses summoned for him. The legislature never intended that the defen-

dant should be bound to disclose to the other side and to the Court the nature of the evidence which he supposed that they would give.

[CROMPTON, J.—It may be that the rule is framed by analogy to the practice of parliamentary committees, to require the party to state what the witnesses will prove. They need not disclose the evidence in a way to do any damage.]

The legislature says, section 241, that the board is to afford the defendant *full* opportunity of defence. The board, therefore, has no such discretionary power as the inspectors have. The powers conferred *sub modo* on the inspectors are conferred absolutely on the board. The inspector could inquire only into certain specified matters under section 15, but section 241. gives larger powers to the board. Further, the statute says that the defendant is to have full opportunity of making his defence by himself or otherwise. That means that he may do it either in person or by means of his legal advisers. The defendant had therefore an absolute legal right to have his attorney present, and the attorney swears positively that he was excluded. These proceedings of the Court amount to a denial of justice. A *certiorari* is the only remedy.

CROMPTON, J.—The *certiorari* can only be granted if it is shewn that the local marine board have acted beyond their jurisdiction. They were the judges whether the defendant had been guilty of misconduct. If they have decided without hearing the case, I think I ought to grant the *certiorari*. The question, to my mind, is, whether the defendant has been heard. It is hardly necessary to say anything on the points of law, as I think that the substantial matter of complaint is answered by the affidavits. Proceedings of this kind, which are penal, if not criminal, should be as public as possible. Those who conduct such an inquiry should give the party charged every opportunity of having his attorney and counsel and witnesses present. It can hardly be contended that there was no evidence of misconduct under the act of parliament. But the applicant relies on section 241, which provides that the accused shall have full opportunity of making his defence, by himself or otherwise; and

the word "otherwise" there seems to mean by his counsel or attorney. The only clause under which any power of summoning witnesses is given is by the proviso in section 241, that the board shall have all the powers of inspectors appointed by the Board of Trade; and by section 15. an inspector may, by summons under his hand, require the attendance of all such persons as he may think fit to examine. Witnesses, therefore, are to be summoned under the power given by section 15; and I think the local marine board takes the power of summoning witnesses with the same discretionary qualification as an inspector had. Those witnesses which are summoned are, I think, to be paid for by the Court which summons them. The statute seems to me to give a discretion to bodies such as the local marine board, where all the expense of the witnesses is to be thrown upon the public. It would be right for the board to prevent a witness being vexatiously summoned by a party. I think there was nothing wrong in the Court saying to the defendant "give us a list of the witnesses you wish summoned, and tell us what they are expected to prove." Here the defendant was asked twice whether he wished the case adjourned for the purpose of having the attendance of the witnesses, and was told that it was, to some extent, discretionary with the Court to grant the summonses. The Court, indeed, would act very ill if they did not allow a defendant to have a summons for any one that, in the widest sense, could be considered a necessary witness. But the defendant does not even allege that it would be inconvenient for him to give a list of the witnesses. It is suggested that he wanted witnesses to prove that in some other cases the local marine board had not considered the course of conduct charged on him to be misconduct. That was an irrelevant matter which he should not have been allowed to prove. But the defendant, in answer to the inquiry by the Court, says, in effect, that he does not want any witnesses. The same reply may be given to the objection respecting the exclusion of the solicitor. No complaint is made by the defendant of the absence of his solicitor. He is asked, in effect, whether he wants his solicitor, and he says I am going to conduct my case myself. If a solicitor be prevented getting in while a

trial is going on, it is very difficult to say that the Court has on that account no jurisdiction. On the whole, I think it cannot be said that in this case there was no hearing. If the board has not heard the case, they are liable to a mandamus to hear it. I therefore put my decision upon this ground, that the defendant said that he would go on without witnesses, and would conduct his case himself, and that he wished the case to go on then and there. At the same time I own that I think that there was some obstruction to the admission of the solicitor.

Rule discharged.

1864.
Nov. 18.

{ THE MERCANTILE MARINE
INSURANCE COMPANY v.
TITHERINGTON.

Marine Insurance—Policy—Computation of Time.

By a policy of insurance a ship was insured from Liverpool to any port in the Pacific Ocean, "and during thirty days' stay in her last port of discharge." In another part of the policy there was the usual printed clause, by which she was to be insured "until she hath moored at anchor twenty-four hours in good safety." She arrived at M, her port of discharge, at 7 p.m. on the 25th of May, and anchored there, and at 3.45 a.m. on the 24th of June she was driven ashore and lost:—Held, that the loss was covered by the policy, as the thirty days had not expired when she was so lost.

This was a SPECIAL CASE stated for the opinion of this Court under the Common Law Procedure Act, 1852, in an action for the recovery of money alleged to be due from the defendant by way of contribution towards the sum of 3,000*l.*, paid by the plaintiffs upon the total loss of the *Albemarle*, on the 24th of June 1863.

CASE.

1. On the 26th of November 1862, Messrs. A. Baruchson & Co., the owners of the ship *Albemarle*, effected a policy of insurance on such ship for the sum of 2,000*l.*, a copy of which is hereunto annexed.

2. This policy was underwritten by the defendant for the sum of 100*l.*

3. On the 26th of December 1862, B. &

Co. effected another policy on the said ship for 1,000*l*.

4. On the 4th of December 1862, they effected another policy for 2,000*l*.

5. The said ship sailed from Liverpool on the 23rd of December 1862, and arrived at Mazatlan, being a port in the Pacific Ocean, and her last port of discharge, on the 25th of May 1863, at 7 P.M., and then anchored there.

6. The vessel remained anchored at Mazatlan in safety until the 24th of June 1863, and on that day, at 3.45 A.M., she was driven on shore in a gale of wind and was wholly lost.

7. The said B. & Co. immediately on hearing of the arrival of the said ship at Mazatlan, proceeded to effect an insurance on the said ship, on her future voyage; and before any intimation of her loss, they, on the 8th of July 1863, effected a policy with the plaintiffs, a copy of which is hereunto annexed.

8. B. & Co. in like manner covered by insurance the sum of 2,000*l*., being the residue of the sum at which the ship was valued.

9. On hearing of the loss, B. & Co. applied to the plaintiffs and the underwriters on the last-mentioned policy, to pay them the amount of the loss, and the plaintiffs and such underwriters thereupon paid to the owners of the said ship the several sums insured by them respectively.

10. In this action the plaintiff seeks to recover the sum of 47*l*. 15*s*. 3*d*., being the sum which the plaintiff contends the defendant is liable to contribute in respect of the sum of 100*l*., for which the said policy was underwritten by him as aforesaid, upon the ground that such policy was in force at the time of the loss of the said vessel.

The question for the opinion of the Court is, whether the policy of insurance so underwritten by the defendant as aforesaid, was in force at the time of the loss of the said vessel.

By the policy which was underwritten by the defendant, B. & Co. caused themselves "to be insured, lost or not lost, at and from Liverpool to any port or ports in the South and North Pacific Oceans, in any order backwards and forwards, and during thirty days stay in her last port of discharge, with leave to cruise off any port or ports in the Pacific, for a period of thirty days, upon any kind of goods and merchandise, and

also upon the body, &c. of the good ship or vessel called the *Albemarle*, . . . beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above upon the said ship, &c., including collision clause, and shall so continue and endure during her abode there, upon the said ship, &c., and further until the said ship with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at as above upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed," &c. (The clause as to the thirty days was in writing, that as to the twenty-four hours in print.)

Sir G. Honyman (*Mellish* with him), for the plaintiffs.—The policy underwritten by the defendant was in force when the ship was lost. The thirty days ought to be reckoned from midnight on the 25th of May, according to the general rule which is laid down in *Webb v. Fairman* (1) and *Young v. Higgon* (2). Or if the time be reckoned from the actual time of her arrival, the time of the accident would also be covered, for the thirty days would not expire till 7 o'clock on the 24th of June. It will be said that on the construction first suggested, the ship would be uncovered from the time of her arrival till midnight. That, however, would not be the case, for the policy in another part covers her until she has moored at anchor twenty-four hours in good safety.

Lush (*Cohen* with him), for the defendant.—The policy was not in force at 3.45 A.M. on the 24th of June. In calculating the thirty days stay at Mazatlan, the 25th of May is to be included, for any other mode of calculation would render the ship uninsured for a portion of her first day's stay. It is a mistake to say that she would still be insured under the other clause in the policy, which is in printed words, for that part is not intended to have force when the parties have inserted in writing their own terms as to the thirty days. The proper mode of construing this policy is that the thirty days should run from midnight preceding the time at which the ship arrived.

(1) 3 Mee. & W. 473; s. c. 7 Law J. Rep. (N.S.) Exch. 140.

(2) 6 Ibid. 49; s. c. 9 Law J. Rep. (N.S.) M.C. 29.

[CROMPTON, J.—We must construe the policy so as to make all the parts of it available, and I cannot see why we should not read it as meaning that the thirty days should run from the expiration of the twenty-four hours after the ship had moored at anchor. COCKBURN, C.J.—I think that is the right view.]

Per Curiam (3).—There must be judgment for the plaintiffs.

Judgment for the plaintiffs.

1864.
Nov. 19, 23.

{ THE QUEEN v. THE LOCAL
BOARD OF HEALTH OF
THE BOROUGH OF GOD-
MANCHESTER.

Sewer — Drain — Watercourse — Public Health Act, 1848 (11 & 12 Vict. c. 63).—Local Board of Health.

A natural stream, supplied by natural and artificial drainage of cultivated soil belonging to private individuals, was cleared out and partially widened and deepened by Commissioners acting under a private inclosure act, powers being given to them to do so at the expense of the proprietors. In its passage to the river into which it ultimately flowed, it passed through a town and received the drainage of two or three inhabited houses. Semble—That this stream was not a sewer within the meaning of the Public Health Act, 1848.

But even if it were so,—Held, that it came within the exceptions in section 43, and that it was not vested in the local board of health, and that they were not liable to cleanse and repair it.

Mandamus to the local board of health of the borough of Godmanchester, commanding them to cleanse a sewer or watercourse, pursuant to the Public Health Act, 1848.

The defendants made a return, traversing the allegations in the writ, and alleging that the watercourse was not a sewer which it was their duty to cleanse, and also that it had been made under a local act, and that it ought to be cleansed at the expense of the proprietors of the lands through which it flowed. The prosecutor pleaded,

(3) Cockburn, C.J., Crompton, J., Mellor, J. and Shee, J.

first, that the watercourse was a sewer vested in the local board and that it was their duty to cleanse it. Secondly, that it was not made or used under the said local act, nor ought it to be cleansed at the expense of the proprietors, &c.

Issues were joined upon these pleas.

At the trial, which took place at the Summer Assizes for Huntingdon, 1863, the cause was referred to an arbitrator to settle and determine the question as to the origin, nature, and extent of the Stonehill Brook; what was done by the Inclosure Commissioners; what alterations, if any, what repairs, if any, were from time to time done, and by whom. The facts to be stated in a special case, and the Court to draw conclusions from the facts. The writ and return and pleading to form part of the case.

CASE.

In the year 1802 the Godmanchester Inclosure Act was passed, entitled an act for dividing and inclosing certain open and common fields, meadows, lands, commons and commonable places within the parish of Gumcester, otherwise Godmanchester, in the county of Huntingdon. This act may be referred to as part of this case. The Commissioners appointed under the above act made their award under the same on the 23rd of June 1809, and by such award they did set out and appoint, order and direct among, other things, "one other public drain or watercourse, four feet wide, beginning at the London turnpike road into and over an allotment to the Dean and Chapter (meaning the Dean and Chapter of Westminster) and their lessee, along Shooter's Hill, and thence through and over the allotments to Samuel Bleckley's, Lady Olivia Sparrow's and John Martin's, to and across Gravelly Way, and thence over an allotment to George Maule, into an ancient watercourse leading into the town of Godmanchester, along part of the said town and thence into the river Ouse." And the said Commissioners did by their award direct (*inter alia*), "That all such drains and bridges shall be made and forever maintained, supported, scoured and kept in repair by and under the direction of the surveyor of the highways for the time being of the said parish of Godmanchester, at the expense of all the proprietors of land and grounds divided and inclosed by virtue of the act in equal proportions." The drain or watercourse

is the one mentioned in the award of the arbitrator hereinafter set out, and is known by the name of Stonehill Brook, and is the one in question in this mandamus. Stonehill Brook is situate within the corporate borough of Godmanchester, a district within the meaning of the Public Health Acts, exclusively consisting of the whole of the said corporate borough within and for which the defendants are the local board of health under the said acts. The arbitrator made an award in writing, as follows :

"The Stonehill Brook runs in the course which is delineated on the map hereto annexed, commencing at the road called the London Road and passing from thence through land called and known as the Dean and Chapter's land; thence through land called Bleckley's Farm; thence through land called Lady Olivia Sparrow's land; thence through the lands of various proprietors crossing a road called West Street, and terminating in the River Ouse. The whole length of its course between the London Road and the River Ouse is about one and a half mile. The water of Stonehill Brook between the London Road and West Street is solely supplied by the drainage, natural and artificial, of a considerable area of cultivated soil; but at West Street the drains of two or three inhabited houses empty themselves into the brook, and between West Street and the river Ouse the water of the brook stands at the level of that of the Ouse; with the exception of the drains at West Street just mentioned, no drains other than the drains, underground and open, of purely agricultural land discharge themselves in the brook. The channel of the brook is the natural channel of a certain natural stream, except so far as its character is altered by the facts next mentioned. The Inclosure Commissioners acting under a local inclosure act of the 43 Geo. 3, between the years 1802 and 1809, cleared out the channel of the said natural stream, and in various places along its course somewhat widened and deepened it, to render it more efficient as a means for draining a portion of the tract of land which was subject to the provisions of the said act. Afterwards, the owner of Bleckley's Farm, for greater convenience in subdividing his fields, diverted the course of the said natural stream by cutting for it an artificial chan-

nel, which commenced at the point where the said natural stream entered Bleckley's Farm from the Dean and Chapter's lands, and which artificial channel, after running a length of about seven chains, re-entered the old channel, the intervening portion of the old channel having been filled up and destroyed. For the same purpose and about the same period the owner of Lady Olivia Sparrow's land also diverted the course of the said natural stream, by making for it an artificial channel, which commenced at the point where the said natural stream passed from Bleckley's Farm to Lady Olivia Sparrow's land, and which artificial channel, after running a length of about 18 chains, re-entered the old channel very nearly at the further boundary of Lady Olivia Sparrow's land, the old channel being partially filled up, but being left and still remaining capable of acting as an escape channel for surplus waters. The natural channel of the said natural stream so altered and affected as just described, constitutes the existing channel of Stonehill Brook. The width of the channel of Stonehill Brook varies from about 14 feet at its upper extremity to about 15 feet at its lower, and its depth from about 3 feet to about 5 feet between the same limits. Before the inclosure under the said Inclosure Act, Stonehill Brook was cleared out and repaired, sometimes at the joint expense of all the owners of the land, subject to the provisions of that act, and sometimes by paupers of the parish of Godmanchester, under the direction of the overseer of the poor of the said parish for the time being, and paid by him out of the general poor-rates of that parish. After the said inclosure, for a short time, Stonehill Brook was cleared out and repaired when necessary by the paupers of the parish of Godmanchester, under the direction of the overseer of the poor of that parish for the time being, and paid by him out of the general poor-rates of the parish; but for the last thirty years or thereabouts it has been cleaned out and repaired by the owners of the lands through which it passes, each doing that portion of it which traverses his own land."

The special case further stated as follows: It is admitted that the said drain, sewer and watercourse, called Stonehill Brook, was and is in a foul, unclean and

improper state and condition, so as to be a nuisance and injurious to health, as in the writ of mandamus alleged. It is also admitted that the said drain, sewer and watercourse, for want of being properly scoured, cleansed, emptied and kept, had become and was, before and at the time in that behalf in the writ mentioned, and still is, liable to overflow and damage, and then had overflowed and damaged the land of some of the Queen's subjects adjoining and near to the said drain, sewer and watercourse, and the public way, called the Gravelly Way, as in the writ of mandamus alleged.

The question for the opinion of the Court is, whether the prosecutor or the defendants is or are entitled to the verdict on the first and second pleas to the return to the writ. The verdict on these pleas is to be entered as the Court shall direct, it being agreed that the verdict is to be entered for the prosecutor on the third and fourth pleas to the return.

Keane (Douglas Brown and Markby with him), for the Crown.—The defendants are bound to cleanse and repair the Stonehill Brook. At the time of the Public Health Act, 1848, being applied to the borough, the brook existed as a sewer, and therefore vested in the defendants under the 2nd and 43rd sections of that act. By the first of those sections, "the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies," and by section 43, "all sewers, whether existing at the time when this act is applied, or made at any time thereafter, (except sewers made by any person or persons for his or their own profit, or for the profit of proprietors or shareholders, and except sewers made and used for the purpose of draining, preserving or improving land under any local or private act of parliament, or for the purpose of irrigating land, and sewers under the authority of any Commissioners of Sewers appointed by the Crown,) together with all buildings, . . . shall vest in, belong to, and be entirely under the management and control of the local board of health." This brook is not within any of these exceptions. It may be said that it is within the exception, "sewers made and used for the purpose of draining, preserving or improving land under a local

or private act of parliament," but it is not so, inasmuch as it is a natural stream, and was not "made" but only to some extent widened and deepened under the Inclosure Act. There are several sections following the 43rd which give to the local board the requisite powers for purchasing, making and cleansing sewers.

[CROMPTON, J. — It may become a "sewer" by use. MELLOR, J.—May it not come within the interpretation clause (section 2.) under the head of "waterworks," as being a "stream?"]

The Court cannot decide in favour of the defendants unless it holds that the alteration made by the board amounts to its being "made." Nor can a brook passing through fields be a drain. The Local Government Act, 1858 (21 & 22 Vict. c. 98), in s. 68, shews that there may be "sewers" of another kind which the local board are not allowed to interfere with. Again, the word "made" in section 43. cannot be applied to this brook, inasmuch as it must mean something which the local act contemplated as to be made, and it was never intended that under the act the Commissioners should have power to do more than set out and appoint roads, drains, and watercourses—see 41 Geo. 3. c. 109. s. 10. which is referred to in the local act; and *The Earl of Falmouth v. Richardson* (1). Nor has it been used under the local act. There is another reason for saying that this was not a sewer which the local board were entitled to make. It is called one *other* drain, &c. Further, this brook was not made for the purpose of profit, and section 145. of the 11 & 12 Vict. c. 63, which prohibits the interference by the local board with sewers or other works, only applies to such as had been made or used for the purpose of draining, improving or irrigating lands, or for such purposes of profit. This last section was intended to prevent the interference with such sewers as under section 43. would not vest in the board.

[CROMPTON, J.—I do not see how you make it out to be a sewer at all.]

Yes, it comes within the interpretation clause, and not within the exception in section 43; but even if not a sewer it is a drain which is admitted to be offensive and injurious, and if so, under section 58, the local board are bound to cleanse it.

J. Brown, for the defendants.—Accord-

(1) 3 B. & C. 837.

ing to the argument for the Crown, even watercourses would vest in the local board. But clearly that was not intended; the preamble of the act mentions "towns and populous places." This is called a *brook*, and there is nothing to shew that it was a sewer at all, and even if it were it would fall within the second exception in the 43rd section of 11 & 12 Vict. c. 63, as being made and used for the purpose of improving land under the Godmanchester Inclosure Act. It is clear also from the interpretation clause, section 2, that by "sewer" is intended something of the same kind as "drain." Again, the provisions in sections 44. and 58. apply to sewers which are used for the purposes of drainage only in the district of the board, not to watercourses which are repairable by the owners and proprietors under 41 Geo. 3. c. 109. s. 10, which is incorporated with the local act. It would be a great hardship on the ratepayers in the town if they were obliged to contribute to the repair and cleaning of such a watercourse which is really used for purposes of agriculture; the benefit which they derive from it is very small, and yet they would under section 88. have to pay a proportion of the rate amounting to three-fourths, while the proprietors, for whose benefit it would really be done, would only pay one-fourth.

Keane, in reply.—The provision in section 88. as to the occupiers being assessed in the proportion of one-fourth is in favour of the contention for the Crown, inasmuch as it shews that the board have power to levy rates in agricultural districts; and the argument as to hardship would apply equally to the rates assessed upon landowners for the benefit of the towns.

Cockburn, C.J.—Our judgment must be for the defendants. I entertain serious doubts whether the enactment in section 43. was ever intended to include sewers which were private property, for we find that by section 44, if the board think fit to take the rights vested in any persons of making sewers, they may purchase them, and it would be very strange if they could interfere with private rights without making any compensation for them. Such a power would be very dangerous, and I cannot think that, because a watercourse which passes through agricultural land is partly used for the purpose of draining houses, it becomes altogether a

sewer, and vested in the Board of Health. But it is not necessary to decide this point, because the watercourse in question falls within the second exception in the 43rd section, if it is within that section at all. The case finds that the Commissioners by their award directed that all such drains and bridges should be for ever maintained at the expense of the proprietors of lands and grounds divided and inclosed by virtue of the said act. But then it is said that this is a drain which has been altered by widening and deepening it, as found in the award of the arbitrator; but it appears to me, sitting as a jurymen to decide this case, that this was done by the Commissioners for the profit of the proprietors, and at their expense, as was directed to be done by their own award, and as might legally be done. I am of opinion that it is within the second exception in section 43.

Crompton, J.—It is difficult to come to a clear understanding as to this case, but I have arrived at the same conclusion as my Lord. The question is how a jury ought to have found, and whether by reason of this stream having vested in the board, the duty of repairing and cleansing had been thrown upon them. It is not shewn to my satisfaction that it has so vested in the local board. I cannot think that such a natural stream, flowing through and draining agricultural districts, becomes a sewer simply because a few houses have their drains running into it. I can see nothing to make it a sewer except what was done by the Commissioners, and that would be done under the act, and therefore it would come within the second exception. It would be rather strong to say, that because the Commissioners widened it, it was *made* under the local act, and I am rather doubtful upon that. I should rather say it was done under the sanction of the proprietors of the lands. I think that if it comes within the 43rd section at all, it also comes within the second exception, and therefore that the local board are not bound to repair it.

Shree, J.—I am of the same opinion; it clearly was not a sewer, throughout the whole of its length, which would vest in the local board under the 43rd section, and even if it was, it would be within the exception.

Judgment for the defendants.

1864. }
Nov. 25. } PYE v. BUTTERFIELD AND
OTHERS.

Interrogatories — Ejectment — Forfeiture of Lease.

In the exercise of the powers conferred by section 51. of the Common Law Procedure Act, 1854, in allowing a party to deliver interrogatories to the opposite party, this Court will take as a guide the rules and principles acted upon in the courts of equity as to bills of discovery, although it will not consider itself to be fettered by those rules.

In an action of ejectment the Court will not compel the defendant to answer interrogatories where the answer would tend to shew that he had incurred a forfeiture of his lease by reason of his having underlet the premises.

This was a rule calling upon the defendant to shew cause why the plaintiff should not be at liberty to deliver to the defendant, or his attorney, interrogatories in writing, and why the defendant should not answer the questions in writing by affidavit.

It appeared that the plaintiff had brought an action of ejectment against the defendant and others, to recover possession of certain premises held by the defendant.

The following interrogatories were delivered under an order of Shee, J.—

1. Are you the lessee under the plaintiff of the house and premises, No. 18, Clifford Street, and is the house in your possession, or in whose possession is it?

2. Have you at any time assigned or otherwise parted with the said lease to any one, and, if so, to whom, and where and when?

3. Have you underlet or in any way or manner parted with the possession of the said house and premises, or any part thereof? and, if so, state when and to whom, and for how long.

4. Have you underlet the said house and premises to Mr. Grant Heatley Tod Heatley, and, if so, when and under what circumstances and for what purpose?

5. Do you receive any, and, if any, what rent for the said house and premises; and, if so, from whom, and how much?

6. Who is now in possession of the said house and premises, and is the person in

possession there by your authority and permission, and did he derive his possession through you?

7. Have the said house and premises been let by you to be used as a club, or used for such purpose with your permission and authority?

The defendant answered these interrogatories as follows:

1. To the first of the said interrogatories, that I am the lessee under the plaintiff of the house and premises, No. 18, Clifford Street, and the lease is in my possession.

2. To the 2nd, 3rd, 4th, 5th, 6th, and 7th interrogatories, that this action in which K. J. P. is the plaintiff, and J. G. and T. B. and others are the defendants, and in which the said interrogatories are administered, is an action of ejectment brought by the plaintiff to recover possession of certain premises, No. 18, Clifford Street, held by me as tenant to the plaintiff under a lease, dated the 24th of March 1857, for twenty-one years, containing a covenant on my part not to assign over or underlet, or in any way or manner part with the possession of the said premises for any time during the term granted, to any person or persons, without the licence and consent in writing of the plaintiff, his executors, &c. for that purpose first had and obtained, and providing that if I should not well and truly observe and keep the said covenant, and all and every the covenants, clauses and agreements contained in the said lease, it should be lawful for the plaintiff at any time or times thereafter into and upon the said premises, or any part thereof in the name of the whole, wholly to re-enter, and the same to have again as in his first and former estate. And the plaintiff seeks to recover possession of the same premises and to enforce a forfeiture by reason of my having underlet the said premises to Grant Heatley Tod Heatley and Alexander Doland. And I object to answer the 2nd, 3rd, 4th, 5th, 6th and 7th interrogatories, on the ground that my answers may subject me to a forfeiture of my interest as tenant and lessee of the premises. And I respectfully submit to the Court that I am not bound to answer the said interrogatories, they having a tendency to shew that I had incurred a forfeiture.

Laxton shewed cause against the rule.— These interrogatories are such that the Court will not compel the defendant to answer them. The point has not been expressly decided, but the Courts have always been unwilling to make a defendant answer matters which would go to shew that he had committed a forfeiture. The point was touched upon in *May v. Hawkins* (1), where Parke, B. said, "I am sorry that the case should be decided upon the minor point; for it is very much to be desired that the Court should be in a position to decide the principal one. I shall continue to pursue the principle I acted upon in this case at chambers, by refusing to allow interrogatories which are framed with a view to deprive a man of his estate; I believe that this principle is always recognized in the Courts of Chancery, and I shall continue to act upon it until there is a decision to the contrary in the superior Courts." And Martin, B. said, "I take the same view of the matter as my Brother Parke. I think it would be monstrous to allow this enactment to be used for the purpose of fishing out information in a matter of such a penal character as the present." The point also arose in *Chester v. Wortley* (2); but the only decision was that the objection was taken at the wrong time. There is a provision in 46 Geo. 3. c. 37, that "a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to any penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit."

[COCKBURN, C.J. — I am inclined to think that that statute refers only to forfeiture in a legal sense, and not to a forfeiture arising out of a contract between the parties, and of a civil nature.]

The statute is referred to in 2 *Ph. & A. on Evidence*, p. 492, where it is also stated that "in courts of equity it is an established principle that a party is not bound to answer so as to subject himself to pains and penal-

ties, or to any kind of punishment, or to any forfeiture of interest." But, further, it is clear from the language of the 51st section of the Common Law Procedure Act, 1854, that reference must be made to the principles established in the courts of equity, for that section only gives power to deliver interrogatories "upon any matter as to which discovery may be sought." The meaning of these words was considered in *Bartlett v. Lewis* (3), where Erle, C.J. said, "Nor do I read the 51st section as saying, that the practice of the Court of Chancery in respect of bills of discovery is to be imported into the Courts of common law, and that we are not to permit questions to be put in the form of written interrogatories in any case in which a Court of equity would not allow them to be put. I think it means that interrogatories may be put in any case where a bill of discovery might be filed, but I do not think it is intended that the practice of the Court of equity relating to discovery should be introduced." Referring then to the question, whether a Court of equity would allow a bill of discovery to be filed in such a case, we find it stated, in *Wigram on Discovery*, p. 81, that the plaintiff is not entitled to an answer if the answer would prove the defendant guilty of "a forfeiture of interest strictly so called. But the objection does not apply to the mere determination of an interest by force of a limitation." Now, in the case before the Court, there would be a "forfeiture of interest," for the defendant would lose his estate. In *Fane v. Atlee* (4) a bill was filed to discover whether the defendant had not assigned over a lease; the defendant pleaded that there was a proviso in the lease that in case he assigned over, the lease should be void; and that this being in the nature of a penalty or forfeiture, he ought not to be compelled in a Court of equity to discover for the plaintiff. It was said that this was not a penalty, but a part of the contract, yet the plea was allowed. The case is cited in *Milford on Pleadings*, p. 333, where the author says, "It has been also observed, that no person is bound to answer so as to subject himself to any forfeiture, or to anything in the nature of a forfeiture." In *Lord*

(1) 11 Exch. Rep. 210; s. c. 24 Law J. Rep. (N.S.) Exch. 509.

(2) 17 Com. B. Rep. 410; s. c. 25 Law J. Rep. (N.S.) C.P. 117.

(3) 31 Law J. Rep. (N.S.) C.P. 230.

(4) 1 Eq. Cas. Abr. 77.

Uxbridge v. Staveland (5), it was held that a demurrer would lie to a bill for discovery of an assignment of a lease with licence, if the bill does not expressly waive the forfeiture. The same doctrine is, in effect, laid down in *Best on Evidence*, 3rd ed. p. 757; and in *Taylor on Evidence*, p. 1236, it is written, "It has already been casually observed, that some questions a witness is not compellable to answer. First, this is the case where the answers would have a tendency to expose the witness . . . to a penalty or forfeiture of any nature whatsoever. This rule, which is of great antiquity, and was even recognized by Chief Justice Jefferies where it told *against* the prisoner, is not confined to Courts of law, but is also administered in Chancery," &c. It is submitted, therefore, that the Courts of equity would not allow this to be done, and that this Court will follow the rule laid down by them.

[CROMPTON, J.—Suppose at *Nisi Prius*, now that the parties can be examined, the defendant was called as to some other minor matters, it might be hard if he could refuse on cross-examination to answer whether he had not committed some act which would entail upon him the forfeiture of his lease. COCKBURN, C.J.—If he volunteers to give evidence upon some matters, or as to some alleged forfeiture, it may be that he would waive his privilege.]

Needham, in support of the rule.—This is a nice and important question. Neither *May v. Hawkins* (1) nor *Chester v. Wortley* (2) decides the question.

[COCKBURN, C.J.—The opinion expressed by Parke, B. in *May v. Hawkins* (1) is a very strong one. It appears also that the Courts of equity have always exercised a discretion.]

In *Hare on Discovery*, p. 145, it is stated, "if the bill seek a discovery of facts which would shew that the defendant never had an interest in the property which he wrongfully retains, or that having had an interest, that it has ceased by the taking effect of some limitation over, the defendant will not be allowed to set up the loss of possession which the proof of these facts would occasion, as a ground for withholding discovery"; and in *Lucas v. Evans* (6), where

an estate was given by A. to his wife, but on condition that if she married again she should deliver up half to his brother, and a bill of discovery was filed to find out whether she was married, a demurrer to the bill was overruled.

[COCKBURN, C.J.—Yes, because it was a conditional limitation over of the estate, and was expressly distinguished as not coming within the general rule. But if you could do this, you might be perpetually harassing a man.]

The 51st section of the Common Law Procedure Act, 1854, does not shew that the power of this Court is limited to cases where Courts of equity would allow bills of discovery; the natural meaning of the words is to give power to file such interrogatories where the party desires it and the Court is willing to grant it.

[COCKBURN, C.J.—There is nothing to shew that it was intended by this section of the statute that the common law Courts should acquire larger powers than the Courts of equity have been accustomed to exercise; and assuming that we had such larger powers, ought we to set at naught the principles upon which those Courts have acted for so many years? MELLOR, J.—There is no doubt that we may have power to order inspection of documents in cases where the Courts of equity would not grant a discovery, as, for instance, in actions for personal torts. In *Miford on Pleadings*, p. 230, reference is made to *Glyn v. Hourton* (7), where the Master of the Rolls said, "I have looked into the authorities which tend much to confirm my opinion that a bill of discovery cannot be sustained in aid of an action for a mere personal tort." COCKBURN, C.J.—That would not be within the province of a Court of equity at all.]

COCKBURN, C.J.—I think that this rule ought to be discharged. I do not think that the statute, 46 Geo. 3. c. 37, which relates to whether witnesses are to be compelled to answer and to their protection and punishment, is applicable to this case. And I do not think that the word "forfeiture," as there used, means such a forfeiture as in the case now before us, of a person having the possession of property and having com-

(5) 1 Ves. sen. 55.

(6) 3 Atk. 259.

(7) 1 Keen, 239.

mitted a breach of covenant. But in the exercise of the powers recently conferred upon this Court, it seems to me that we ought to be governed by the principles which have been recognized in the Courts in which this branch of our jurisprudence was originally planted, nurtured and grown up. This power was given to us in order that the complication of business caused by the necessity of having recourse to other Courts should be prevented, and when the legislature gave us such power it must be taken to have done so with a knowledge of the rules according to which the power had always been administered in those other Courts, and therefore, whether we are free to exercise our own discretion, or whether it was intended that we should act in accordance with the Courts of equity, I think that we ought to abide by the principles and rules of those Courts. According to the authorities which have been cited and the expressions used by the text-writers who have written upon the subject, those rules are perfectly fixed and well established, that no man shall be compelled to give an answer which shall have an effect leading to the forfeiture of his estate, except when granted subject to a conditional limitation. It may be that the distinction is a fine and subtle one, but the right to file a bill of discovery in the case of an estate granted upon a conditional limitation is a well-established exception to the rule, that a party shall not be obliged to answer where the answer may have the effect of bringing about a forfeiture. The matter is too well established to admit of any doubt. It is also said that the Courts of equity have exercised a discretion whether they will allow a party to be forced to answer in any particular case, but I do not think that is so where the rule applies to which I have referred. I am of opinion that we cannot force the defendant to make this answer, which would be clearly in violation of the rule so well established in the Courts of equity.

CROMPTON, J.—I am of the same opinion. This is a rule calling upon the defendant to shew cause why he should not answer a question which would tend to the forfeiture of his lease. I do not myself think that we are bound by the exact procedure in the Courts of equity, for, as has been pointed

out by my Brother Mellor, there is a class of cases in which those Courts would not allow a bill of discovery at all, and I do not feel clear that we are bound by their mode of procedure in the exercise of the new powers which have been given to us by the act of parliament; but the rules laid down by them as to bills of discovery ought to be a guide to us. I do not look at this privilege or exemption from the liability to answer, in cases where the answer would lead to a forfeiture, as an invention of those Courts, but rather as a rule adopted by them from the Courts of law. It is a principle of the law of evidence which these Courts have always recognized as applicable to the examination of witnesses, and everything shews that they were averse to extending the power of discovery to cases of forfeiture. From the earliest times the rule has been adopted in the Courts of equity with regard to discovery. It may be that the distinction between forfeitures and conditional limitations, where the estate is said to be given over by the donor upon the condition happening, is a very fine and subtle one. But the kind of forfeiture in question here is the one upon which nearly all the cases in equity have been decided. *Dumport's case* (8) is an instance of a forfeiture being claimed on the very same ground as in this case. We ought to be guided in this matter in the way suggested by Lord Wensleydale in *May v. Hawkins* (1); we all know how closely he considered the question, and how he acted, and how he said he should continue to act until one of the superior Courts decided to the contrary. So also was the opinion of my Brother Martin. We cannot disregard a rule so well established, and we ought not, therefore, to allow the questions to be put. As I said during the argument, I cannot help thinking that there may be considerable difficulty, now that the parties on both sides may be examined as witnesses; and I entertain considerable doubt whether or not when a party has been examined as a witness in his own behalf, either as to minor matters or as to some other forfeiture, he could be compelled to answer a question as to whether he had done something else which would lead to a forfeiture of his lease.

(8) 1 Smith's Lead. Cas. 15.

But that is not the question here which we have to decide.

MELLOR, J.—I am of the same opinion. I agree with the distinction pointed out by my Lord and my Brother Crompton, that though we are not fettered by the rules of the Courts of equity, inasmuch as we exercise powers in some cases in which they do not grant discovery, yet that we ought in the exercise of the new powers given to us to take their rules as a guide. As was said by my Brother Crompton, this particular rule has been adopted as a rule of evidence by the Courts of equity, and I think that it is not to be left to the absolute discretion of the Judge or of the Court to decide without reference to what had been the procedure and practice in those Courts. I was at first struck with the subtlety of the distinction between forfeiture and conditional limitations, but, as has been already observed, that distinction, though a nice one, clearly establishes the rule, and in addition we have two cases in Chancery so clearly in point that no distinction between them and the present case can be pointed out by Mr. Needham; and we have besides the dicta of several Judges. We ought not, therefore, to allow these interrogatories to go.

Rule discharged.

1864. { THE QUEEN, on the prosecution
Nov. 22. { of JAMES HEPWORTH, v. THE
INHABITANTS OF THE TOWN-
SHIP OF DENTON.

Highway—Indictment for Non-repair—Plea, Guilty—Costs—5 & 6 Will. 4. c. 50. s. 98.

Where on an indictment for the non-repair of a highway the defendants have pleaded guilty, there is no power in the Court before whom it is preferred to award costs, under the 5 & 6 Will. 4. c. 50. s. 98, which makes it lawful to award costs, if it shall appear to the Court that the defence was frivolous and vexatious.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C.—p. 13.]

1864.
Dec. 13.

{ CARR AND ANOTHER v. THE
ROYAL EXCHANGE ASSUR-
ANCE CORPORATION.
CARR AND ANOTHER v. MON-
TEFIORE AND OTHERS.

Marine Insurance—Partial Loss—Pleading—Inconsistent Counts—Payment into Court—Procedure—Jurisdiction of Court.

A declaration contained a count upon a policy of insurance upon a ship and cargo, and also the usual money counts. The defendants, as to the first count, pleaded that they had not broken their covenants, and they also paid into court, under the money counts, the amount of the premiums, and the plaintiffs took the money out of court. The cause was referred to arbitrators, to fix the amount of the loss, which they did, irrespective of the amount which had been paid into court:—Held, that the Court had power to prevent injustice being done to the defendants, and that the plaintiffs were only entitled to judgment for the balance which remained after deducting the amount of premiums paid into court.

Rule calling upon the plaintiffs to shew cause why the judgment roll should not be amended by entering the verdict for the sum awarded by the arbitrators, less the amount of premiums paid into court.

It appeared, from the affidavits, that an action had been brought upon a policy of insurance effected upon a ship called the *Dos Hermanos* and her cargo.

The declaration contained a count on the policy, and also the ordinary counts to recover back the premiums, on the ground that the policy had never attached. The defendants paid money into court upon the common counts; the plaintiffs took it out of court, and went on with the action. Before, however, going to trial an agreement was entered into between the respective attorneys, the material part of which was as follows: "That in case the plaintiffs shall be held to be entitled to recover as for a total or a partial loss in this action, on ship or cargo, or either of them, it shall be referred to Mr. Davidson and Mr. Richards, the average-staters of London, or in case they differ, to a third London average-stater, to be named by them, as

umpire between them, to fix the amount of such total or partial loss, as the case may be, and the verdict shall be entered for such amount accordingly, not exceeding the amount of liability under the policy."

When the case came on for trial, it was agreed that a special case should be stated for the opinion of the Court upon the question whether the policy attached or not. The special case was argued in this court, and it was decided that the plaintiffs were entitled to recover. It was agreed, "for the purpose only of completing the judgment to enable the defendants to bring error," that judgment should be signed for 2,500*l.* damages, and costs 1,500*l.*; and upon appeal to the Exchequer Chamber, the judgment of this Court was affirmed. The arbitration was then proceeded with, and by their award the arbitrators fixed the amount of the "loss of both ship and cargo at the sum of 2,038*l.* 11*s.* 7*d.*"

A summons was then taken out by the plaintiffs to shew cause why the verdict should not be entered and final judgment signed for 2,123*l.* 10*s.* 3*d.*, being the amount of the sum awarded together with interest. It was discovered that, in making their award, the arbitrators had only considered the amount of the loss, but that they would have deducted the amount paid into court if they had thought that they were at liberty to do so. The defendants then obtained the rule above mentioned.

A rule to the same effect was also obtained by Cohen, in *Carr v. Montefiore*, and the two rules were brought on together.

Milward (Nov. 25) shewed cause.—The money was paid into court upon the money counts, and, having been taken out by the plaintiffs, those counts are abandoned, and the action proceeds upon the special count upon the policy. The respective attorneys agreed that the matter should be referred to the average-staters to "fix the amount of such total or partial loss, as the case may be; and the verdict shall be entered for such amount accordingly." Now, the verdict has been entered for the amount fixed; and *Marriott v. Hampton* (1) shews that where money has been paid under the compulsion of legal process, it cannot afterwards

be recovered back, though it turns out that it was not due.—(He was then stopped.)

Watkin Williams, in support of the rule.—There was only one true claim in this action; and the plaintiffs cannot be allowed to keep the amount due under the policy, and also the amount of the premiums. In *Early v. Bowman* (2), where money was paid into court upon an account stated, it was held that the plaintiff could not recover nominal damages under a special count upon a bill of exchange given for precisely the same amount as that about which the account had been stated. So here, the Court will not allow that which would be a perfect scandal, namely, that the plaintiff should be allowed to recover on the policy, and also to keep the premiums. *Gould v. Oliver* (3) is in point, as shewing that the plaintiff in an action cannot recover upon two counts which are inconsistent with one another. It was an action on a charter-party, and the declaration contained two counts: first, for not loading and taking care of the cargo; and, secondly, for general average. Money was paid into court on the second count, and the jury found a verdict for the plaintiffs on the first count, with general damages; Tindal, C.J., in delivering the judgment of the Court, says, at page 235, "The effect of the pleadings in the present case is this: the plaintiffs claim a total loss upon their goods, in consequence of the misconduct of the defendant; and in case they should fail in establishing such misconduct in the defendant, they claim a partial compensation for the sacrifice of their goods in the shape of general average. The defendant, admitting the second claim, pays it into court, which the plaintiffs take out, having no claim, in this view, beyond the amount paid in. But in so doing, they do not abandon the claim which they have preferred in the first count of the declaration, and upon which issues remain to be tried. They would not, indeed, be permitted to retain the whole amount of loss under the first count, and the amount of general average under the second," &c. And in the course of the argument (p. 221), his Lordship said: "You never could expect to recover upon two inconsistent

(2) 1 B. & Ad. 889.

(3) 2 M. & G. 208; *n.c.* 7 Law J. Rep. (N.S.) C.P. 68.

(1) 2 Smith's Lead. Cas. 236.

counts;" and Bosanquet, J. asked "Can you recover on both?" The agreement entered into by the attorneys is really not of any importance as to the question now before the Court, for it only places the average-staters in the position of the jury.

[COCKBURN, C.J.—If the plaintiffs are entitled to have two strings to their bow, so ought the defendants. The plaintiffs are seeking to establish two claims which cannot co-exist.]

Just so. As to the question whether the Court has power to interfere, *Cocker v. Temperst* (4) is decisive, as shewing that every Court has unlimited power over its own process, and may stay proceedings brought against good faith.

Cohen, in support of the rule in *Carr v. Montefiore*.—This question is tacitly decided in many cases where the declaration contains a special count, and also common counts upon which the defendant pays money into court. The Judge tells the jury that, in determining the amount of damages, they ought to take into consideration the amount paid into court. So here, the plaintiffs are only entitled to recover what was due at the time of the verdict. In *Churchill v. Day* (5) Lord Tenterden said, "It would be dangerous to say that if money is paid into court, and in the declaration another count is found more accurately applicable to the plaintiff's cause of action, the effect of the payment should be defeated."

Milward was again heard.—*Gould v. Oliver* (3) does not decide the point now before the Court. The observations referred to were not necessary for the decision of the case. Upon the pleadings, the plaintiffs are entitled to recover both amounts and to keep them.

Cur. adv. vult.

The judgment of the Court was now delivered by—

CROMPTON, J. — In these cases, the plaintiffs having declared on policies of insurance with a count for money had and received, the defendants paid the amount of the premiums into court on that count, pleading to the count on the policies so as

to raise, amongst other defences, that of unseaworthiness. The plaintiffs took the money out of court in satisfaction of the claim under the count for money had and received. At the trial, the defence of unseaworthiness having failed, or having been abandoned, a special case was stated for the opinion of this Court, which was afterwards taken into the Exchequer Chamber, and in both courts it was held that the plaintiffs were entitled to recover as for an average loss. The amount of the average loss was referred to and ascertained by arbitrators, but this not being done before the argument of the case, a nominal judgment for 4,000*l.* was entered up for the purpose of taking the case into error.

The plaintiffs are now to enter up their judgment and take out their execution for the amount to which they are entitled. And they claim to be entitled to enter their judgment and take out their execution for the entire amount of the average loss, without giving credit to the defendants for the amount paid into court and taken out by the plaintiffs. The defendants obtained rules *nisi* in effect to restrain the plaintiffs from taking judgment and execution for the entire amount of the loss, without giving credit for the sums paid in respect of the premiums.

It is obvious that nothing could be more unjust than that the plaintiffs should recover back the premiums, which they could only be entitled to on the ground that the risk under the policy did not attach, and also the whole amount of the loss to which they could only be entitled if the risk did attach. It is plain that what the plaintiffs were entitled to in the event which happened was the loss after deducting the premiums. It was said, however, on the part of the plaintiffs, that the state of the pleadings allowed them to perpetuate this injustice, and that the money which had been paid into court and taken out in satisfaction, could not in any way be treated as reducing the amount to which the plaintiffs were entitled in respect of their average loss. On the other hand, it was contended that the deduction in question was one which a jury ought, on the trial, to take into account in reduction of the damages. It was said that the jury, having ascertained the amount of the loss, have to inquire what is the damage to

(4) 7 Mee. & W. 502; s. c. 10 Law J. Rep. (N.S.) Exch. 195.

(5) 3 M. & R. 71.

umpire between them, to fix the amount of such total or partial loss, as the case may be, and the verdict shall be entered for such amount accordingly, not exceeding the amount of liability under the policy."

When the case came on for trial, it was agreed that a special case should be stated for the opinion of the Court upon the question whether the policy attached or not. The special case was argued in this court, and it was decided that the plaintiffs were entitled to recover. It was agreed, "for the purpose only of completing the judgment to enable the defendants to bring error," that judgment should be signed for 2,500*l.* damages, and costs 1,500*l.*; and upon appeal to the Exchequer Chamber, the judgment of this Court was affirmed. The arbitration was then proceeded with, and by their award the arbitrators fixed the amount of the "loss of both ship and cargo at the sum of 2,038*l.* 11*s.* 7*d.*"

A summons was then taken out by the plaintiffs to shew cause why the verdict should not be entered and final judgment signed for 2,123*l.* 10*s.* 3*d.*, being the amount of the sum awarded together with interest. It was discovered that, in making their award, the arbitrators had only considered the amount of the loss, but that they would have deducted the amount paid into court if they had thought that they were at liberty to do so. The defendants then obtained the rule above mentioned.

A rule to the same effect was also obtained by Cohen, in *Carr v. Montefiore*, and the two rules were brought on together.

Milward (Nov. 25) shewed cause.—The money was paid into court upon the money counts, and, having been taken out by the plaintiffs, those counts are abandoned, and the action proceeds upon the special count upon the policy. The respective attorneys agreed that the matter should be referred to the average-staters to "fix the amount of such total or partial loss, as the case may be; and the verdict shall be entered for such amount accordingly." Now, the verdict has been entered for the amount fixed; and *Marriott v. Hampton* (1) shews that where money has been paid under the compulsion of legal process, it cannot afterwards

be recovered back, though it turns out that it was not due.—(He was then stopped.)

Watkin Williams, in support of the rule.—There was only one true claim in this action; and the plaintiffs cannot be allowed to keep the amount due under the policy, and also the amount of the premiums. In *Early v. Bowman* (2), where money was paid into court upon an account stated, it was held that the plaintiff could not recover nominal damages under a special count upon a bill of exchange given for precisely the same amount as that about which the account had been stated. So here, the Court will not allow that which would be a perfect scandal, namely, that the plaintiff should be allowed to recover on the policy, and also to keep the premiums. *Gould v. Oliver* (3) is in point, as shewing that the plaintiff in an action cannot recover upon two counts which are inconsistent with one another. It was an action on a charter-party, and the declaration contained two counts: first, for not loading and taking care of the cargo; and, secondly, for general average. Money was paid into court on the second count, and the jury found a verdict for the plaintiffs on the first count, with general damages; Tindal, C.J., in delivering the judgment of the Court, says, at page 235, "The effect of the pleadings in the present case is this: the plaintiffs claim a total loss upon their goods, in consequence of the misconduct of the defendant; and in case they should fail in establishing such misconduct in the defendant, they claim a partial compensation for the sacrifice of their goods in the shape of general average. The defendant, admitting the second claim, pays it into court, which the plaintiffs take out, having no claim, in this view, beyond the amount paid in. But in so doing, they do not abandon the claim which they have preferred in the first count of the declaration, and upon which issues remain to be tried. They would not, indeed, be permitted to retain the whole amount of loss under the first count, and the amount of general average under the second," &c. And in the course of the argument (p. 221), his Lordship said: "You never could expect to recover upon two inconsistent

(2) 1 B. & Ad. 889.

(3) 2 M. & G. 208; s.c. 7 Law J. Rep. (N.S.) C.P. 68.

(1) 2 Smith's Lead. Cas. 236.

counts;" and Bosanquet, J. asked "Can you recover on both?" The agreement entered into by the attorneys is really not of any importance as to the question now before the Court, for it only places the average-staters in the position of the jury.

[COCKBURN, C.J.—If the plaintiffs are entitled to have two strings to their bow, so ought the defendants. The plaintiffs are seeking to establish two claims which cannot co-exist.]

Just so. As to the question whether the Court has power to interfere, *Cocker v. Temper* (4) is decisive, as shewing that every Court has unlimited power over its own process, and may stay proceedings brought against good faith.

Cohen, in support of the rule in *Carr v. Montefiore*.—This question is tacitly decided in many cases where the declaration contains a special count, and also common counts upon which the defendant pays money into court. The Judge tells the jury that, in determining the amount of damages, they ought to take into consideration the amount paid into court. So here, the plaintiffs are only entitled to recover what was due at the time of the verdict. In *Churchill v. Day* (5) Lord Tenterden said, "It would be dangerous to say that if money is paid into court, and in the declaration another count is found more accurately applicable to the plaintiff's cause of action, the effect of the payment should be defeated."

Milward was again heard.—*Gould v. Oliver* (3) does not decide the point now before the Court. The observations referred to were not necessary for the decision of the case. Upon the pleadings, the plaintiffs are entitled to recover both amounts and to keep them.

Cur. adv. vult.

The judgment of the Court was now delivered by—

CROMPTON, J. — In these cases, the plaintiffs having declared on policies of insurance with a count for money had and received, the defendants paid the amount of the premiums into court on that count, pleading to the count on the policies so as

to raise, amongst other defences, that of unseaworthiness. The plaintiffs took the money out of court in satisfaction of the claim under the count for money had and received. At the trial, the defence of unseaworthiness having failed, or having been abandoned, a special case was stated for the opinion of this Court, which was afterwards taken into the Exchequer Chamber, and in both courts it was held that the plaintiffs were entitled to recover as for an average loss. The amount of the average loss was referred to and ascertained by arbitrators, but this not being done before the argument of the case, a nominal judgment for 4,000*l.* was entered up for the purpose of taking the case into error.

The plaintiffs are now to enter up their judgment and take out their execution for the amount to which they are entitled. And they claim to be entitled to enter their judgment and take out their execution for the entire amount of the average loss, without giving credit to the defendants for the amount paid into court and taken out by the plaintiffs. The defendants obtained rules *nisi* in effect to restrain the plaintiffs from taking judgment and execution for the entire amount of the loss, without giving credit for the sums paid in respect of the premiums.

It is obvious that nothing could be more unjust than that the plaintiffs should recover back the premiums, which they could only be entitled to on the ground that the risk under the policy did not attach, and also the whole amount of the loss to which they could only be entitled if the risk did attach. It is plain that what the plaintiffs were entitled to in the event which happened was the loss after deducting the premiums. It was said, however, on the part of the plaintiffs, that the state of the pleadings allowed them to perpetuate this injustice, and that the money which had been paid into court and taken out in satisfaction, could not in any way be treated as reducing the amount to which the plaintiffs were entitled in respect of their average loss. On the other hand, it was contended that the deduction in question was one which a jury ought, on the trial, to take into account in reduction of the damages. It was said that the jury, having ascertained the amount of the loss, have to inquire what is the damage to

(4) 7 Mee. & W. 502; s. c. 10 Law J. Rep. (N.S.) Exch. 195.

(5) 3 M. & R. 71.

which the plaintiffs were entitled, and that there were many cases in which circumstances occurring after the *prima facie* damage has occurred are allowed to reduce the damages. Thus part payment after action brought has always been held to reduce the damages. So, in trover, the return of the goods goes in reduction of damages. In the case of an executor *de son tort* who has interfered with the estate and so converted it, if he has paid debts, he is "recouped," as it is called, in damages.

It is unnecessary to decide this question in the present case, because we think that the Court has the power of preventing the plaintiffs from proceeding to carry out by its process such a piece of injustice as they are here contemplating. In *Gould v. Oliver* (3), where money was paid into court on a count inconsistent with that on which the plaintiff recovered, it was insisted that, by taking the money out of court, the plaintiff had estopped himself from recovering on the inconsistent count. The Court held, that such estoppel ought not to prevail, but that each count must be dealt with independently of the rest of the record; but Tindal, C.J. remarked, that the plaintiffs would not be permitted to retain the whole amount of the loss under the first count, and the amount of the general average under the second. This remark, though said not to be necessary to or part of the matter decided, was strictly pertinent to the matter under the consideration of the Court, being an answer to an objection that might have arisen that, if there was an estoppel, the plaintiff, having got the money, could not be made to part with what he had taken out of court, and that so the plaintiff could recover it twice over. No, says the Chief Justice, the Court will not allow him to retain it and take the whole loss besides. Now here, the plaintiff would get besides his indemnity from loss on the policy, the amount of the premiums. In other words, he would get back the price he has paid and the thing bargained for as well. We think he cannot be permitted to retain both. The expression of the Chief Justice seems to point to the power inherent in these Courts by stay of proceedings or otherwise to prevent the abuse of their process.

For these reasons, we are of opinion that the defendants are entitled to the relief which

they pray for, and that the rule should be made absolute to prevent the plaintiffs from signing judgment or issuing execution for any larger amount, in respect of damages, than the balance of the average loss ascertained by the average-staters after deducting the amount of the premiums paid into court.

Rule accordingly, without costs.

Rule absolute.

1864.
Nov. 9.

{ THE QUEEN, on the prosecution of THE OVERSEERS OF THE PARISH OF WENNINGTON, respondents, v. HALL-DARE, appellant.

Poor-Rate—Rateable Value—What Deductions to be Allowed—Sewers-Rate—6 & 7 Will. 4. c. 96. s. 1.

In assessing land to the poor-rate, deductions are to be allowed in respect of the general sewers-rate imposed by the Commissioners of Sewers, and the annual tax imposed by them for maintenance and cleansing of the sewers and works within the district; and for the annual average cost of the maintenance of a sluice and flood-gate, by which the land alone is benefited, and of the maintenance of a sea-wall, which the owner of the land is bound to keep up under a due presentment under the commission of sewers.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 17.]

1864. }
Nov. 28. } REEVE, appellant, v. WOOD, respondent.

Witness—Competency—Husband and Wife—Rogue and Vagabond.

Upon the hearing of an information, under 5 Geo. 4. c. 83. s. 3, against a man for neglecting to maintain his wife, whereby she becomes chargeable, the wife is not a competent witness against her husband.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 15.]

1864. }
Nov. 15, 18. } KEYES v. ELKINS.

Debtor and Creditor—Composition Deed—Release—Covenant not to sue—Sureties—Bankruptcy Act, 1861, s. 192.

To a declaration upon a bill of exchange, the defendant pleaded a composition deed executed by himself and three-fourths in value of his creditors whose debts amounted to 10l. and upwards. By the deed, set out in the plea, the defendant agreed to set apart half his income until a composition of 5s. in the pound should be paid to all the creditors respectively. The creditors who executed the deed agreed thereby to accept "these presents in full discharge and satisfaction of their respective debts, claims and demands" against the defendant; and they, by the deed, released the defendant from all their debts and claims against him, and agreed that the deed might "operate as a defence pleadable in bar to or be otherwise set up as a defence to any action," &c. The deed also contained a proviso that it should not operate to prevent any of the creditors from claiming or realizing any security held by them, or from suing any person, other than the said debtor, liable for payment of such security, nor in any way prejudice or affect the rights or remedies of any such creditors, except as against the said debtor (the defendant). The plea then alleged performance of the several requirements of section 192. of the Bankruptcy Act, 1861:—Held, that the plea disclosed a good defence to the action.

Declaration on a bill of exchange drawn by the plaintiff and accepted by the defendant.

Plea—1. As to the first count, that after the accruing of the causes of action and contracting the debts in the declaration mentioned, and after action brought, a composition deed within the true intent and meaning of the Bankruptcy Act, 1861, was executed by the defendant, then being a debtor within the said act, and was a deed made and entered into between the defendant, so being such debtor, and his creditors relating to his debts and liabilities, and his release therefrom; which deed was and is

in the words and figures and to the effect following, that is to say: "This indenture, made the 18th day of March, 1864, between Edward Elkins of No. 59, Newman Street, Oxford Street, in the county of Middlesex, gentleman (hereinafter called the debtor), of the first part; James Lane, of Greenford, in the said county, Esq. (hereinafter called the trustee), of the second part; and the several persons whose names are subscribed and seals affixed in the schedule hereunder written, or who shall, before or after the execution hereof by the said debtor, in writing, assent to or approve of this deed or instrument—being respectively in their own right, either individually or in co-partnership with others, or being agents or attornies of, creditors of the said debtor, on behalf of themselves and all and every other the creditors of the said debtor (hereinafter called the creditors), of the third part. Whereas the said debtor is and standeth indebted to the parties hereto of the third part, and all those who are or are intended to be bound by these presents, in divers sums of money respectively; and whereas the said debtor being unable immediately to pay his said creditors the amount of their several debts or claims against him in full, hath lately proposed to them, and it hath been mutually agreed between the said parties hereto of the second and third parts respectively, that the said debtor should pay all and every the creditors of him the said debtor, whether executing, assenting to or approving of this deed or not, and that they the said creditors should accept from him the sum or composition of 5s. in the pound on the full amount and in full discharge of all and every the debts of the said debtor due and owing by him at the time of the execution of these presents, in manner and at the times hereinafter mentioned, and that the said debtor should make such provision for the payment of the said sum or composition of 5s. in the pound, and enter into such covenants, provisions and agreements as are hereinafter contained, and that the said creditors should execute the release hereinafter provided: Now this indenture witnesseth that, in pursuance of the said agreement and in consideration of the premises, he the said debtor doth hereby for himself, his heirs, executors and administrators,

covenant, promise and agree with the said trustee on behalf of himself and the said creditors respectively, and their respective executors, administrators, partners and partner, that he the said debtor shall and will set apart and appropriate one equal half part or moiety of his future net income or profits to be derived and received by him from his professional fees and emoluments as an attorney and solicitor [here followed provisions for ascertaining the income of the debtor, and paying over the composition of 5s. in the pound]. And this indenture further witnesseth that, in further pursuance of the said agreement and in consideration of the premises and of the said covenant of the said debtor, they the said creditors do hereby severally for themselves, and their respective heirs, executors, administrators, partners, partner and successors, covenant and agree with the said debtor, his executors and administrators, to accept and take, and they do hereby accept and take, these presents in full discharge and satisfaction of their respective debts, claims and demands against or upon him the said debtor, his estate and effects. And they the said creditors, in further pursuance of the said agreement, and for the considerations aforesaid, do, and each and every of them doth, by these presents, for themselves and their respective heirs, executors, administrators, partners, partner and successors, freely, clearly and absolutely remise, release, exonerate, discharge and for ever quit claim unto the said debtor, his heirs, executors and administrators, and his and their future lands, tenements, goods and chattels, estate and effects, all and singular their, and each and every of their said respective debts, claims and demands now due and owing to them respectively, and all and all manner of action and actions, suit and suits, cause and causes of action and suit, bills, bonds, writings obligatory, debts, sums of money, promissory and other notes, IOUs, dues, duties, accounts, reckonings, costs, charges, expenses, agreements, judgments, decrees, decretal or other orders, warrants of attorney, defeazances, extents, executions, quarrels, controversies, trespasses, damages, claims and demands, whether admitted or not, whatsoever, both at law and in equity, or otherwise howsoever, which

they the said creditors and their respective heirs, executors and administrators, partners, partner and successors now have, ever had, or shall or may or otherwise could or might hereafter have, claim, challenge, or demand of, from and against him the said debtor, his heirs, executors or administrators, or his or their lands and tenements, goods and chattels, estate and effects, or any of them, for or by reason or on account of the debts, claims or demands of them, or any of them respectively, now due and owing or claimed to be due and owing from the said debtor, and all interest and arrears of interest for or in respect of the same several debts and premises, or any of them, or for or by reason or on account of any other matter, cause or thing whatsoever relating thereto antecedent to and including the day of the date hereof; and these presents shall and may accordingly operate as a defeazance pleadable in bar to or may be otherwise set up as a defence to any action or actions, suit or suits, or other proceedings at law or in equity heretofore or hereafter brought, instituted or taken by or on the behalf of the said creditors, or any of them, their or any of their heirs, executors or administrators, partners, partner or successors, for or in respect of such debts, claims and demands, or any of them. Provided always, and it is hereby agreed and declared by and between the said parties hereto, that the execution, assenting to, or approval of these presents and the acceptance of the said sum or composition of 5s. in the pound, at the times, by the means and in manner hereinbefore mentioned, and the release hereinbefore contained, shall not in anywise prejudice, affect, or extend or be construed to extend to prevent any of the said creditors from claiming or realizing any security now held by them, or any of them, or from suing any person or persons, other than the said debtor, liable to payment thereof, for the recovery thereof less the amount received by them, or any of them, under and by virtue of these presents, nor in any way prejudice or affect the rights or remedies of any such creditors except as against the said debtor, to which, but for agreeing to or signing these presents, they might severally have recourse to for the recovery of their several debts or demands; but, nevertheless, if any such security shall be enforceable against

the said debtor or his estate or effects, then and in that case such creditor (unless he shall consent to abandon his said security) shall be entitled to receive payment of his secured debts, under these presents, upon so much only of his said secured debt or debts as may remain after such security shall have been realized, or after credit shall have been given for the full value thereof, such value to be ascertained as in bankruptcy. And, moreover, it is hereby lastly agreed and declared by and between the said parties that these presents are intended to operate, and shall (so far as lawfully may be) operate to all intents and purposes whatsoever as a deed of composition within the provisions of the 192nd section of the Bankruptcy Act, 1861, in that behalf, and that so soon as a majority in number representing three-fourths in value of the creditors of the said debtor whose debts shall respectively amount to 10% and upwards shall have executed, or in writing assented to or approved of this deed, it is intended that the same shall be registered in the Court of Bankruptcy under the provisions of the said act, and the general orders made thereunder in that behalf, in order that the said debtor may obtain the protection of the said Court granted under the said act, for the purpose of being available to him for all purposes as a protection in bankruptcy, and that all the creditors of the said debtor who would be bound by this deed in case it were a deed of composition or trust-deed for the benefit of creditors within the true intent and meaning of the 192nd section of the Bankruptcy Act, 1861, and in case all the conditions mentioned in the said act in that behalf had been observed, shall be equally bound by and entitled to the benefit of this deed, and that any provision herein to the contrary shall be void and of none effect. In witness, &c.

And the defendant says that the said deed has become and is as valid, effectual and binding on all the creditors of the defendant as if they had duly executed the same, and that all the conditions in the said act in that behalf mentioned have been observed; and that a majority in number representing three-fourths in value of the creditors of the defendant, whose debts amounted respectively to 10% and upwards,

have executed, or in writing assented to, or approved of the said deed, and that the execution of the said deed by the defendant was attested by an attorney and solicitor, and that within twenty-eight days from the day of execution of the said deed by the defendant, the same was produced and left, having been first duly stamped at the office of the Chief Registrar in Bankruptcy, for the purpose of being registered; and that together with the said deed there was delivered to the said Chief Registrar such affidavit as by the said act is in that behalf required, and that the said deed has been duly registered and notice thereof duly given, and a certificate of registration obtained according to the said act, and that all other conditions prescribed by the said act were observed and performed, and that all things were done and happened which were necessary to have been done and to happen to give validity to the said deed as a composition deed under the Bankruptcy Act, 1861, and that the plaintiff became and was and is bound by the said deed, with respect to the debt sued, for as if the plaintiff had been a party thereto and had duly executed the same; and that the defendant was and is released and discharged from the claim in the declaration by the said deed, and by the provisions of the said act and of the said deed having been complied with by him.

Demurrer and joinder in demurrer.

Cleasby, in support of the demurrer to the plea.—The deed is no bar to this action under the Bankruptcy Act, 1861, nor would it be any bar at common law. It purports to contain a release to the debtor of all debts, claims and demands, although it afterwards provides that such release shall not prejudice any of the creditors in suing upon any security held by them against any person other than the debtor. This shews that it could not have been intended that it should operate as a release, for a release to one joint debtor will operate as a release to all. It therefore ought to be treated as a covenant not to sue, and not as a release—*Price v. Barker* (1); and it cannot be pleaded in bar to the action. The only reason why a covenant not to sue

(1) 4 E. & B. 76; s.c. 24 Law J. Rep. (N.S.) Q.B. 180.

is allowed to be pleaded in bar is in order to avoid circuity of action, but that reason would not apply here, inasmuch as the creditor would not be liable to an action. The case of *The Ipsstones Park Iron Ore Company v. Pattinson* (2) is very nearly the same as the present, and there the Court of Exchequer held, that the deed afforded no answer to the action, but that the remedy was either by application to the Court of Bankruptcy, or, after judgment, to a Court of law to stay execution.

[CROMPTON, J.—It would be against the intention of the deed that this should be a covenant not to sue, and if so it must be a release. This seems to me to be good as an equitable plea, and a Court of equity would grant a perpetual injunction.]

Eyre v. Archer (3) shews that a deed in the form given in Schedule D, assented to and executed by the creditors, cannot be pleaded in bar to an action for a debt in respect to which the creditor has so assented.

[COCKBURN, C.J.—There is no release at all in a deed in that form, which is very distinguishable from a deed under section 192, where there is a release. CROMPTON, J.—I think that *Clapham v. Atkinson* (4), which has been affirmed in the Exchequer Chamber (5), is decisive of the present question.]

No; the proposition now suggested was not brought before the Court in that case; and in *Dell v. King* (6), the Court in a considered judgment said, that "the debtor has no right to make his creditor covenant, nor has he any right to subject him to a loss of his debt if he think fit to contest the validity of the deed."

[SHEE, J.—It would be unreasonable if he could do so.]

The effect of such a deed as this is, that those only who execute it disable themselves from suing the debtor. The proposition above cited from *Dell v. King* (6) was slightly modified in *Hidson v. Barclay* (7),

where Bramwell, B. in delivering the judgment of the Court stated, "We said in *Dell v. King* (6), that the debtor has no right to make his creditor covenant. Without saying that in no case would a covenant imposed on a creditor be valid, we abide by this opinion, that no covenant can be imposed on him beyond what is necessary for the release of the debtor, and these covenants are not. We think therefore they are unreasonable and bad."

Mellish, contra.—It is clear that if the plaintiff had executed this deed, the defendant would have been released, and the plaintiff is now in the same position as if he had done so, inasmuch as by the statute the assent of the required majority binds all the other creditors. The action is by drawer against acceptor, and by the deed the creditors agree to accept the composition offered, and to release the defendant from the debts due to them. It therefore becomes an absolute release. Then, the proviso which has been relied on is inoperative, because it may be that there is no joint debtor or surety, and if so the proviso will not prevent the deed from operating as a release to the debtor from all his debts, and indeed any provision in such a deed which is inconsistent with the general intention and principal object of it may be rejected. *Price v. Barker* (1) is admitted to be law, but a covenant not to sue is a bar to an action by the party bound by the covenant. The only real question is, whether the deed is productive of inequality between the creditors who have securities and those who have not. There is, no doubt, considerable difficulty in saying how deeds of this kind ought to be framed with regard to the remedies against sureties, but it would be manifestly unjust that a solvent surety should be discharged altogether.

[COCKBURN, C.J.—You may say that there is really no inequality. CROMPTON, J.—It seems to be an engagement on the face of it to take as an accord and satisfaction the agreement by the debtor to go on with his business and keep his accounts, &c. in the way mentioned, and to pay the composition.]

Yes; and the defendant is entitled to put the case as if the plaintiff had executed the deed. No Court of equity would allow

(2) 33 Law J. Rep. (N.S.) Exch. 193.

(3) 16 Com. B. Rep. N.S. 638; s. c. 33 Law J. Rep. (N.S.) C.P. 296.

(4) 33 Law J. Rep. (N.S.) Q.B. 81.

(5) See *post*, p. 49.

(6) 2 H. & C. 84; s. c. 33 Law J. Rep. (N.S.) Exch. 47.

(7) 33 Law J. Rep. (N.S.) Exch. 273.

him to sue the defendant. The plaintiff is seeking to take advantage of the technical effect at common law of a covenant not to sue.

Cleasby did not reply.

COCKBURN, C.J.—We are all agreed that our judgment ought to be for the defendant. We are not called upon to proceed upon the ground taken by the Court of Exchequer in *The Ipstones Park Iron Ore Company v. Pattinson* (2). It is not necessary that we should say what would be the effect of the clauses in the Bankruptcy Act in cases of deeds in which there was no release—whether the effect would be to give the debtor a remedy by having recourse to the Court of Bankruptcy, or whether he would be able to plead the deed in bar to the action. In the case before us we have matter which was not present in the case referred to; we have a release by the creditors; and for the purpose of considering Mr. Cleasby's argument, a release which is qualified by the reservation of the right of the creditors in proceeding against the sureties. Now, Mr. Cleasby says that according to legal principles, such a release of the debtor would not operate as a release absolutely, but only as a covenant not to sue; but he seems to admit that the effect of such a release might be pleaded in bar to an action brought by a person who was a party to the deed; though he contends that it could not be so pleaded to an action by a person who is only a party to the deed by reason of the provisions of the Bankruptcy Act, 1861, in section 192. But I find that those provisions amount to a statutory enactment that, with regard to a creditor who does not execute the deed, the release shall, if the requirements of the section are carried out, be as valid and effectual and binding on him as if he had been a party to and had duly executed the same. The execution by the necessary proportion of the creditors is therefore considered as the execution of all the others, and the creditor who does not execute must be taken as being bound by the deed. But I feel, after what Mr. Melish has said, that we need not decide the case upon that ground; for it seems to me that there is here a good release to the debtor, and not merely a covenant not to sue. Mr. Melish says that it is an absolute

release by all the creditors, with the exception of those who have sureties, in which case they reserve to themselves the right to proceed against them. Now, the plaintiff has no person in the position of a co-debtor, and therefore he has absolutely released the debtor; the only way the objection could prevail would be by reason of producing inequality among the creditors; but the statute says that the deed shall be binding unless it contains something unreasonable. Now, to make it unreasonable on the ground of inequality among the creditors, there ought to be some substantial inequality. In substance and essence, whether it be a release or a covenant not to sue, the deed may be set up to prevent an action being brought against the debtor. I cannot see any real effectual inequality, or anything to shew that it is unreasonable; and therefore I hold it a good deed under section 192, and that the plaintiff is bound by it.

CROMPTON, J.—I have come to the same conclusion. I do not see any inequality in the case, as the assenting and non-assenting creditors are in the same position. Looking at it altogether, I think it does not operate as a release to the destruction of all the debt. I think a release would be entirely unfair on the non-assenting creditors if they had sureties against whom their claims could be enforced. This deed is prepared in the usual manner. This case is quite different from *The Ipstones Park Iron Ore Company v. Pattinson* (2), for in that case there was no agreement not to sue, or that the debtor should be discharged. Then, taking this to be an agreement not to sue, I think the plea is good as shewing an equitable, if not a legal, defence to the action. It is this: "We, the creditors, will take this agreement in accord and satisfaction of the debts due to us from you, and we will not bring any action against you in respect of any of such debts;" that is an agreement entered into by the creditors for a good consideration; and a Court of equity would restrain them from bringing an action upon it, and would say, you shall not sue the debtor. It is almost necessary that a deed of this kind must contain a clause reserving the rights against sureties, and the deed seems to be a fair one in that respect. We must look to see what the effect of the deed is. I do not doubt, and I am confirmed by

Clapham v. Atkinson (4), that the creditors take the agreement for the composition in the deed as an accord and satisfaction of their debts. In that case there were the words, we "have agreed to accept such composition as aforesaid," and then the words, "severally undertake and agree to execute a good and sufficient release in the law of our several respective claims and demands upon him," when called upon to do so. In the present case the creditors agree not to sue their debtor, which appears to me to be just the same, and to be a bar to the action by section 192. *Clapham v. Atkinson* (4) is practically the same as the case now before us; and if we were to decide this case in favour of the plaintiff, we should be going against the decision of the Exchequer Chamber. The plea is good, as shewing an equitable defence to the action, and our judgment must be for the defendant.

MELLOR, J.—I am of the same opinion. The object of the 192nd section is to allow a large number of creditors and the debtor to make what, in their judgment, appears to be the arrangement most satisfactory for them all; but as they are to have the power of binding the non-assenting creditors, it is necessary to import this: that the deed must be one which three-fourths in value agree to, and that it must be a reasonable deed. That being so, the moment it has been executed by the required majority all are bound by it. If the remedies against sureties be not preserved, I cannot understand how, with any degree of fairness, the majority, who have claims upon the debtor alone, could impose upon the minority, who have also claims against sureties, the result of being bound by the deed. If we were to decide this case in favour of the plaintiff, we should defeat the intention of the legislature. I am clearly of opinion that though this may be a covenant not to sue the debtor, yet that, in truth and in substance, it is a discharge which may be pleaded in bar to the action.

SHEK, J.—I am of the same opinion. We are to endeavour to give effect to the 192nd section, which enacts, that every deed made "between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts and liabilities of the debtor; and his release therefrom

... shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided" the specified conditions be observed. Now, this deed purports to be, and is, a release of the debts due from the debtor; but it has been argued that it cannot be so, because it is of the essence of a release that if the debts due to the principal are released, there can be no remedy against the sureties, and that inasmuch as in this deed the remedy against the sureties is kept up, it cannot be a release; but I think that Mr. Cleasby has attributed to the release rather more efficacy than it of necessity has, for in many releases a remedy against sureties is reserved, and it appears to me that this deed contains just such a reservation. It amounts to a covenant by those of the creditors upon whom the act makes it binding not to sue the debtor. It is said also that there is inequality; but there is only such an inequality as a Court of equity or the Court of Bankruptcy would give effect to, and the deed is not so unequal as to make it invalid.

Judgment for the defendant.

1864. Nov. 11.	{	GLEDSTANES AND OTHERS v. THE CORPORATION OF THE ROYAL EXCHANGE ASSUR- ANCE.
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*Marine Insurance—Declaration of Risk
—Knowledge of Loss.*

The plaintiffs were the London agents of an insurance company having an agent also in Calcutta: the defendants were a London insurance company. By a course of dealing between the plaintiffs' company and the defendants, an open policy was from time to time effected by the plaintiffs with the defendants, "lost or not lost, from Calcutta to the United Kingdom, on goods, to cover the excess over 5,000l. which might be taken by the Calcutta agent of the plaintiffs' company in any one ship, on first-class ship or ships as may be declared." As soon as the Calcutta agent had ascertained that there was an excess of 5,000l. in any one ship on a policy granted by the plaintiffs' company, he wrote

to the plaintiffs to appropriate such excess to the current open policy effected with the defendants, and the plaintiffs, as soon as the letter reached London, declared to the defendants the name of the ship and the amount of excess, which were indorsed on the back of the policy. On the 15th of February 1860, the Calcutta agent wrote to the plaintiffs notifying an excess in the ship *R. G.* On the 16th of March 1860, a telegram was made known to the plaintiffs and the defendants—"Calcutta, March 10, Ship *R. G.* burnt, some cargo will be saved." On the 17th of March the plaintiffs appropriated the whole of the amount remaining on the then current policy of the defendants to other ships. On the 19th of March a policy in the usual terms, which was expressed "to succeed" the last current policy, was effected by the plaintiffs with the defendants. On the 21st of March the plaintiffs in due course received the letter from Calcutta of the 15th of February, and immediately notified to the defendants that the excess of 5,000*l.* on the *R. G.* would be appropriated to the policy of the 19th of March; and on the 26th of March, on receiving the full particulars from Calcutta, they indorsed the amount of excess on the policy, which the defendants disputed their right to do:—Held, that the plaintiffs could recover the excess in the *R. G.* on the policy of the 19th of March, as the appropriation and declaration were sufficient; and that the fact of the loss of the *R. G.* being known to both parties at the time the policy was granted did not affect it, as it was not then known to the plaintiffs or the defendants that the plaintiffs' company had any excess of insurance on board.

Semble, that if this had been then known, the plaintiffs could still have recovered.

CASE stated by consent, without pleadings.

This was an action brought to recover 2,715*l.*, as the amount of a partial loss alleged to have attached, under one or other of certain open policies, effected by the plaintiffs with the defendants, on goods insured in the sum of 7,699*l.* 1*l.* 3*d.*, whereof 4,738*l.* was declared on the policies hereinafter mentioned, by ship or ships, in respect of the cargo of the ship *Red Gauntlet*, which was totally lost by fire at Calcutta under the circumstances hereinafter set forth.

The plaintiffs are merchants in London and act as the agents there of the Hong-Kong Insurance Company. This company is established at Hong-Kong, and carries on the business of marine insurance there and elsewhere, and they have an agent established at Calcutta with general authority to underwrite policies on their behalf.

The course of business of the company in taking risks at Calcutta, so far as it is material to the question that arises on this case, is as follows: Merchants at Calcutta intending to make consignments of merchandise, for example, to the United Kingdom, and being desirous of securing insurances upon the same with the company, make application to that effect to the agent of the company, some time before the goods are actually shipped, or even the name of the intended ship is known, or the precise quantity or particulars of the merchandise is defined; and if the application is accepted, a slip naming the risk accepted in general terms, but without naming the ship or specifying the particulars of the merchandise, is delivered to the assured, and as soon as the particular ship is determined on a formal policy of insurance, expressed to be upon the whole amount of merchandise which the assured may consign by that particular ship, is drawn up and delivered to the assured. What quantity of merchandise is covered by such policy remains uncertain until the same is actually shipped.

Under these circumstances the company do not know at the time of issuing a policy of insurance, as above mentioned, what may prove ultimately to be the amount of risk taken by them on any particular ship; and, not deeming it expedient to take upon themselves risks to a greater extent than 5,000*l.* upon any one ship, the plaintiffs, as their agents in London, effect, on their behalf, with the defendants and others, open policies of insurance to cover the several amounts, if any, which the company may have taken in excess of 5,000*l.* upon any one ship. The maximum amount of value to be insured in these policies is fixed therein, as will presently appear.

In accordance with the course of business, the plaintiffs effected a policy of insurance with the defendants, dated the 8th of October 1858, numbered 22,122,

for 7,000*l.*, the subject of insurance being described and valued as follows: "Lost or not lost at and from Calcutta to a port in the United Kingdom, being on goods. Free of all average; part of 10,000*l.* To cover the excess of 5,000*l.* which may be taken by the Calcutta agent of the Hong-Kong Insurance Company on any one ship. Warranted to be shipped on or before the 31st of March 1859." The ships were described as "first-class ship or ships as may be declared."

As a fact the Calcutta agent of the Hong-Kong Insurance Company had taken risks on goods which exceeded 5,000*l.* on single ships; and from time to time as the plaintiffs received advices from the company to that effect, stating the names of the ships and the particulars of the amounts of excess on each ship, the plaintiffs made declarations of the amounts and names of the ships to the defendants, and indorsements were made of the declarations upon the back of the policy. (The indorsements on the back of the policy were set out, the last being dated the 16th of March 1859.) The particulars of the subjects of risks covered by this policy were thus on the 16th of March 1859 completed, the policy fully appropriated, or, as it is sometimes expressed, "consumed."

On the 12th of February 1859, before the last-mentioned policy was fully appropriated, the plaintiffs proposed to effect a further policy of the same kind for 7,000*l.* This proposition was made by means of a memorandum which was indorsed on the back of the policy of the 8th of October 1858, as follows: "12th February, 7,000*l.* to follow this," and this proposal being accepted another policy, numbered 3686/33 and dated February the 14th, 1859, was effected for 7,000*l.*, being expressed to be "on goods, part of 1,000*l.*, to cover the excess of 5,000*l.* on any one ship free of all average, to follow and succeed policy No. 22,122, 8th of October 1858, warranted to be shipped on or before the 30th of June 1859"—"ships" being inserted where the blank occurred for the name of the ship. This policy was in like manner appropriated by declarations indorsed thereon as before; the last of which, being upon part value of a policy on the ship *W. W. Smith*, was dated the 7th of November 1859.

A similar policy was also opened by the plaintiffs with the defendants, numbered 7529/30, and dated the 31st of March 1859, also for 7,000*l.*, "being upon goods part of 10,000*l.*, to follow and succeed policy No. 3686, dated the 14th of February 1859, warranted to be shipped on or before the 31st of December 1859," and a memorandum was indorsed on policy No. 3686/33, as follows: "31st of March, 7,000*l.* to follow this at 30/." In this policy of the 31st of March 1859, the ships were described as "A 1, British built, or equal thereto." On the 7th of November 1859, the first indorsement was made upon this policy, and was upon the remainder of the Hong-Kong Insurance Company's policy on the ship *W. W. Smith*, partly appropriated by the last indorsement on the preceding policy as above mentioned.

On the 16th of March 1860, there remained still 5,000*l.* unappropriated upon the open policy dated the 31st of March 1859.

On the same day the following telegram arrived in London by the Red Sea and India Telegraph, having been despatched from Calcutta six days previously.

"At 6-27 Friday, the 16th of March 1860, received the following message.

From Malta, dated 15. Time 8 P.M.

To Lloyd's, London.

Ship *Red Gauntlet*, bound to London, burnt and scuttled, some cargo will be saved. Calcutta, March 10, 16-8-22 A.M.

Lloyd, Calcutta."

This telegram became known to the plaintiffs and defendants on the same day (16th of March).

On the 17th of March 1860, the plaintiffs, in accordance with the course of business before described, appropriated the remaining 5,000*l.* upon the above-mentioned policy of the 31st of March 1859 to insurances in excess of 5,000*l.* upon the ships *City of Manchester*, 2,000*l.*, *Blenheim*, 2,000*l.* and *Agamemnon*, 1,000*l.*, and on the same day the plaintiffs effected with the defendants three specific policies on behalf of the Hong-Kong Insurance Company; one on goods per *City of Manchester* for 3,000*l.*, another on goods per *Agamemnon* for 4,000*l.*, and a third on goods per *Blenheim* for 2,000*l.*, parts of the risks in respect of the cargoes of those ships having already been placed

upon the open policy just appropriated as above mentioned.

On the 19th of March 1860, the plaintiffs effected a further policy for 10,000*l.* to follow the policy of the 31st of March 1859, which was expressed to be as follows: "Lost or not lost, at and from Calcutta to a port in the United Kingdom. Being on goods. Free of particular average, unless stranded, sunk or burnt. To follow and succeed policy No. 7529/30, dated the 31st of March 1859, warranted to be shipped on or before the 31st of December 1860." The ships being described simply as "ships." The plaintiffs in the mode that had been previously pursued when the prior policies were effected, indorsed on the policy No. 7529/80 the following memorandum, "10,000*l.* to follow the 17th of March at 30/," as instructions for the said policy of the 19th of March 1860, and the defendants initialed the memorandum as an acceptance of the risk (1).

On the 21st of March 1860, the plaintiffs in due course received from the Calcutta agent of the Hong-Kong Insurance Company the following instructions, despatched from Calcutta on the 15th of February 1860. "In our next by regular mail you will find particulars for insurances under our open policy for *Red Gauntlet* and *Surrey*." This was the first intimation received in England of any insurance by the Hong-Kong Insurance Company upon the *Red Gauntlet*.

The plaintiffs, immediately upon the receipt of these instructions from Calcutta, notified to the defendants that the declaration of insurance in excess of 5,000*l.* on the cargo of the *Red Gauntlet* would be made upon the last-mentioned policy when the particulars were received; the right to declare in respect of the *Red Gauntlet* was, however, disputed; and on the 26th of March, the plaintiffs having received advices from Calcutta that the Hong-Kong Insurance Company, as the fact was, had taken risks upon the cargo of the *Red Gauntlet*, to the amount of 4,738*l.* in excess of 5,000*l.* upon that one ship, indorsed a declaration of that amount for the *Red Gauntlet*, on the back of the policy of the 19th of March 1860, and gave notice of the same to the defen-

dants. The defendants refused to accept or acknowledge such declaration, upon the ground that the burning of the *Red Gauntlet* was known to both parties before the policy was effected or applied for; the plaintiffs thereupon wrote opposite the declaration per the *Red Gauntlet* the words "in dispute," and after doing so, declared other risks upon the policy to the full amount, which were initialed by the defendants, but the words "in dispute" were not noticed by the defendants.

The plaintiffs on the 24th of March 1860, before the last-mentioned policy was exhausted, and while there remained upwards of 5,000*l.* unappropriated upon it, effected a further policy with the defendants for 20,000*l.* to follow the policy of the 19th of March 1860; and a memorandum was indorsed on the policy of the 19th of March 1860, as follows, "20,000*l.* to follow the 25th of March," such date being a mistake for the 24th of March.

Similar policies have been from time to time effected during the currency of the preceding policy, and there remains upon the last of such policies an amount unappropriated, more than sufficient to cover the amount of the *Red Gauntlet*.

The interest of the Hong-Kong Insurance Company and the validity of the insurances are admitted, as well as the loss, and that the goods were shipped on board the said ship, and that all warranties and conditions were complied with, except so far as the same may otherwise appear on this case; and it is agreed that the amount to be recovered by the plaintiffs (if any) shall be settled by an arbitrator to be named by the parties.

The question for the opinion of the Court was, whether the plaintiffs are entitled to recover in respect of the excess over 5,000*l.* taken by the Hong-Kong Insurance Company upon the cargo of the ship *Red Gauntlet*. If the Court should be of opinion that the plaintiffs are so entitled to recover, then the plaintiffs were to enter up judgment for the sum so to be settled as above mentioned, together with costs of suit, including costs of reference as to the amount. If the Court should be of the contrary opinion, the judgment was to be entered for the defendants with costs of suit.

Lusk (Hannen with him), for the plaintiffs.—The plaintiffs are entitled to recover

(1) The day on which this was done was disputed, and the statement in the case was therefore left open.

for the excess in the *Red Gauntlet* on the policy effected on the 19th of March. The effect of the course of dealing is to make these successive policies but one continuous insurance; the object being that the plaintiffs should always have any excess over 5,000*l.* on any one ship re-insured from the time of sailing. The risk would attach on any particular ship in the order of sailing.

[COCKBURN, C.J.—I doubt that; the insurance is “on ships, as may be declared.”]

That construction is equally favourable to the plaintiffs. The declaration is only a notification to the defendants of the exercise of the power of appropriation, which is in the insured alone; the insurers having no power to reject any risk coming within the terms of the policy—*Harman v. Kingston* (2). A declaration of the subject-matter of the insurance is no contract; it need not be assented to; in fact, the appropriation is the important step from which the assured cannot recede; and the declaration given to the insurers is simply information for their protection, and can only be given as soon as practicable by the course of post. The risk attached as soon as the appropriation was made, and by the course of dealing it was to be covered by whatever was the current policy at the time the notice of appropriation reached London.

Bovill (*Watkin Williams* with him), for the defendants.—There was not here a continuous insurance; there was a break between the 17th of March 1860 and the 19th; on the former day the current policy was filled up and exhausted, and there was therefore no policy for two days. Even assuming the policy to take effect from the 17th, that was after the loss, so that there was no risk on this ship on which it could attach.

[COCKBURN, C.J.—That argument might be valid if the defendants had not or could not insure lost or not lost.]

But on the 17th, taking the earlier date as most against the defendants, both parties had notice of the loss, and an insurance with notice of loss is void. The appropriation can have no validity without a declaration made to the defendants: on this, *Harman v. Kingston* (2) is directly

(2) 3 Camp. 150.

in the defendants' favour; for it was held, that, inasmuch as the declaration was not made till after the loss, the policy was not a valued policy.

[MELLOR, J.—It may be important that both parties should know as to value; but the risk is quite a different question. COCKBURN, C.J.—There must be an agreement as to valuation. SHEE, J.—The distinction taken in the case is against you; for the policy was held good without a declaration.]

Assuming, then, that the declaration relates back to the time the appropriation was made, still as the loss occurred before the declaration reached the defendants, and before the policy was effected, there was nothing on which it could attach.

Lush, in reply.—There was no knowledge of the loss in the present case. The knowledge that would vitiate a policy must, at least, be a knowledge of the loss of the subject-matter of insurance; here neither party knew whether the plaintiffs had any insurance, much less an excess in the ship *Red Gauntlet*. But even if they had this knowledge, that does not vitiate the policy, if the underwriter choose notwithstanding to execute the policy—*Mead v. Davison* (3). The argument of the other side, that a declaration cannot operate if made after the loss, practically amounts to saying that they will only insure such ships of the plaintiffs as arrive safe. As soon as the risk is incurred, if the assured mean to appropriate, they must do so at once, and that was done in the present case. In 1 *Arnould on Marine Assurance*, p. 175, (p. 221, 2nd edit.) it is said, “As a general rule, the name of the ship ought to be declared before notice of loss; as, however, cases may occur in which it would not be possible, as when the assured does not ascertain the name of the ship till he hears of her loss, it is in no case a condition precedent to the plaintiff's right to recover on the policy.” So, in *Robinson v. Touray* (4), it was held that a declaration of risk requires no assent, and need not be in writing, and that when a *bond fide* mistake had been made in the name of the ship, the declaration might be withdrawn, and the right ship substituted.

(3) 3 Ad. & E. 303; s. c. 4 Law J. Rep. (N.S.) K.B. 193.

(4) 3 Camp. 158.

COCKBURN, C.J.—I am of opinion that judgment should be for the plaintiffs. I will first consider whether there was any sufficient policy of which the plaintiffs may avail themselves to recover for this loss. I think there was. It is true that the policy to which the risk on the goods in the *Red Gauntlet* was appropriated was effected at a time posterior to the appropriation. But I think we must take it that the appropriation in Calcutta (to be followed by a declaration in London) was made in anticipation of a policy to be afterwards effected in London; and if we look at the course of dealing between the parties this is clear, that it was intended that whenever the plaintiffs' principals, the Hong-Kong Insurance Company, from time to time became liable on insurances on goods in any one ship in an excess over 5,000*l.*, they should be always covered as to the excess by re-insurance with the defendants. Mr. Bovill, indeed, did not deny that if the policy had been effected on the 16th of March instead of the 19th, although equally subsequent to the appropriation, the policy would have been sufficient to entitle the company on a proper appropriation to have the benefit of the insurance. But he said that the insurance was invalid, because, at the time the policy was effected, the *Red Gauntlet* was lost, to the knowledge of both parties. To this there are two answers. The first urged by Mr. Lush was to me conclusive:—the loss of the ship was not the risk insured against, the risk depending on the contingency that the plaintiffs' principals had insured goods on board that ship and in excess of 5,000*l.* And whether this was the case or not was unknown to the plaintiffs and defendants at the time the policy was effected. But, secondly, the knowledge here was common to both parties, and if an underwriter chooses to insure when the subject-matter is lost, I can see no reason why he should not. He may have good reasons for taking the risk; and it may also be observed that the telegram spoke of part of the cargo being saved. On these grounds I think there is nothing in the facts of the case to vitiate the insurance.

The next question is, whether the fact of the declaration having been made to the defendants subsequently to the loss of the ship

is any obstacle to the plaintiffs recovering. The policy gives the right to the assured to appropriate goods in any ship, but it is to be declared to the assurers; and it is said by Mr. Bovill that the risk does not attach until the declaration has been made; and if that were true in the present case the plaintiffs could not recover. But to put such a construction on the agreement of the parties would be to frustrate altogether the obvious intention of the whole proceeding, which was to secure to the Hong-Kong Company the certainty of being secured by re-insurance against the excess over 5,000*l.* in any one ship. But whether they had this excess in any particular ship could not be ascertained till the loading was complete and the vessel about to sail, and the appropriation being then made, the declaration could not be communicated to the defendants in less than about six weeks; so that if the defendants' contention were correct, during the whole of that time the plaintiffs would be altogether unprotected. I cannot suppose that that was what was meant by saying that the ship is to be declared. It may be that by declaring it meant that appropriation is to be made by some overt act from which the assured cannot recede, and that when that is done at Calcutta, that is sufficient without more. But without going that length, it is enough to say that, if the declaration must be made to the insurers, it is sufficient if it be made at the earliest convenient opportunity. By this construction the underwriters are protected, because it would be a fraud upon them if after the appropriation to one vessel there were an attempt to appropriate the policy to another. It is quite clear that the appropriation, in some shape or other, must be so made as that the ship shall be insured in the interval between the appropriation and the declaration to the defendants. This view is in accordance with the passage cited from *Arnould on Marine Assurance*, p. 175, (p. 221, 2nd edit.). It is scarcely necessary to add, that Mr. Bovill's contention that the risk did not attach till the declaration reached the defendants is quite untenable; for if the assured had a right, as he admits they had, to make the appropriation to any ship they chose, to say that a loss occurring between

the appropriation and the declaration reaching the defendants would not be covered, is to deprive the assured of all the advantage of their right.

CROMPTON, J.—I am of the same opinion. I think the real construction of this policy is that it is to follow the former one as one insurance so as to substitute 10,000*l.* for 7,000*l.*; and the object of the proceedings between the parties is quite clear; the plaintiffs' company wished to cover any excess over 5,000*l.* in any one ship from Calcutta to London, so as to secure themselves on the whole voyage. It appears to me that the policy is to be treated as following and keeping up the former open policy, although there were three slips on three specified ships treated in a different way; but I cannot think it was meant that the short interval between the other risks being appropriated and the fresh policy actually effected was to be left uncovered. Then comes the question, when did the risk on this policy attach? I do not agree with Mr. Lush's first contention, that the effect of the course of dealing and form of policies was that the risk attached in order of the sailing of the ships insured by the plaintiffs' company. But I feel inclined to think that his other proposition is true, that the risk attached as soon as the excess of insurance on the ship *Red Gauntlet* was appropriated to the defendants' policy by the agent in Calcutta. The risk of the plaintiffs would attach on the loading, and in all probability, I think, the defendants' risk does attach immediately on the appropriation made abroad; but, at all events, I have no doubt that the appropriation made by letter from the agent at Calcutta, and acted on by the plaintiffs in London, by forthwith communicating it to the defendants, was a declaration of the risk in good time. According to the contention of Mr. Bovill, the whole voyage could never be covered. I think the appropriation would be binding in the first instance; at any rate it would be by the declaration delivered in London. It seems to be clearly sufficient if a declaration is made at once in London according to the instructions received from abroad, and I adopt Lord Ellenborough's view (in *Robinson v. Touray* (4)) that the power of naming or declaring the ship on which the policy is to attach is a

power given to the assured, and that they may exercise this power at any time, as long as they can do it innocently and without fraud. Here the appropriation was made perfectly *bond fide* in Calcutta, and was carried out by the plaintiffs in London. I think Mr. Arnould's statement is quite correct, and it agrees with my view of the law.

MELLOR, J.—The question is, what was the nature of the contract between the plaintiffs and the defendants, as deduced from the documents themselves and the course of dealing between the parties, with reference to which the policies were affected? And it is quite clear that the intention was, that while the defendants were to be protected by a declaration, the plaintiffs' company should always be secured, against any excess over 5,000*l.* on goods on any one ship, as soon as they had contracted this liability. I also agree, that the knowledge of the loss of the ship was not a knowledge of loss in any sense that could vitiate the policy. I entirely agree with what has already been said, and will not repeat it.

SHEP, J.—The defendants have undertaken to insure the excess of risk above 5,000*l.* on any insurance that may be taken by the plaintiffs' company on goods in any one ship from Calcutta to London, to be shipped on or before the 30th of December 1860, on ships of a certain class and to be declared. The *Red Gauntlet*, on which goods had been insured by the plaintiffs' company for an excess above 5,000*l.*, was one such ship; so that according to the plain meaning of the words the risk would come within the meaning of the contract. Now, when this particular policy was effected, it was known to both parties that the *Red Gauntlet* had been lost, but it was not known to either that she was one of the ships on which any risk at all, much less in excess of 5,000*l.*, had been taken by the plaintiff's company; and in order to vitiate the policy there must at all events be a knowledge that the particular risk insured was lost. Then the ships are "to be declared"; that can hardly mean that the underwriters have an option to refuse when the declaration is made, for they undertake to insure any excess on any ship

of a particular class sailing before a particular time; and the engagement to declare can only mean that as soon as an excess over 5,000*l.* has been taken by the plaintiffs' company, they will declare the name of the ship to which they apply the defendants' open policy, and the policy must attach as soon as the risk taken is so declared. And I do not think the defendants could get rid of their liability, even if it had been known that that risk had been lost at the time the policy was effected.

Judgment for the plaintiffs (5).

1864. } TURNER AND SHEPHERD, ap-
Nov. 16. } pellants, v. THE POSTMASTER-
GENERAL, respondent.

Justices, Jurisdiction of—Summary Conviction—Irregularity—24 & 25 Vict. c. 97. s. 52.

The appellants were apprehended and charged before Justices with setting fire to the letters in a pillar letter-box. Witnesses were examined in support of the charge, and the appellants were remanded on bail to appear again before the Justices. They did so appear and were represented respectively by attorneys, and were informed that they would be charged under section 52. of 24 & 25 Vict. c. 97; and the attorneys were asked whether the appellants would plead guilty to such charge, or whether further evidence should be offered in support of the same. In answer to this they told the attorney for the prosecution that he must go on and prove his case, whereupon other witnesses were called and examined and cross-examined. After the case was closed, the attorneys for the appellants objected that the Justices had no jurisdiction, inasmuch as there was no information on oath, and the appellants were not found committing the offence, and therefore were not legally in custody. The Justices, however, committed the appellants:—Held, that they had jurisdiction to do so.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 10.]

(5) See *Henchman v. Offley*, 2 H. Black. 345, n.

[IN THE EXCHEQUER CHAMBER.]
(Appeal from the Court of Queen's Bench.)

1864. }
June 15. } BINGHAM v. CORBITT.*

Guarantie, Continuing—Mortgage-Deed—Release of Surety.

In consideration of the plaintiff supplying C. with goods, the defendant agreed to be answerable up to 200*l.* for the price of goods supplied to C. at any time due to the plaintiff on an account current after two months' credit. Some time after, 332*l.* being then due from C. to the plaintiff for goods supplied, C. executed a mortgage-deed to the plaintiff as security for the then existing debt and for any future debt for goods to be supplied. The deed contained a proviso that if C. paid the plaintiff the 332*l.* in six months from its date, and all sums due for future supplies in six months from their date, without prejudice to the plaintiff's right not to give credit in respect of future supplies, the mortgaged premises were to be reconveyed to C. There was also a covenant to pay the existing debt in six months, and future debts within six months from their accruing due, without prejudice to the plaintiff's refusing to give credit for future debts. The parties in fact dealt on a two months' credit only. In the course of dealing C. paid off the 332*l.* A further debt exceeding 200*l.* having subsequently accrued, which C. could not pay, the plaintiff sued the defendant on the guarantie. The defendant pleaded that he was discharged by time having been given by the plaintiff to C.:—Held, reversing the judgment of the Court below, that by the mortgage-deed the plaintiff did not give time to C, except in respect of the 332*l.* debt, and that, as that debt had long been discharged, the giving that time did not prejudice the surety as to other and future debts due from C. to the plaintiff; and that, as in fact only a two months' credit was given by the plaintiff to C, the guarantie remained in force, and that the defendant was liable, up to 200*l.*, on C.'s failure to pay the sum due in

* Decided in Trinity Term, coram Erle, C.J., Williams, J., Willes, J., Bramwell, B. and Channell, B.

respect of goods supplied by the plaintiff to C. subsequent to the mortgage-deed.

This was an appeal by the plaintiff against the decision of the Court of Queen's Bench on discharging a rule obtained by the plaintiff to set aside the verdict for the defendant, and to enter a verdict for himself for 200*l*.

The action was on a guarantie given to the plaintiff by the defendant for one John Crowther. The defendant pleaded, among other pleas, that a "deed was made between the plaintiff and Crowther without the consent of the defendant, whereby Crowther covenanted that he would pay the plaintiff the prices payable for goods supplied by the plaintiff to Crowther six months after the same became payable; that the goods were supplied on the terms, without the defendant's consent, that Crowther should have a longer time than two months' credit, viz. six months' credit; and that the plaintiff, without the defendant's consent, gave Crowther that time for payment."

The material question raised in the case was, whether there was any evidence that the plaintiff had discharged the defendant from liability by giving Crowther a longer credit than two months without the consent of the defendant.

The guarantie, which was signed by the defendant and addressed to the plaintiff, was in these terms: "In consideration of your giving John Crowther until the 13th day of August next, for payment of 50*l*. 4*s*. he owes you, and of your supplying him in future with goods, I hereby agree to pay to you the said sum of 50*l*. 4*s*. in case he does not, and I further agree to be answerable to the extent of 200*l*. that may be due to you at any time on current account and interest in respect thereof, after the expiration of two months' credit. As witness my hand this 13th day of June 1857."

The plaintiff supplied goods to Crowther on the terms of this guarantie.

In August 1858, Crowther being indebted to the plaintiff in 332*l*. 13*s*. 4*d*., and the plaintiff being desirous of obtaining further security for that debt and for any further supplies which he might make, and Crowther being anxious to obtain a

larger supply of goods on credit, a deed was, on the 28th of August 1858, executed between them, by which Crowther mortgaged certain premises to the plaintiff for securing the existing and any future debt which should from time to time become due from Crowther to the plaintiff on the balance of accounts. The deed contained the following clause: "Provided always; and the grant and assurance hereinbefore contained are upon this express condition: that if the said John Crowther, his heirs, appointees, executors, administrators or assigns, shall pay unto the said Edward Bingham, his executors, administrators or assigns, the full sum of 332*l*. 13*s*. 4*d*. sterling, with interest for the same after the rate of 5*l*. per cent. per annum, on the 28th day of February 1859 without any deduction, and also shall in like manner pay to the said Edward Bingham, his executors, administrators or assigns, all such further sum or sums of money as shall be owing to him or them by the said John Crowther, his executors or administrators, on the balance of account for goods sold and delivered by the said Edward Bingham, his executors or administrators, to the said John Crowther, or otherwise, for or on any other account, cause, matter or thing, at the expiration of six calendar months next after the date when any such further sum of money shall from time to time fall due or become payable (without prejudice nevertheless to the said Edward Bingham refusing to give or allow any future or further credit to the said John Crowther beyond or in addition to the sum in which the said John Crowther already stands indebted to the said Edward Bingham as aforesaid), together with interest thereon, at the rate of 5*l*. per cent. per annum, computed from the same date; then the said hereditaments and premises hereby granted and assured are to be re-conveyed unto the said John Crowther, his heirs and assigns." There was also this covenant: "And the said John Crowther, for himself, his heirs, executors and administrators, hereby covenants and agrees with the said Edward Bingham, his heirs, executors, administrators and assigns, that he the said John Crowther, his heirs, executors or admin-

istrators, shall and will pay unto the said Edward Bingham, his executors, administrators or assigns, the full sum of 332*l.* 13*s.* 4*d.*, with interest after the rate of 5*l.* per cent. per annum, upon the 28th day of February 1859, and also that if the said sum of 332*l.* 13*s.* 4*d.*, or any part thereof, shall not be paid at the time aforesaid, he the said John Crowther, his heirs, executors, administrators or assigns, shall and will, so long as the same sum, or any part thereof, shall remain unpaid, pay to the said Edward Bingham, his executors, administrators or assigns, interest for the said sum of 332*l.* 13*s.* 4*d.*, or so much thereof as shall remain unpaid, at the rate of 5*l.* per cent. per annum, by equal half-yearly payments on the 28th day of February and the 28th day of August in each and every year without deduction; and also that if any further sum or sums of money shall hereafter become due and owing from the said John Crowther, his executors or administrators, to the said Edward Bingham, his executors or administrators, on the balance of account for goods sold and delivered to him or them by the said Edward Bingham, his executors or administrators, or otherwise, for or on any other account, matter or thing, to pay or at the expiration of six calendar months after the date when any such further sum of money shall from time to time fall due or become payable (but without prejudice to the said Edward Bingham's refusing to give or allow any future or further credit beyond or in addition to the sum now already owing to him by the said John Crowther or any sum that shall or may from time to time be so owing), together with interest thereon computed from the same date, at the rate of 5*l.* per cent. per annum."

After the execution of the mortgage, the parties went on dealing as before; the plaintiff continually supplying goods to Crowther, and Crowther from time to time making payments. The items on each side were set down in an account current between them, shewing the receipts and payments. Only two months' credit was given. If goods were not paid for on two months after the delivery interest was charged on the price. It appeared by the account that, assuming that the sums paid by Crowther were applied in discharging and satisfying the older items in order of the plaintiff's

claim, the debt of 332*l.* 13*s.* 4*d.* had been paid long ago. The dealings and the account were continued to January 1861, and then shewed a balance due from Crowther to the plaintiff of 417*l.* 17*s.* 10*d.*

The case was tried, before Cockburn, C.J., without a jury. The learned Judge found for the defendant on the above plea, leave being reserved to the plaintiff to move.

T. Jones, for the appellant, the plaintiff. —The plea that the plaintiff had entered into a deed giving Crowther six months' credit was not proved. The deed expressly provided that as to future supplies the plaintiff was not bound to give credit. The only credit given was as to the debt existing at the time of the deed. That was paid off long ago in the course of dealing. The balance now sued for accrued years after. There was, in fact, no alteration of the period of credit on which the goods were supplied. It remained a two months' credit as before the deed, unless, indeed, the deed has the effect of making it a six months' credit.

[*WILLES, J.*—Unless the deed renders a two months' credit impossible.]

The decision of the Court below was wrong, both in law and fact. The Court of Queen's Bench held that the deed, in effect, gave a credit, and that the goods supplied since the deed were on a different contract, which altered the position of the surety. There was no evidence of any such change.

[*BRAMWELL, B.*—In September 1859 all was paid up; therefore all the goods supplied in respect of which the claim is now made were after the mortgage-deed.]

Garth, for the respondent, the defendant. —The position of the surety was materially altered by the arrangement made by the mortgage-deed, between the principal and the debtor. It was clearly altered as to the payment of the 332*l.* 13*s.* 4*d.* The payment of that debt was postponed for six months. The deed took off from Crowther the pressure to pay that debt. If so, the surety is released—*Calvert v. the London Dock Company* (1), *Rees v. Berrington* (2), *The Bank of Ireland v. Beresford* (3).

[*ERLE, C.J.*—Assuming that the surety

(1) 2 Keen, 638.

(2) 2 Tudor's Lead. Cas. in Chanc. 814.

(3) 6 Dow, 233.

is not bound as to the 332*l.* 13*s.* 4*d.*, and that the contract discharges him as to that sum, is the guarantie void as to future supplies? Is the surety in a worse position as to the subsequent claim?]

If a surety *may* be prejudiced, that is enough to avoid a guarantie. It is not necessary he should be actually prejudiced. The arrangement made by the mortgage-deed allows the debtor to run more largely into debt. The mortgage-deed had the effect of putting an end to the guarantie wholly.

[BRAMWELL, B.—If the surety is once discharged from his liability for the current account, is he never to be liable again? The guarantie is, that the defendant will be answerable up to 200*l.* for sums at any time due.]

It is all one account current. After the mortgage was given, there was no express agreement as to the time of credit; but the mortgage itself is a contract to give an extended time for payment of all future sums.

ERLE, C.J.—We have come to the conclusion that the judgment of the Court below must be reversed. The guarantie on which the action was brought was in respect of goods to be supplied on a two months' credit. From its date in June 1857 the plaintiff went on dealing with Crowther, without any change in the terms upon which they dealt, down to January 1861, the transactions being, according to the oral evidence, all along on a two months' credit. There was no change in the credit given, unless the deed created such a change. The mortgage-deed, it is true, would have prevented the plaintiff having recourse to the surety in respect of the debt, 332*l.* 13*s.* 4*d.*, due at the time of the deed. But the paying off of that sum has prevented the mortgage-deed having any further operation in respect of that sum. The mortgage-deed was to be a security, not only for that debt, but for payments to become due in respect of supplies after that time. It was to be a security collateral to and beyond the securities then held by the plaintiff. The proviso for re-conveying the premises to Crowther shews that the recourse of the plaintiff as mortgagee against the debtor under the mortgage-deed in respect of any sums was postponed for six months, though it seems to me to contemplate that the parties should go on dealing on the usual terms. The covenant to

pay at the end of six months does not merge the simple contract debt which had accrued. There is a remedy under the guarantie as well as a remedy under the mortgage. The stipulation that the deed is to be without prejudice to the plaintiffs refusing to allow any further credit, seems to me to shew that the deed was meant to be a collateral security leaving to the plaintiff all his rights. The defendant's counsel has argued that the guarantie is gone altogether as to the further debts, by reason of the terms of the mortgage-deed. But I cannot see that the surety's position is in any way prejudiced by these terms after the 332*l.* 13*s.* 4*d.* is paid. There is no authority to support the view contended for on the part of the defendant. The cases cited are not applicable. We are all of opinion that in respect of the matters for which the action was brought the mortgage-deed did not prejudice or alter the situation of the defendant as surety.

The other JUDGES concurred.

Judgment reversed.

1864. { CARY (appellant) v. THE LOCAL
Nov. 16. { BOARD OF HEALTH OF THE
BOROUGH OF KINGSTON-
UPON-HULL.

Local Board—Public Health Act, 1848, (11 & 12 Vict. c. 63. s. 69.)—Levelling a Street.

By section 69. of 11 & 12 Vict. c. 63. if any street, not being a highway, be not levelled, paved, &c. to the satisfaction of the Local Board of Health, notice may be given requiring the owners or occupiers of houses fronting upon the same street to level, pave, &c., and in default of their doing so, the local board shall do it if they please, and may recover the expense from the owners, &c.:—Held, that the power given by this section only attaches where the particular street requires to be levelled, &c., looking at it as an isolated street; and therefore that where the local board had required the owner of a house to level the part of the street upon which his house fronted so as to make it on a level with other streets, they could not compel him to pay the money, which they had expended, upon his refusal to do the work.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 7.]

1864. } BAILEY AND OTHERS v.
Jan. 13.* } EDWARDS.

Principal and Surety—Giving Time to Principal—Discharge of Surety.

T. P. & D. Price, coal masters, having stopped payment and having petitioned the Court of Bankruptcy, executed a deed which was assented to by the creditors and the Commissioner in Bankruptcy. The deed contained a proposal, that the business should be carried on under inspection; that the plaintiffs, who were creditors and parties to the deed, should be paid in full the sum of 8,700*l.*, being the amount of bills discounted, but partly by instalments, the first to be made on the 31st of December 1860. The plaintiffs covenanted that they should bind themselves, "subject to the provisions thereafter contained, not to enforce claims against any parties to the bills in their hands, who as between themselves and the petitioners were not then liable on such bills respectively, but that the right of the plaintiffs against all parties to the bills in their hands (whether liable or not to the petitioners as between the petitioners or any of them and such parties) should in no way be prejudiced in the event of the proposals made to the petitioners not being carried into effect, and also that in such case the plaintiffs should in all respects be entitled to claim the full amount then due to them after deduction of any sum in the mean time paid to them, notwithstanding their acquiescence in the proposals of the petitioners thereby made." The deed provided that the creditors in general should receive a composition of 10*s.* in the pound; that the business was to be carried on and that the proceeds were to be applied in paying the composition agreed upon; that the creditors, except as mentioned in the proposals, who should execute the deed and who should hold securities upon which any other person should be liable, should not be prejudiced as to their rights against such persons: provided that nothing contained in the deed should prevent the creditors, "other than as provided for in the said proposal," from enforcing their claims against the estate of T. P. & D. Price. At the time of the execution of the deed the plaintiffs

were holders of a bill of exchange accepted by the defendant for the accommodation of T. P. & D. Price, and they had no notice that the defendant was not liable to T. P. & D. Price, although they knew that some of the parties whose bills were in their hands were not primarily liable to T. P. & D. Price. The deed remained in full force, and time was given to T. P. & D. Price till the first instalment became due, which they failed to pay:—Held, that the effect of the deed was to give time to T. P. & D. Price, and that equitably the defendant was not liable on the bill so accepted by him.

The first count of the declaration was upon a bill of exchange drawn by John Price, accepted by the defendant, indorsed by John Price to certain persons designated by the name and style of T. P. & D. Price, and by them indorsed to the plaintiffs.

There were also counts for interest and upon an account stated.

The defendant pleaded pleas traversing the acceptance and indorsements. There were also pleas of *never indebted* and payment, and then came the sixth plea, which was as follows: "And for a sixth plea to the first count for defence on equitable grounds, the defendant says that there never was any value or consideration for the acceptance of the said bill of exchange by the defendant or for the making or indorsement thereof by the said John Price, or for the said John Price, or for the said T. P. & D. Price holding the same. And that at the time of the indorsement of the bill by the said T. P. & D. Price to the plaintiffs, the defendant and the said John Price were merely sureties on the said bill for the said T. P. & D. Price to the plaintiffs for any value given or to be given by the plaintiffs to the said T. P. & D. Price for the said bill, whereof the plaintiffs had notice when the said bill was first indorsed to them, and they took the said bill from the said T. P. & D. Price on the terms that the defendant and the said John Price should be liable to them on the said bill as sureties only for the said T. P. & D. Price; and after the indorsement of the said bill to the plaintiffs and whilst they were the holders thereof, and after the said bill had become due, to wit, on the 17th of November 1858, by an indenture then

* The report of this case has been unavoidably delayed.

made between T. P. & D. Price by their names of Thomas Prothero Price and David Price of the first part, the said Thomas Prothero Price of the second part, Thomas Greatrex, Charles Lyne and William Murrey Chapp of the third part, the plaintiffs and one William Williams of the fourth part, John Parry de Winton, David Evans, John Evans and William de Winton of the fifth part, and the several persons whose names and seals were thereunder set in the first schedule thereunder written, being creditors of the said Thomas Prothero Price and David Price of the sixth part, and the several persons whose names and seals were thereunto subscribed and set in the second schedule thereunder written, being separate creditors of the said Thomas Prothero Price of the seventh part. After reciting according to the facts a petition and proceeding for arrangement between the said Thomas Prothero Price and David Price, and their creditors, under the Bankrupt Law Consolidation Act, 1849, it was proposed and agreed by the parties thereto, that certain collieries and works of the said T. P. & D. Price should be carried on under inspection for a certain time therein mentioned, and that the plaintiffs and the said W. Williams should be paid a certain sum, to wit, 8,700*l.* in full, and a certain composition on the residue of their debt in manner therein mentioned, they thereby engaging not to enforce claims against any parties to the bills in their hands, who, as between themselves and the said T. P. & D. Price, were not then liable on such bills; and it was thereby provided, that the rights of the plaintiffs and the said W. Williams should in no way be prejudiced in the event of certain proposals made by the said T. P. & D. Price not being carried into effect; and the defendant further says, that the said deed was executed by the said T. P. & D. Price and by the plaintiffs, and the said W. Williams, and by divers other creditors of the said T. P. & D. Price, and that the said bill in the first count mentioned was one of the bills referred to in the said deed and was then in the hands of the plaintiffs and the said W. Williams, and the defendant was then a party to the said bill, who was not liable to the said T. P. & D. Price thereon; and that the said proposals of the said

T. P. & D. Price in the said deed mentioned have been fully carried into effect; and that the said deed was made and entered into between the plaintiffs and the said T. P. & D. Price without the consent of the defendants.

At the trial, which took place before Blackburn, J., at the Sittings at Westminster during Hilary Term, 1863, the facts which are fully set out in the judgment of this Court were proved, and a verdict was entered for the defendant, with leave to the plaintiffs to move.

A rule *nisi* was subsequently obtained, pursuant to the leave reserved, calling upon the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiffs for 126*l.* 6*s.* 10*d.*, on the ground that the substance of the sixth plea was not proved. The Court to have power to make such amendments, if any, as they might think that the Judge should have made at *Nisi Prius*.

Lush and Gibbons (Nov. 3, 21, 1863,) shewed cause against the rule. — They referred to *Smith v. Winter* (1), *Ex parte Glendinning* (2) and *Rees v. Berrington* (3).

J. D. Coleridge and *Gray* supported the rule, and referred to *Kearsley v. Cole* (4), *Owen v. Homan* (5), *Price v. Barker* (6) and *Orme v. Young* (7).

Cur. adv. vult.

The judgment of the Court was now delivered by—

BLACKBURN, J.—In this case the plaintiffs sued as indorsees of a bill of exchange accepted by the defendant. The defendant pleaded, as a defence on equitable grounds, that he was surety for Messrs. Price, the indorsers of the bill, and that the plaintiffs had discharged him by giving time to Messrs. Price by a composition-deed. At

(1) 4 *Mee. & W.* 454; *s. c.* 8 *Law J. Rep.* (N.S.) *Exch.* 34.

(2) *Buck.* 517.

(3) 2 *Ves. jun.* 540.

(4) 16 *Mee. & W.* 128; *s. c.* 16 *Law J. Rep.* (N.S.) *Exch.* 115.

(5) 4 *H. L. Cas.* 997; *s. c.* 20 *Law J. Rep.* (N.S.) *Chanc.* 314.

(6) 4 *Ell. & B.* 760; *s. c.* 24 *Law J. Rep.* (N.S.) *Q. B.* 130.

(7) *Holt's N.P.* 84.

the trial, before me, a verdict was directed for the defendant on this plea, with leave to move to enter the verdict for the plaintiffs on the facts proved and admitted at the trial. Power was reserved to amend the plea if necessary, so that the question is, whether the facts proved and admitted constituted a defence in equity, and is independent of the form of the plea actually pleaded. It was at the trial admitted that, in 1858, the plaintiffs, without the assent or knowledge of the defendant, executed a deed, on the effect of which the question principally depends: that deed was between the Messrs. Price, carrying on business as coal masters under the firm of T. P. & D. Price, of the first part; T. P. Price alone, of the second part; some trustees of the third part; the persons forming the firm of Bailey, Greatrex & Co., bankers (the present plaintiffs), of the fourth part; another firm of bankers, Wilkins & Co., of the fifth part; the several creditors of Messrs. Price who should execute the deed, of the sixth part; and the separate creditors of T. P. Price of the seventh part. It recited that T. P. & D. Price, having stopped payment and presented their petition to the Court of Bankruptcy, had made a proposal, which, as modified, had been assented to by the creditors and the Commissioner, and was intended to be carried into effect by the deed. This modified proposal is then set forth in the deed. The following are the parts of it material to the present question: The proposal was that T. P. & D. Price, the petitioners, should carry on their business under inspectorship for the benefit of all their creditors; that Bailey, Greatrex & Co. (the now plaintiffs), who, it was recited, held various securities for their debt, should be paid in full the sum of 8,700*l.* (being the amount of bills discounted for T. P. & D. Price in respect of some matters specified), by applying the proceeds of the sale of some property over which Bailey, Greatrex & Co. held security in part payment of the 8,700*l.*, and that the residue of the sum of 8,700*l.* and 10*s.* in the pound on the rest of their debt should be paid to Bailey, Greatrex & Co. by eight annual instalments, the first to be made on the 31st of December 1860.

The proposal then contained stipulations on the part of Messrs. Bailey, Greatrex

& Co., amongst others one very material indeed to the present question. They covenanted that they should bind themselves "(subject to the proviso thereafter contained) *not to enforce claims against any parties to the bills in their hands, who, as between themselves and the petitioners, were not then liable on such bills respectively*; but it was thereby provided that the rights of the said Messrs. Bailey, Greatrex & Co., against all parties to the bills in their hands (whether liable or not to the said petitioners as between the petitioners and such parties) should in no way be prejudiced *in the event of the proposals made by the petitioners or any of them not being carried fully into effect*, and also that *in such case* the said Messrs. Bailey, Greatrex & Co. should in all respects be entitled to claim the full amount then due to them after deduction of any sum in the mean time paid to them, notwithstanding their acquiescence in the proposals of the petitioners thereby made."

Then followed in the proposal special stipulations with respect to the debts due to Messrs. Wilkins & Co., the parties of the fifth part, which it is not necessary to notice, and that the creditors in general should receive a composition of 10*s.* in the pound out of the proceeds of the trade. The deed then, for the purpose of carrying out this proposal, contained a grant of licence from all the creditors (as well Bailey, Greatrex & Co. and Wilkins & Co., the parties of the fourth and fifth parts, as the parties of the sixth and seventh parts), to carry on the business under inspectorship so long as they should observe the conditions and covenants on their part contained; these conditions and covenants were to the effect that they would apply the proceeds under the inspectorship to paying the composition agreed upon. Then comes an agreement "that the creditors of the said T. P. Price and D. Price (*except as mentioned in the proposal*), who shall execute these presents, and who shall hold any bonds, bills of exchange, promissory notes or other securities upon which any other person or persons shall be liable to the payment of the money thereby secured, shall not be prejudiced as to their rights and remedies against such person or persons respectively;" and finally, the deed contains the following proviso: "Provided always, and it is hereby agreed between and

by the several parties to these presents, that nothing herein contained shall extend, or be deemed or construed to extend, to prevent the said creditors parties hereto or to be bound hereby, or any of them, or their or any of their respective partners or partner, or their or any of their respective heirs, administrators, executors or assignees, *other than as provided for in the said proposal*, from enforcing or otherwise obtaining the full benefit and advantage of any mortgage, claim, charge or lien which they or any of them now have or hath upon any estate or effects whatsoever, whether of or belonging to the said T. P. Price and D. Price, or any other person or persons whomsoever, or from suing, prosecuting, or otherwise proceeding against any other person or persons other than the said T. P. Price and D. Price, their or his heirs, executors and administrators, who is, are, shall or may be liable to or accountable for the payment or making good to any of the said creditors of all or any part of their respective debts, either as drawers, indorsers or acceptors of any bill or bills of exchange or promissory note or notes, or as being jointly or separately bound in any bond or bonds, obligation or obligations, or other instrument or instruments, or as being liable or accountable for the payment of any debt or debts without having subscribed any bill, bond or other instrument; whatsoever, or otherwise howsoever as if these presents had never been made; and for conformity sake (but for conformity sake alone) the said T. P. Price and D. Price, their heirs, executors or administrators, may be joined in any such proceeding as last aforesaid."

The bill on which this action was brought was one of those of which the plaintiffs were holders at the time when the deed was executed. It was apparent, from the terms of the proposal, that the plaintiffs were aware that some of the parties to the bills in their hands were not liable to T. P. & D. Price, but it was admitted that they had no notice that the present defendant stood in that position. The only disputed fact was, whether he really was, as between him and them, liable to Messrs. T. P. & D. Price on his acceptance. Evidence was given shewing that the acceptance by the defendant of the bill in question was by way of loan for the accommodation of the Messrs. Price. The

question was left to the jury, who found that he was not liable to them, and that finding is not now complained of. The Messrs. Price made default in paying the instalments, the first of which became due on the 30th of December 1860, before this action, but from the execution of the deed till default was made, a period of more than two years, the deed was in full force, and during that period time was given to the principal debtors.

A rule to enter the verdict for the plaintiffs pursuant to the leave reserved was obtained, and was argued in the course of last term, before my Lord, my late Brother Wightman, my Brother Mellor, and myself. We are of opinion that the rule must be discharged, as the effect of this deed is under these circumstances to discharge the defendant in equity. The principle upon which the Courts of equity have proceeded appears to be this. A surety has, as such, a variety of rights; amongst others he has the right in equity to call upon the creditor to enforce all his, the creditor's, remedies against the principal debtor for the surety's benefit and at the surety's risk and expense—*Wright v. Simpson* (8). No doubt a Court of equity would put the surety under terms to give indemnity to the creditor before it would enforce this right, and consequently the right which the surety has is of very little practical value, and is seldom, if ever, exercised. Still, the surety has this right, and if the creditor wilfully deprives the surety of this right he so far alters the surety's position. Lord Eldon, in his judgment in *Samuell v. Hawarth* (9), says, that where time is given by virtue of a positive contract between the creditor and the principal, "the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not; and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract." Whether, if the matter were *res integra*, it might not have been better to confine the surety's right in such cases to compensation in damages for this injury, which is generally only nominal, it

(8) 6 Ves. 714, 734.

(9) 3 Mer. 272, 278.

is not now open to us to consider; a long series of decisions, many of which may be found collected in the notes to *Rees v. Berrington* (10), have settled that such an alteration in the position of the surety discharges him, even though the delay may be shewn to be for his benefit. Lord Eldon, in *Samuell v. Hawarth* (9), gives as the reason for this apparent harshness, that "the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit."

The principle has been imported from the courts of equity into those of law, and is clearly stated by Williams, J., in *Strong v. Foster* (11). He there says, p. 219, "What I understand by a giving of time in such a case is this: the surety has a right at any moment to go to the creditor, and say, 'I have reason to suspect the principal debtor to be insolvent; therefore, I call upon you to sue him, or to permit me to sue him.' If the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue him, he thereby discharges the surety. The case then falls within the general doctrine as to principal and surety, which equally obtains at law and in equity, that, if the creditor does any act to alter the position of the surety he thereby discharges him."

There is, however, another point to be noticed here. The bill of exchange on which this action is brought is a written contract, and conclusively shews, both at law and in equity, that the contract of the defendant to the plaintiffs was as principal and not as surety; and moreover the plaintiffs had not notice at the time when they took the bill that the defendant was other than an acceptor for value. There are authorities, amongst others *Strong v. Foster* (11), tending to shew that, in order to enable a surety to raise at law a defence on the ground that time has been given to the principal, it is necessary to shew that the original contract between the plaintiff and the defendant was that of creditor and surety. How this may be at law we are not now called on to decide. We are determining this case as a Court of

equity. It was decided in this Court, in *Pooley v. Harradine* (12), on an equitable plea, that the equity on which the Court should act "does not depend on any contract with the creditor, but on its being inequitable in him knowingly to prejudice the rights of the surety against the principal." By this judgment we are bound, even if we did not agree with it as we do. In *Pooley v. Harradine* (12), the plea alleged that the creditor, at the time when he became holder of the bills, as well as when he gave time, had notice of the relationship of principal and surety between the defendant and his creditor, and the decision did not go further; but it had previously been determined by Sir J. Leach, M.R., that even though the relationship of principal and surety was created, by an arrangement between them after the parties had become liable to the creditor as joint debtors, the creditor by giving time to the principal, with notice of this arrangement, discharged the surety, and this decision was affirmed by Lord Brougham and by the House of Lords—*Oakeley v. Pasheller* (13). Now, in the present case, the plaintiffs, when they executed the deed, had notice that some of the parties to the bills in their hands were not primarily liable to the Messrs. Price on those bills. They entered into the deed, making stipulations with regard to such parties, and taking their chance as to who they should turn out to be. We think that if the effect of the deed was to alter the position of the parties who should turn out to be sureties, it was as wilfully done and as inequitable as if they had express notice who these parties were.

The question, therefore, as it seems to us, comes round to this, whether the effect of the deed is to give time to Messrs. Price & Co., so that it would discharge ordinary sureties of whom the plaintiffs then had notice. The plaintiffs and Messrs. Price did not intend to discharge the sureties. On the contrary, they have by an express proviso agreed that in the event which has happened, of the proposal not being carried fully into effect, the sureties should be liable then as if the deed had never been made. But during the two years which elapsed before the Messrs. Price made default, the plaintiffs

(10) 2 White & Tudor's Lead. Cas. in Eq. 2nd edit. 822.

(11) 17 Com. B. Rep. 201.

(12) 7 El. & B. 431; s. c. 26 Law J. Rep. (N.S.) Q.B. 156.

(13) 4 Cl. & F. 207; s. c. 10 Bligh, N.S. 548.

could not without a breach of faith and of contract on their part have sued Messrs. Price, and if the surety had called on them to sue they would have been bound to refuse. It is quite true that where the contract by which the creditor binds himself to the principal debtor not to sue him for a time, is so worded as to shew that it was intended only to apply to suits for the benefit of the creditor, and to except from its operation suits at the instance of sureties and on their behalf, no alteration in the position of the surety is produced, and he is not discharged. And it seems established that, if in the contract for giving time there is an unqualified reservation of remedies against sureties, the contract is to be construed as allowing the surety to retain all his remedies over against the principal debtor, and, as it is said in *Price v. Barker* (6), "that the covenant not to sue is to operate only so far as the rights of the surety may not be affected." In the deed now before us, the creditors generally have stipulated for a right to have immediate recourse against sureties, but from this there is an exception of those mentioned in the proposal. And on reference to the proposal we find that Bailey, Greatrex & Co. expressly bound themselves not to sue the parties to the bills who stood in the position of sureties, for a period which turned out to be two years, and we find nothing to shew any intention to preserve for those sureties during that time, their right to call upon Bailey, Greatrex & Co. to sue Messrs. Price if so advised. We think, therefore, that an equitable defence is made out, and consequently that the rule must be discharged.

Rule discharged.

[IN THE EXCHEQUER CHAMBER.]
(Error from the Court of Queen's Bench.)

1864. }
June 21.* } CLAPHAM v. LANGTON.

Ship and Shipping—Marine Insurance
—Voyage Policy—"Seaworthiness."

The "seaworthiness" of which, in the absence of express stipulation, there is an

* Decided in the Sittings after Trinity Term, coram Pollock, C.B., Williams, J., Willes, J., Bramwell, B. and Channell, B.

implied warranty in every voyage policy, is a relative term depending on the nature of the ship as well as of the voyage insured. Therefore, on a policy "on a voyage from the Tyne to Odessa," it being shewn that the vessel was an iron steamer of very light draught of water, constructed for river navigation only, that this was disclosed to the underwriters before the policy was effected and the dimensions of the vessel then stated to them, and that (though it was impossible to make her fit to encounter the ordinary perils of ocean navigation) the ship had been made as seaworthy as her size and construction would admit, the underwriters were held liable on her being lost by the perils insured against.

Error was brought on a bill of exceptions to the ruling of Cockburn, C.J.

The declaration was on a policy of insurance on a vessel called the *Kniaz Boratinsky*, on a voyage from the river Tyne to Odessa or another port in the Black Sea, and alleged that the length, breadth, draught and tonnage of the vessel were specified in a memorandum made on the face of the policy at the time of making the policy. The claim was for general average loss.

Plea—that at the time of the commencement of the voyage from the Tyne the ship was not seaworthy for the voyage.

A memorandum on the face of the policy (which was in the terms stated in the declaration) set forth that the length of the vessel was 200 feet, her breadth 32·25 feet, her draught about 3 feet, her tonnage 404 tons, and that she was warranted to sail for Odessa on or before the 1st of August 1859. Before the policy was executed, and with a view of getting the vessel insured, the plaintiff had written to the defendant stating that the vessel was an iron steamer going out with nothing in her but her coals, and describing her dimensions as in the memorandum on the policy.

The oral evidence proved that the vessel corresponded with the description given on the face of the policy above set forth, and that she was intended after she had accomplished the voyage to be used in river navigation only, and was, as to the hull, built and adapted to such navigation exclusively, and could not by any strengthening appliances to the hull be rendered

fit to encounter the ordinary perils of the voyage insured in the policy. The description and dimensions of the vessel given on the face of the policy were sufficient to convey to any competent person acquainted with shipping that the vessel was not built for ocean navigation and was not an ordinary sea-going vessel.

The plaintiff gave evidence to shew that before commencing the voyage strengthening appliances were put into the hull of the vessel, to assist the vessel in encountering the perils of the voyage, and that such appliances were reasonably proper and sufficient, according to the then knowledge and practice of naval architects, and that by that means the vessel was rendered as seaworthy as a vessel, of such build, capacity, and construction, was capable of being made. The plaintiff further gave in evidence that the vessel commenced the voyage on the 29th of July 1859, with the hull so strengthened as aforesaid, but that nevertheless the vessel was not then, in respect of the said hull thereof, fit to encounter the ordinary perils of the said voyage. In the course of the voyage she received damage from perils of the sea.

The defendant adduced evidence to shew that the strengthening appliances resorted to by the plaintiff were not reasonably proper, or sufficient, according to the then knowledge and practice of naval architects; but that other and better appliances, then well known and practised by naval architects, might have been used, and that the vessel was not, by means of the appliances put into and upon the hull as aforesaid, rendered as seaworthy for the voyage as a vessel of such build and capacity was capable of being made.

Cockburn, C.J. directed the jury as to the issue in question, "that if in their opinion the plaintiff had, before the execution of the said policy, brought to the knowledge of the defendant the nature and description of the vessel intended to be insured, and the more than ordinary risk that such a vessel would necessarily encounter on the voyage insured, and if in their opinion the said vessel at the time of commencing the said voyage had been and was, by the strengthening appliances put into and upon the hull of the said vessel as aforesaid, made as sea-

worthy for the said insured voyage as a vessel of such a nature and description as the said vessel could reasonably be made, they should find their verdict for the plaintiff on the said issue." The counsel for the defendant thereupon excepted "that the Chief Justice ought to have directed the jury that, inasmuch as it was proved that at the time of commencing the said insured voyage, the said vessel was not, in respect of the said hull thereof, fit to encounter the ordinary perils of the said insured voyage, they, the said jury, ought to find a verdict for the defendant on the said issue." The jury found for the plaintiff.

Mellish (*Vernon Lushington* with him), for the plaintiff in error, the defendant below (June 14).—This is, in reality, an appeal from the decision of the Court of Queen's Bench in *Burges v. Wickham* (1), where the law was laid down substantially in the same manner as by the Chief Justice in his direction in the present case. It is submitted that that direction is erroneous. The fact of the plaintiff having brought to the knowledge of the underwriter the particulars concerning the build of the vessel is unimportant, and cannot affect the question of the warranty of seaworthiness. It is not necessary to communicate to the underwriter any fact relating to a matter covered by the warranty of seaworthiness, nor need the underwriter attend to any such communication.

[*POLLOCK, C.B.*—The warranty of seaworthiness is not express, but implied. Suppose the shipowner says, "I cannot say whether the ship is seaworthy. I will give you all the facts and the dimensions of the vessel, and tell you all I know about her." Is not the old warranty gone?]

It is better to adhere to the well-known rule, and say that there is an implied warranty of seaworthiness in all cases of voyage policies, if nothing appears on the face of policy to the contrary. A few words, "seaworthiness not warranted," might easily be inserted in a case where it was not intended to warrant it. It is inconvenient to allow the matter to turn in any way on the communication to the underwriter, which makes the

(1) 3 B. & S. 669; s.c. 33 Law J. Rep. (N.S.) Q.B. 17.

extent of the implied covenant depend on the opinion of the jury. It is true that seaworthiness does, to a certain extent, admit of degrees; but it ought not to be possible for a jury to be able to find a vessel to be seaworthy, which it is admitted, is not in a state to meet the ordinary perils of the sea. The communication to the underwriter of the dimensions of the vessel is not sufficient to enable him to appreciate the risks he is running, for an underwriter is not bound to know the build of ships of an extraordinary character. The mere statement of the dimensions of a vessel does not in any way modify the usual implied warranty of seaworthiness or contradict it in terms, for it may not be known to any one that a vessel of the particular build would necessarily be unseaworthy. All the authorities shew that in a voyage policy the implied warranty of seaworthiness, according to mercantile usage, is the basis of the contract of insurance—*Dixon v. Sadler* (2), *Biceard v. Shepherd* (3), *Bouillon v. Lupton* (4), *Haywood v. Rodgers* (5), *Knill v. Hooper* (6) and *Gibson v. Small* (7). In the latter case, p. 418, Lord Campbell, in his judgment, says that the term seaworthy means "that the ship is in a condition in all respects to render it reasonably safe wherever it happens to be at any particular time referred to, whether in a dock, in a harbour, in a river, or traversing the ocean." The question always has been whether the ship was at the commencement of the voyage in such a state as to be reasonably capable of performing it and competent to resist the ordinary perils of the voyage—See 1 *Arnould on Marine Insurance*, par. 248, p. 689, 2nd edit. It will tend much to confuse the law if the Courts put a non-natural sense on the term seaworthy. It is better to adhere to the plain rule suitable to ordinary cases, and to allow those of an exceptional character to be dealt

with by express stipulation between the parties.

Bovill, for the plaintiff, (*Raymond* and *Bosanquet* with him) was not heard.

Cur. adv. vult.

WILLIAMS, J.—In this case the judgment will be affirmed for the reasons assented to by all the Court in *Burges v. Wickham* (1), as to the meaning of the term seaworthiness. We express no opinion upon the question controverted by Blackburn, J. in that case, as to the admissibility of parol evidence to qualify a warranty in a written policy, either express or implied.

The other JUDGES concurred.

Judgment affirmed.

1864. }
Nov. 12. } THE QUEEN v. JAMES PURDEY.

Conviction—Appeal to Quarter Sessions—Costs—Party to Appeal—12 & 13 Vict. c. 45. ss. 5, 7.

Upon an appeal to the Quarter Sessions against the conviction of the appellant, as a rogue and vagabond under the 5 Geo. 4. c. 83, the Sessions have power to give costs against the prosecutor; and the Justices who have convicted the appellant, and who do not appear to support the conviction, are not the parties against whom an order for costs can be made.

By the 12 & 13 Vict. c. 45. s. 7, no objection on account of any omission or mistake in any order brought up upon a return to a writ of certiorari shall be allowed, unless such omission or mistake shall have been specified by the rule for issuing such certiorari:—Semble, per Mellor, J., that the appellant could not upon a motion to quash the order, object that it was bad for not finding as a fact that the person against whom the order was made, was the prosecutor, unless the omission so to find was specified in the rule.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 4.]

(2) 5 Mee. & W. 405; s. c. 9 Law J. Rep. (N.S.) Exch. 48.

(3) 14 Moore, P.C. 471.

(4) 15 Com. B. Rep. N.S. 113; s. c. 33 Law J. Rep. (N.S.) C.P. 37.

(5) 4 East, 590.

(6) 2 Hurl. & N. 277; s. c. 26 Law J. Rep. (N.S.) Exch. 377.

(7) 4 H.L. Cas. 353, 423.

[IN THE EXCHEQUER CHAMBER.]
(Error from the Court of Queen's Bench.)

1864. }
June 21. } CLAPHAM v. ATKINSON.*

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134. s. 192.)—Composition - Deed, Validity of — *Cessio Bonorum*.

To an action on a promissory note, the defendant pleaded, by way of equitable defence, that, after the accruing of the plaintiff's claim, he was indebted to the plaintiff and divers other persons, and that a deed was made and entered into by and between the defendant of the one part, and the several persons being creditors of the defendant who should execute the same of the other part, relating to the debts and liabilities of the defendant and his release therefrom. The deed was set out in the plea, and after reciting that the defendant, being unable to pay his debts in full, had applied to his said several creditors to receive a composition of 2s. 6d. in the pound, it went on as follows: "which we, the several creditors signing these presents, have agreed to do, and being a majority in number representing three-fourths in value of the creditors of the said (defendant) whose debts respectively amount to 10l. and upwards, have agreed to accept such composition as aforesaid, and in consideration thereof, and on payment thereof, or whenever thereafter called upon for the purpose, hereby severally undertake and agree to execute to the said (defendant) a good and sufficient release in the law of our several and respective claims and demands upon him." The plea then averred that a majority representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10l. and upwards, did in writing assent to and approve of the execution of the said deed; that the deed was duly registered, and that the plaintiff was bound thereby as if he had been a party thereto, and had duly executed the same:—Held, that the plaintiff, though a non-assenting creditor, was barred by the deed from maintaining his action; that the deed was a

valid deed within section 192. of the Bankruptcy Act, 1861, as it sufficiently shewed that it was intended to be an arrangement between the debtor and the whole body of his creditors, as all had the option of coming in and signing it; that it was not unequal, although there was no compulsory clause directing the debtor to pay the composition; and that it was not necessary to the validity of a composition-deed that there should be any *cessio bonorum*.

Error was brought by the plaintiff to reverse the judgment of the Court of Queen's Bench in favour of the defendant on a demurrer (1).

The declaration was upon a promissory note made by the defendant for the sum of 100l., with the usual common counts.

Plea, by way of equitable defence, except as to 14l. 10s., parcel, &c., that after the accruing of the plaintiff's claim, and after the 11th of October 1861, the defendant was indebted to the plaintiff and divers other persons; and, thereupon, while he was so indebted, a deed, bearing date the 8th of March 1862, was made and entered into by and between the defendant of the one part, and the several persons being creditors of the defendant who should execute the same of the other part, relating to the debts and liabilities of the defendant, and his release therefrom, which said deed, without the schedule, was in the words following, that is to say: "This indenture, made the 8th day of March 1862, between Joseph Robert Wilkin Atkinson, of No. 6, Alma Terrace, Kensington, in the county of Middlesex, gentleman, of the one part, and the undersigned creditors of the said J. R. W. Atkinson, of the other part. Whereas the said J. R. W. Atkinson from divers causes is unable to pay us, the said several creditors, full 20s. in the pound, and whereas the said J. R. W. Atkinson hath applied to us to receive and take a composition of 2s. 6d. in the pound in full satisfaction and discharge of our several and respective claims and demands on him, payable on the 9th of March 1863, which we, the several creditors signing these presents, have agreed to do, and being a majority in number representing three-

* Decided in the Sittings after Trinity Term, coram Erle, C.J., Williams, J., Willes, J., Bramwell, B., Channell, B. and Pigott, B.

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(1) 33 Law J. Rep. (N.S.) Q.B. 81.

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fourths in value of the creditors of the said J. R. W. Atkinson, whose debts respectively amount to 10*l.* and upwards, have agreed to accept such composition as aforesaid; and in consideration thereof, and on payment thereof, or whenever thereafter called upon for the purpose, hereby severally undertake and agree to execute to the said J. R. W. Atkinson a good and sufficient release in law of our several and respective claims and demands on him. In witness hereof the parties hereto have respectively subscribed and set their hands and seals."

The plea then alleged that a majority in number, representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards did in writing assent to and approve of the said deed, that the deed was duly registered, and that the plaintiff was bound thereby as if he had been a party thereto and had duly executed the same. It then averred the tender to the plaintiff of the 2*s.* 6*d.* in the pound on his debt, and the plaintiff's refusal to accept it.

Demurrer and joinder in demurrer.

Kemplay, for the defendant, the plaintiff in error.—The deed is confined to the debtor and the particular creditors who signed it, and is not a deed for the benefit of all the creditors; therefore the plaintiff, a non-assenting creditor, is not bound by it. It does not on the face of it shew that it is a deed for the equal benefit of all the creditors. It ought to shew (what this deed does not) that it is a deed in respect of all the debts and all the liabilities of the debtor—*Ilderton v. Castrique* (2), *Ilderton v. Jewell* (3), *Dingwall v. Edwards* (4), *Hodgson v. Wightman* (5), which is similar to this case, and by which the Court below felt themselves bound, is not law. The introduction of the words to the effect that the creditors who execute are a majority in number and three-fourths in value of all the creditors, cannot affect the construction of this deed in respect to the question, whether it purports to affect all the creditors. The statement

may not even be true. It is not requisite that that number should execute the deed. If they assent to it in writing it is sufficient. Secondly, the deed is unreasonable and unequal. It does not provide for the payment of the composition to the creditors, but leaves it in the debtor's power to pay some and not to pay others. He might, therefore, tender the 2*s.* 6*d.* in the pound to some, and purposely fail to do so to those whom he wished to prefer, and who for failure of such tender could recover their whole debts. Thirdly, the deed is void, because it contains no *cessio bonorum*. In *Walter v. Adcock* (6), there are strong opinions expressed in favour of the necessity of a *cessio bonorum*. The observations to the contrary in *Ex parte Morgan* (7), *Ex parte Rawlings* (8), and *Ex parte Cockburn* (9), are mere dicta. There has been no decision on the point under the Bankruptcy Act of 1861, except the case now under review. But in *Tetley v. Taylor* (10) there is an express decision of the Court of Exchequer Chamber that a *cessio bonorum* was necessary under the old law. There is no such difference between the act of 1861 and the previous statutes as to make that decision inapplicable.

Macnamara, for the defendant. — The judgment below is correct. The Court will construe the deed so as to support it if possible. The deed is meant to apply to all the creditors. Pursuant to its language every creditor may come in and sign it if he please. The statute makes the deed to affect all the creditors when signed and duly assented to by the requisite number. If the deed is applicable to all the creditors and is signed by some and is intended for the benefit of all, it is sufficient. It is admitted by the demurrer that the deed relates to all the debts and liabilities of the debtor, for the plea expressly avers that fact. Non-assenting creditors are here put on an equal footing with those who assent. *Hodgson v. Wightman* (5) is expressly in point on a

(6) 7 Hurl. & N. 541; s. c. 31 Law J. Rep. (N.S.) Exch. 380.

(7) 32 Law J. Rep. (N.S.) Bankr. 15.

(8) Ibid. 27.

(9) 33 Law J. Rep. (N.S.) Chanc. 17.

(10) 1 El. & B. 521; s. c. 21 Law J. Rep. (N.S.) Q.B. 346.

(2) 32 Law J. Rep. (N.S.) C.P. 206.

(3) 32 Law J. Rep. (N.S.) C.P. 256; s. c. in error, 33 Law J. Rep. (N.S.) C.P. 148.

(4) 33 Law J. Rep. (N.S.) Q.B. 161.

(5) 32 Law J. Rep. (N.S.) Exch. 147.

deed framed like the present deed. *The General Furnishing Company v. Venn* (11), *Macnaught v. Russell* (12) and *Feltham v. Cudworth* (13) are to the same effect. Secondly, the provision as to the payment of the composition money is sufficient. It is a reasonable provision, and equally applicable to all. It cannot be supposed that a debtor would wilfully neglect to pay 2s. 6d. in the pound, and leave himself liable to the whole debt. Thirdly, a *cessio bonorum* is not necessary. *Tetley v. Taylor* (10) has no longer any application. The provisions of the new and the old statutes are very different on this point. The Bankruptcy Act of 1849 contained a stipulation that the joint and separate assets of the debtor should be distributed as in bankruptcy. No such provision is contained in the act of 1861. Though the deed contains no release in terms, yet if a creditor were to attempt to act contrary to it, the Court of Chancery would grant a perpetual injunction to prohibit him.

Kemplay replied.

WILLIAMS, J.—The question is, whether the deed set out in the plea is a bar to the plaintiff's claim. The parties thereto are, the debtor of the one part, and the undersigned creditors of the other part. It recites a proposal by the debtor to pay a composition of 2s. 6d. in the pound on the 9th of March 1863, and states that the creditors signing the deed, being the requisite majority, have agreed to receive that sum in discharge of their debts. The plaintiff did not sign the deed, but he is bound thereby if the deed fulfils the conditions imposed by section 192. of the Bankruptcy Act, 1861, and the following sections. We are of opinion that it does. It is within the words of section 192, being a composition-deed between the debtor and his creditors; and it is not shewn that any of the required conditions mentioned in section 192. of the statute have not been observed. The parties intended that the deed should be within that section, as it states the signing creditors to be the requisite majority in

number and value. One objection was, that the deed was made with the creditors who signed, and not with all; but all the creditors have the option of coming in and signing. Therefore the objection on this ground fails.

It was further objected that the deed was unequal, as it left to the debtor the option of paying the composition to some of his creditors and of leaving the others at liberty to recover their debts in full. But we cannot assume that the debtor would choose to pay 20s. in the pound, when he could bar the claim by paying 2s. 6d. in the pound. We see no reason for assuming that any such course would be adopted. If the deed was tainted with fraud it would be void, and the object of the debtor would be defeated. In *Waller v. Adcock* (6) a deed in the same form was held to be a deed within section 192. In *Ilderton v. Castrique* (2) the deed was decided to be no defence, but the grounds of objection on which the Court relied were different from those which were pressed upon us here; and in that case the judgment of Blackburn, J. supports the validity of a deed in this form. Although no remedy is given for recovering the composition of 2s. 6d. in the pound, yet the liability to pay 20s. in the pound in case it is withheld, is a sufficient security.

It was further objected that the deed contained no *cessio bonorum*. But in *Ex parte Rawlings* (8) Turner, L.J. gives an elaborate judgment in his Court, that no objection can be sustained on that ground. So is the declared opinion of the present Lord Chancellor (Lord Westbury) in *Ex parte Morgan* (7). The reasons assigned in those cases in Chancery we adopt here, as the ground of our judgment, that the deed may be valid under the act of 1861 without a *cessio bonorum*.

On these grounds we affirm the judgment of the Court below.

I ought to add, that my Brother Willes concurs in the judgment with great reluctance, as he thinks the deed illusory.

The other JUDGES concurred.

Judgment affirmed.

(11) 32 Law J. Rep. (N.S.) Exch. 220.

(12) 1 Hurl. & N. 611; s.c. 26 Law J. Rep. (N.S.) Exch. 192.

(13) Ld. Raym. 760.

1864. } HEALEY v. THE THAMES VAL-
Nov. 4. } LEY RAILWAY COMPANY.

Railway Company—Lands Clauses Consolidation Act (8 Vict. c. 18), s. 68.—Compensation—Notice of Claim—“Nature of Interest.”

The 68th section of the Lands Clauses Consolidation Act enacts, that it shall be lawful for any person entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which no satisfaction shall have been made, to give notice in writing to the promoters of his desire to have the question of compensation decided by arbitration, “stating in such notice the nature of his interest in the lands in respect of which he claims compensation, and the amount he claims”; and if he desires a jury, then it shall be lawful for him to give notice thereof in writing, “stating such particulars as aforesaid:”—Held, that where lands have been taken, in order to bring himself within this clause a claimant must give, in his notice for a jury, such reasonable information as to his interest as will enable the promoters to judge whether they will pay the whole claim, or what amount they ought to offer; and where the claimant is occupier under a lease for years, it is not sufficient to state in the notice that he “holds under a lease.”

Cameron v. the Charing Cross Railway Company (1) commented upon.

*Declaration—That the plaintiff having an interest in certain pieces of land taken by the defendants under the powers of their act of parliament for making a railway, and in certain other pieces injuriously affected by the execution of the works, and the plaintiff desiring to have the question of compensation settled by a jury, gave notice to the defendants, stating in such notice the nature of his interest in the said lands in respect of which he claimed compensation, the amount claimed being 1,031*l.* 14*s.* 6*d.*; that the defendants did not within twenty-one days after the receipt of the notice issue their warrant to*

the sheriff to summon a jury; and that the plaintiff by reason of such default became entitled to the sum claimed.

Plea, inter alia, that the plaintiff did not state in his notice the nature of his interest in the lands in respect of which he claimed compensation, in accordance with the provisions of “The Lands Clauses Consolidation Act, 1845.”

At the trial, before Crompton, J., at the Sittings in Middlesex in Easter Term, it appeared that the plaintiff was the lessee and occupier of a house and land at Hampton, under a lease for the term of eleven years, from Midsummer-day, 1853. The defendants were empowered, under the 25 & 26 Vict. c. clii., to take certain portions of the plaintiff's land for the formation of their railway, and on the 21st of May 1863 gave him notice to treat. Negotiations were entered into between the parties, but no agreement was come to.

*The defendants had entered on the land, as the jury found, on the 23rd of May 1863; and on the 7th of December 1863 the plaintiff served the defendants with a notice that he desired a jury. This notice, after describing the plaintiff's claim as a claim in respect of lands in the parish of Hampton, the particulars of which were contained in the notice served on him on the 21st of May 1863, under the defendants' act, proceeded to state: “The said lands and hereditaments are held by me on lease, and are used partly as and for private grounds, and partly for farming and agricultural purposes. I, the said T. Healey, do claim, as and for the value of my estate and interest in the said lands and hereditaments, and as compensation for the damage that has been and will be sustained by me by reason of the said lands and hereditaments being compulsorily taken by the said railway company, and by reason of the injuriously affecting the lands and hereditaments adjoining the lands required to be taken, and now in my possession and occupation, by the exercise of the powers of the said act, the sum of 1,031*l.* 14*s.* 6*d.*”*

The defendants did not take any steps on this notice, and the plaintiff accordingly commenced the present action on the 9th of January 1864, and claimed to be entitled to recover the whole amount claimed.

(1) 16 Com. B. Rep. N.S. 430; s. c. 33 Law J. Rep. (N.S.) C.P. 318.

It was objected, by the defendants' counsel (*inter alia*), that the above notice was insufficient, within the 68th section of the 8 Vict. c. 18; and a verdict was returned for the plaintiff for the amount claimed; leave being reserved to move to enter the verdict for the defendants, if the Court should be of opinion that the notice was insufficient.

A rule *nisi* was afterwards obtained accordingly, on the ground that the notice was not sufficient, within the 68th section of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), and that it did not contain a sufficient statement of the nature of the plaintiff's interest within that section (2).

J. D. Coleridge and Patchett (Nov. 2 and 3) shewed cause.—The notice describes the interest of the plaintiff sufficiently. By the 68th section, when a person claiming compensation for lands taken wishes the matter to be settled by a jury, he is to give notice, stating "*such particulars as aforesaid*"; those words are to be construed by looking to the earlier part of the section, which requires the party entitled to compensation to state in his notice of arbitration the "nature of his interest in the lands in respect of which he claims compensation, and the amount of compensation claimed"; and it cannot be denied that the notice does specify the nature of the interest which the plaintiff has in the lands taken by the company; that is to say, that he was the lessee of such lands, and that he used them for private grounds,

and for farming and agricultural purposes.

[MELLOR, J.—But is not the claimant bound to give the promoters some means of forming an estimate of the value of the plaintiff's interest; so that before he can put this penal clause into operation, they may be able to make an adequate offer for it?]

By giving them notice that he holds under a lease, he enables them to require the production of the lease, under section 122; and if he refuses to produce it, he suffers from the consequence imposed upon such refusal; namely, that he cannot claim any further compensation than he would be entitled to if he were a tenant from year to year simply.

[CROMPTON, J.—There is a difficulty there, for the claimant need not produce the lease till after the expiration of twenty-one days after notice; while the promoters are bound, by section 68, to issue their warrant within twenty-one days after the receipt of the notice of the claimant.]

There is the same difficulty under section 38, by which they must give ten days' notice before issuing their warrant.

[MELLOR, J.—I doubt whether sections 122. and 38. refer to this case at all.]

If the claimant refuses to produce the lease, the promoters may countermand their warrant.

[CROMPTON, J.—A very heavy penalty is imposed on the company after a proper notice has been made. The nature of the interest should be stated in the notice; do you do so, when there is no statement

(2) The 8 Vict. c. 18. s. 68. is as follows:

"If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall

enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided; and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior Courts."

whether the lease is for fifty years, or for life, or what it is for?]

The terms of the notice, under section 68, need not be so precise as the terms of the notice referred to in section 18, which is to contain "the particulars of their estate and interest in such lands."

[MELLOR, J.—Then, where things are proceeding regularly under sections 18. and 21, more particularity is required than when hostilely, and with a possibility of a penalty being incurred on the part of the company.]

The question has already been decided by the Court of Common Pleas in *Cameron v. the Charing Cross Railway Company* (1), where it was held, that a notice which simply stated that the claimant was "the occupier of a dwelling-house, bakehouse and shop, situate," &c., was sufficient.

[MELLOR, J.—It may be that that decision was quite correct, for the claim was in respect of the injury to the trade of the claimant—an injury already done and completed—and therefore the time during which he was to be the occupier would make no difference.]

The decision was given upon the words of the very same section; and the amount of injury would depend upon the time during which the claimant was to be the occupier.

[MELLOR, J.—The promoters are to pay all the costs if the jury give a larger sum than that which has been offered by them (s. 51), so that it is very material that the notice should give them the means of understanding what the interest of the claimant is. COCKBURN, C.J.—And the nature of the interest with reference to the injury is most material.]

This may easily be ascertained by further inquiry. It is impossible for a surveyor to ascertain the value of a person's interest merely from a statement of the duration of the interest; all the covenants, &c. of the lease would have to be taken into consideration. This is expressly pointed out in the case of *Cameron v. the Charing Cross Railway Company* (1). In *The North Staffordshire Railway Company v. Landor* (3) Parke, B. says, that an award, within the 18th section, must state the particular interest of the parties, whether an estate

in fee or life, or what other interest; but the learned Judge says nothing about the duration of the interest. If the decision in *Cameron v. the Charing Cross Railway Company* (1) proceeds on the knowledge the parties had irrespectively of the notice, then in the present case there can be no doubt that the defendants knew what the duration of the plaintiff's interest was, for in the course of the negotiations they had a copy of his lease (4).

[COCKBURN, C.J.—We cannot take that into consideration. The question is, whether the notice must give reasonable information; and supposing the claimant to have done nothing but send this notice in, whether, having regard to the subject of this claim, viz., not temporary injury, but permanent taking of land, the statement that he holds the land on lease is sufficient.]

Bovill, in support of the rule.—The distinction has already been pointed out from the Bench between this case and *Cameron v. the Charing Cross Railway Company* (1), and if the judgments and dicta of every one of the learned Judges in that case are examined, it is clear that, if that had been the case of taking land, the decision would have been against the sufficiency of the notice. There are two conclusive reasons why the "particulars" mentioned in the clause of the 68th section as to a jury, must be taken to mean the particulars as mentioned in section 18; or if referring to the "nature of the interest," &c. mentioned in the first part of section 68, then that "nature of interest" must include the quantity as well as quality of the estate. In the first place, this notice is the foundation of the jurisdiction of the compensation jury, and the interest shewn in the notice is the basis of the calculation on which the jury must award compensation, and it is only on an action being brought for the amount awarded that the company can contest the claimant's title. Secondly, reasonable information must be given to the company in order that they may be able to form an approximate estimate, at least, to the value of the claimant's real interest, so as to enable the parties to come to an agreement; or, if not, to enable the company to protect themselves from the liability to pay costs, which

(3) 2 Exch. Rep. at p. 242; s. c. 17 Law J. Rep. (N.S.) Exch. at p. 353.

(4) It did not appear that this fact was disclosed at the trial.

without reasonable information they would be unable to do, except by at once tendering the whole amount claimed.—(He was then stopped by the Court.)

COCKBURN, C.J.—We are of opinion that this rule should be made absolute. I own I have had some difficulty in arriving at this conclusion, because the language of the legislature in the 68th section, upon which this question turns, does to my mind *prima facie* imply that the notice should contain a statement of the quality of the interest of the claimant in the land, without comprehending also the necessity for stating the quantity of it. The “nature of the interest” seems to me rather to infer that the quality of the interest in the land, be it freehold or be it leasehold, should be stated, and so forth, than as embracing a statement of the number of years for which the claimant’s lease is to run, in case the interest should be of a leasehold tenure. But although that may be the signification which, *prima facie*, I should attach to the words used in the 68th section, yet the term is general and vague, and may have been used by the legislature as intending to comprehend a statement of the quantity as well as the quality. And interpreting these words by the light which is to be obtained from other parts of the statute in question, and from the general considerations which present themselves with reference to this subject, if we see reason to believe that by putting the narrower construction we shall be defeating the intention of the legislature, and that which may reasonably be presumed to have been the purpose of the legislature, then I think we ought to put the larger construction upon the language in question, so as to give effect to what we believe to have been the intention of the legislature. Now the scheme of this legislation with reference to lands to be taken by railway companies against the will, or, at all events, without the consent of the proprietor, appears to be this. Where power is given to a company to take lands without the consent of the proprietor, they are, in the first place, to give him the notice required by the statute of such intention to take, and they are likewise to give notice of their readiness and willingness to treat with the party interested for the value of the land,

and in order to enable them to do so they are, by the 18th section, to demand of the party particulars of his interest. It is plain that is to enable them to treat, on fair grounds, with the proprietor of the land. If the proprietor intends to negotiate with them, and so to avoid the necessity of litigation, he must furnish those particulars, and I think no one can doubt the meaning of the term “particulars” in the 18th section must be taken to be, such particulars as would enable the company to meet the just claim of the party by ascertaining what is the true value of the land, offering him compensation accordingly. Then, if the party declines to treat, or if, negotiations having been entered into, they prove abortive, and do not produce any satisfactory result, the company are not to be deprived of the right which the legislature has given to them of acquiring the land necessary for the purpose for which the company is constituted, but they are to take possession. Then, in that case the position of the parties is reversed, and the proprietor of the land must make the claim for compensation. In that claim the 68th section requires that he should state the “nature of his interest,” and the question we have to determine is, whether he is bound to do less in the way of the statement of particulars, than he would have been bound to do if he had been making a statement of the particulars in the first instance I have mentioned. Now, there can be no reason why he should give less complete information where he is claiming adversely compensation of the company, they having taken possession of his land, than where he does so with a view to a negotiation which may end in their being satisfied of the value of his land. On the contrary, it strikes me there is the greater reason, as soon as the hostile attitude is assumed between the parties, why the landowner should give complete information, inasmuch as if the parties cannot agree, and the matter goes to arbitration or before a jury, the company will have to pay the penalty of costs, if they do not make such an offer as the jury shall afterwards deem reasonable. There seems, therefore, more reason why full particulars should be enforced under the 68th section. Although the language used in that section, as I have already pointed out, might, at

first sight, appear capable only of a more limited construction, yet when one looks to what clearly must have been the intention of the legislature, it is not because that form of expression may have been used that we are to adopt that limited construction, if by any reasonable latitude of construction and without putting undue force upon the words used, we can give a construction which appears to do reasonable justice. Now, it is quite plain that the legislature has pointed out that unless the company have these particulars, or have particulars much more extensive than those which have been afforded in the present instance, they cannot be in a right position either to satisfy the claim of the owner of the land without having recourse to litigation; or if he makes a claim which they consider to be greater than he is entitled to make, they cannot put themselves on a right footing by making such an offer as will bear them harmless with regard to the costs in the event of the jury determining that they are not to pay a larger sum. On all these grounds, therefore, I think the true construction of this language used in the 68th section, that is, the "nature of the interest," is, that it is synonymous with and equivalent to the term "particulars of estate and interest," which is used in the 18th section. Now, in this case, all that the claimant has stated is, that his interest is a leasehold interest. That really affords no information whereby the company may be guided as to paying him at once the full amount of compensation he has claimed, or making him an offer which would put him in a right position as to the costs. I think, therefore, the claimant in this instance has not done sufficient, and that the company are entitled to say that this notice is not one under which they are bound to pay the full amount of compensation claimed.

As to the case which has been so much pressed upon our attention (*Cameron v. the Charing Cross Railway Company*) (1), I do not at all quarrel with the judgment of the Court of Common Pleas. Perhaps there may be language occurring in the judgments which would not have been used by the learned Judges if they had had the present case before them. But fully concurring in the decision

of that case, upon the ground that all that was necessary there was, that the interest should be stated as being the interest of an *occupier*, the obstruction having been temporary and not permanent, and therefore it being clearly unnecessary, in order to guide the company, that the claimant should state whether he was the occupier for the time or for any longer term, fully concurring in the propriety of the decision, I cannot go the length of saying, as it is contended for the plaintiff, that the language of the learned Judges applies to the case now before us. I think that the true construction to be put on the language of the 68th section is, that it requires the same statement of particulars as would have been required under the 18th section, and that it being agreed on all hands that under the 18th section the present statement would not be sufficient, the company are right in their contention.

CROMPTON, J.—I have come to the same conclusion. What we are now to decide upon is, whether a valid notice was given by the plaintiff to the company. The 68th section puts the company in a very bad position; it subjects them to pay the whole of the money claimed if they do not perform an act which they are ordered by the legislature to perform on receiving a valid notice. Therefore it comes, in my mind, to this question: Is this a sufficient, valid notice? Now, I think it is not valid, whatever view we may take of the particular words used in the 68th section. Looking to the words of that part of the section in question, "stating such particulars as aforesaid," coupling them with the "nature of the claim and the extent of the compensation" in the section before, and then looking back to where the word "particulars" in a similar matter have occurred before, I am very much inclined to think it would not be a strained construction to say the legislature meant the same thing by all these expressions. Modern legislation looks more to elegant wording, so to speak, endeavouring not to use the same language again and again; and we have to complain frequently of variations of language, for no earthly purpose that I can discover, except that it looks rather better in print. However that may be, it appears to me that this is not a sufficient notice. The

act of parliament directs notice to be given, and on the claimant giving that notice in a valid way, if the company do not obey it, they are put in the situation of having to pay all the money. Therefore, I think, we should see very clearly that a valid notice is given under such provisions. Notice is to be given by the person entitled. Why is that to be given? It must be for some object. The object is, that the company may act upon it, and the company are to act upon it, by seeing whether they can come to an agreement to pay or not. What does this notice say? All that it says is, that the interest is "leasehold." It does not say, as it happened to be in this case, a leasehold with about a year remaining, or whether it is a tenancy from year to year, or a freehold lease for life, or whether it is a very long valuable lease. It really does not give any information upon which the company could act. I agree with what seems to have fallen from the Court of Common Pleas in *Cameron v. Charing Cross Railway Company* (1), that it is not meant that the notice is to supersede fair inquiry. The most minute particulars a notice could give, would still leave it necessary for the company to inquire, if they did not know beforehand, as to the value of the land in the neighbourhood, and other matters; but in my opinion, the claimant is to give them sufficiently reasonable notice, so that they should be put upon inquiries to enable them to act. This really, to my mind, gives no such notice. I treat this as a question of the sufficiency of the notice, with reference to the subject-matter before us, and I think that this view is rather strengthened by the case in the Court of Common Pleas; because, all the Judges in that case put the question as arising on the nature of the claim, and that they are to judge of the sufficiency *quoad* the circumstances under which the claim is made, and the circumstances of the case. That is the principle upon which we now go—whether this is sufficient with reference to a claim for taking land. It is observable that my Brother Keating expressly puts this very distinction. He says, "The distinction was expressly pointed out by Mr. MacLachlan, in his able argument, between the notice required where the Company give notice of their intention to

take land, and the notice in a case like this, where the claim is in respect of an injury which could only affect the occupying tenant." I give my judgment in this case, upon the notion that claimants are to give a notice which will be of some assistance to the company. Whether they do give a sufficient notice, I think, is a question of law for us, just like the question, whether the notice of dishonour of a bill of exchange is sufficient. I think we are to determine whether this is a sufficient notice. To my mind this is not sufficient under the circumstances, and therefore the rule must be made absolute.

MELLOR, J.—I am entirely of the same opinion. I will not repeat the observations of my Lord Chief Justice, with reference to the machinery of the act in general; but I entirely agree in the view he has taken of the general provisions, and the effect of them; but looking at this particular section, I certainly think the words "nature of the interest in such lands" may be read to include, not only quality, but quantity, when we find them used in immediate connexion with the words which follow: "the nature of the interest in such lands, in respect of which he claims compensation, and the amount of compensation so claimed therein." Then observe what follows: "And unless the promoters of the undertaking be willing to pay the whole amount of the compensation so claimed, and enter into a written agreement for that purpose, they shall issue their warrant within a certain period to summon a jury, or in default they shall be liable to pay the whole amount claimed." One cannot read these words without seeing that the legislature intend the company, in the particular position of the parties contemplated, to have the information requisite to enable them to form some judgment as to the nature of the interest they were required to pay or tender compensation for; and I think it is, as my Brother Crompton has said, a question, under all circumstances of this particular case, whether the notice is sufficient or not. Entirely agreeing, as I do, in the decision of the Court of Common Pleas in the case referred to—*Cameron v. the Charing Cross Railway Company* (1)—I think it will be found, on looking at the expressions of the Lord Chief Justice, of my

Brother Willes particularly, and also of my Brother Keating, that they were only looking at the particular circumstances of the case, and the nature of the interest which was there alleged to have been injuriously affected. The nature of the injury and of the interest alleged to have been injuriously affected, as already pointed out, was an injury to the occupation, which injury was really determined before the occupation had ceased. Therefore, every possible information which could be required by the company in that case, to enable them to determine what they should pay, was afforded by the notice. I agree in this, that it is not intended the notice should supersede all inquiry on the part of the company. The company, with reference to all matters which are patent, may still find out for themselves, but the nature of the information which must be given is that which is peculiar to the claimant himself, and therefore the notice must, as it appears to me, give that information which is in possession of the party, to enable the company to form some judgment as to the propriety of the claim made upon them, before they determine whether they will issue their warrant or not.

SHEP, J.—I am of the same opinion. I think, in considering the 68th section of the act, we must look, not only to the words of the section, but to the words of those sections which are necessarily and more specially connected with it, including those, and they are the principal ones, to which my Lord Chief Justice adverted, at the commencement of the act of parliament,—the 18th, 19th and 21st. But, further than that, I think we must look at section 38. and section 51, and we must construe the last clause of the 68th section with reference, of course, to the manifest object, and to the effect which the construction would have upon the construction of those two other sections, the 38th and the 51st.

Now, the 68th section provides, that "if any party shall be entitled to any compensation in respect of any lands or of any interest therein which shall have been taken or injuriously affected by the company, and shall desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking,

stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into an agreement for the purpose, or unless they issue their warrant within twenty-one days to the sheriff to summon a jury, then they shall pay the whole of the amount claimed." Now, if we look back to section 38. we shall find that on this requirement of the legislature that they shall issue their warrant within twenty-one days is necessarily involved this further requirement, that they shall give not less than ten days' notice of their intention to cause such jury to be summoned, and in such notice they shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him in the execution of the works. So that, incorporating that section with the 68th, it is absolutely incumbent on the company that they shall not only within twenty-one days issue a warrant to the sheriff to summon a jury, but that they shall also state the amount they are willing to pay; and then, if we refer to the 51st section of the act, we shall find that if they offer a sum less than is finally recovered, they will have to pay the whole of the costs. Now, putting all these three sections together, it seems to me to be almost impossible to suppose that the legislature could have intended that it would be sufficient to give to the company a general notice, which did not give them the least means of ascertaining whether the compensation which was claimed was a reasonable compensation or not. Certainly, merely stating that it was a leasehold interest would not enable them to form any estimate at all. I have had a doubt in the course of the argument,—in which, however, my Lord Chief Justice and my learned Brothers do not agree with me,—whether it may be possible that the words "nature of the interest" refer only to the case of arbitration, in the 23rd section of the act, and in the last clause but one of the 68th; but I do not found my judgment upon that at all. I think it may well be that this word "particulars," at the end of the section, refers as well to the words "nature of the interest" in the earlier part of the section, and to the words at the commence-

ment of the section, "entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for, or injuriously affected by the execution of the works." The word "particulars" may refer to both these parts of the section. I entirely agree, therefore, with the judgment of the rest of the Court.

Rule absolute.

1864. { DAWSON, appellant, v. THE
Dec. 13. { SURVEYOR OF THE HIGH-
WAYS OF WILLOUGHBY WITH
SLOOTHBY, respondent.

Highway-Rate—Exemption—Evidence of Hamlet repairing its own Highways.

The hamlet of *M.* forms part of the parish of *S.* but the lands in *M.* had never been assessed to the highway-rates of *S.* nor had *S.* ever repaired or contributed to the repair of the highways in *M.* From 1828 to 1841, by living testimony, and previously, by evidence of reputation, it appeared that highway-rates were assessed upon the lands in *M.* by the neighbouring parish of *W.* jointly with the lands in *W.* and the highways in *M.* were repaired by the surveyors of *W.* out of such rates jointly with the highways in *W.* without any distinction. Since 1841, by private arrangement between *M.* and *W.* *M.* ceased to be assessed to the highway-rates of *W.*; and the occupiers in *M.* by arrangement among themselves, repaired the highways in *M.* without any rate or assessment being made:—Held, that a part of one parish could not legally be united to another parish for the purpose of the repair of the highways, and that no continuing consideration was shewn on the part of *S.* so as to create a liability on the part of *W.* to repair the highways in *M.* being part of *S.*; and that there was no sufficient evidence to draw the inference of fact that *M.*, though part of *S.* had been originally a hamlet repairing its own highways. That there was therefore no sufficient ground of exemption shewn by the hamlet of *M.* to avoid its *prima facie* liability to contribute to the highway-rates of the parish of *S.* of which it formed part.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 37.]

BAIL COURT. }
1864. }
Nov. 30. }

THE QUEEN v. PAYN.

Coroner's Inquest—Adjournment of the Court.

If a coroner's inquest on a dead body be adjourned, and on the day appointed the Court be not formally opened and further adjourned, the proceedings drop and the Court is dissolved, and everything else done in the matter of the inquest is coram non judice; and this is the case, even where the adjournment takes place only for the purpose of drawing up a formal inquisition after the jury have, in substance, agreed upon their verdict.

This was a rule for a *certiorari* to bring up an inquisition taken by W. H. Payn, the coroner of Dover, on a dead body, for the purpose of quashing the same.

The proceedings on the inquest, which was held at Margate, commenced on the 2nd of August, and were duly continued to the 5th of the same month, on which day the jury in writing agreed, in substance, on their verdict. The inquest was then adjourned to the 8th of August, for the purpose of having the inquisition formally drawn up in the mean time. The jurors were bound by recognizances to meet again at Margate on the 8th. On the 6th of August, however, the coroner having ascertained that the inquisition would not be ready by the 8th, wrote to the constable, the summoning officer, to inform the jurors that the inquest was further adjourned for a day or two. On the 8th of August the coroner, who resided at Dover, did not attend, and no Court was opened or adjourned. On the 12th of August the constable, by the coroner's written direction, gave a fresh notice to the jurors, who met accordingly on that day, and signed the inquisition, after some discussion as to its terms.

Francis shewed cause (Nov. 25).—The inquisition is valid. A regular adjournment was not necessary at that stage of the proceedings. The substance of the verdict had been agreed upon. It only remained to put it into a legal and formal shape. There is no authority that formal adjournment is absolutely essential to the jurisdiction of the coroner and jury. In 2 *Burn's Justice of the Peace*, tit. 'Coroner,' p. 37, 29th edit.

it is recommended that the inquisition should be signed before the jury disperse. It is not there spoken of as essential. Secondly, there was a sufficient adjournment. The writing the letter to the summoning officer to put off the meeting, and writing a second letter to bid the jurors assemble at the further day, are sufficient. It was not necessary for the coroner to attend personally on the 8th, and go through the formal process of adjourning the Court to the 12th.

Henry James, in support of the rule.—The proceedings dropped by the non-attendance of the coroner on the 8th. If his letter to summon the jurors to re-assemble were to be treated as a summoning of a second inquest on the 12th of August, that inquest would be bad because not held *super visum corporis*, and because no evidence was taken on it. The practice on a coroner's inquest is for the court to be opened and to be adjourned from day to day by proclamation—*Jervis on Coroners*, 290, 293, 1st ed. A coroner's court is like a Court of Quarter Sessions, if it is not duly adjourned the Court has no jurisdiction—*The King v. West Torrington* (1). The public interest is concerned in its being fully and openly stated when a coroner's court is to re-assemble. The meeting at which the inquisition is signed is most important. Until a juror has actually signed the inquisition, he may change his mind and alter the verdict. If a coroner were ill, the proceedings would have to commence *de novo*, as in the case of a judge of assize being taken ill on the trial of a cause.

Cur. adv. vult.

SHEE, J.—It is of great importance that the duties of coroners in holding inquisitions *super visum corporis* should be conducted with the observance of those forms which have been established to ensure regularity. The forms of adjournment are requisite to secure the re-attendance of the jurors after an adjournment at the time and place appointed, and the continuity of the proceedings from the first meeting of the inquest until its completion by the signing of the inquisition. In this case the adjournment from the 5th to the 8th was for the purpose of having the inquisition drawn in the proper form to give effect to the verdict of the jury. If the coroner had

(1) *Burr. S.C.* 293.

taken the trouble, as it was his duty to do, of going from Dover to Margate on the 8th of August, and again adjourned the inquest to a day certain, all would have been right; but not having done so, the final and important proceeding of adopting and signing the inquisition did not take place under the original precept, and was *coram non jure*. The rule, therefore, will be absolute.

Rule absolute (2).

1864. } *BUCKLE, appellant, v. WRIGHT-*
Nov. 29. } *SON, respondent.*

Hackney Carriage Licence — Towns Police Clauses Act, 1847, ss. 35. 47.—Post-horse Licence—2 & 3 Will. 4. c. 120.

The possession of a revenue licence to let horses and carriages for hire, under the 2 & 3 Will. 4. c. 120, does not supersede the necessity of the proprietor having a licence for his carriage to ply for hire under the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 37. and 45.

[For the report of the above case, see 34 *Law J. Rep. (N.S.) M.C.* p. 43.]

1864. } *THOMAS, appellant, v. JONES,*
Nov. 29. } *respondent.*

Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), ss. 4. 11.—“Fixed Engine”—Net fixed to the Soil.

A net, six yards in length, and one yard sixteen inches in depth, and stretched across a river by means of corks and lead, and fastened at one end to a large stone lying on the bank of the river, which keeps the net in its place, but gives way as soon as a salmon touches the net, which then rolls up, and the salmon gets entangled and dies, is not “a fixed engine” or “net temporarily fixed to the soil,” and as such illegal, under the Salmon Fishery Act, 1861, (24 & 25 Vict. c. 109.) s. 11.

[For the report of the above case, see 34 *Law J. Rep. (N.S.) M.C.* p. 45.]

(2) On the inquisition being brought up, cause was shewn in full Court, Jan. 31, 1865, against the rule to quash it, but the Court affirmed the decision of *Shee, J.*, in the Bail Court, and quashed the inquisition on the same objection of want of adjournment.

1864. } THE MIDLAND RAILWAY COM-
Nov. 9. } PANY, appellants, v. THE
OVERSEERS OF THE PARISH
OF BADGWORTH, respondents.

Poor Rate—Railway—Rateable Occupation—Easement—Running Powers.

Under the powers of an act of parliament, a railway was constructed from G. to C, for the common purposes of the G. W. Company and the M. Company, each paying half the cost; on the completion, the half of the railway nearest G. became the sole property of the M. Company, and the half nearest C. the sole property of the G. W. Company. Each company was bound to keep its own half in repair and supply the staff of officials, &c. necessary on that half for the traffic of both companies. The railway was constructed for broad and narrow gauge traffic, with three rails on each line; and in practice the G. W. Company used the broad gauge and the M. Company the narrow, so that of the three rails one was used in common and one exclusively by each company. The traffic of the M. Company far exceeded that of the G. W. Company:—Held, that there was no rateable occupation by the M. Company of the G. W. Company's half of the railway, but only an easement, and that the M. Company were therefore not rateable to the poor-rate of a parish through which that half of the railway passed.

Semble, the G. W. Company were rateable for their half of the railway in respect of the value of the occupation as enhanced by the profits made over it by the M. Company.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 25.]

1864. } THE QUEEN v. THE JUSTICES
Nov. 23. } OF ESSEX.

Appeal—General Inclosure Act, 8 & 9 Vict. c. 118. s. 63.—Limitation of Time—Notice of Appeal.

The General Inclosure Act, section 63, enacts that any person within four months after the first Sunday on which a notice of an intention to stop up a way has been given on the church-door, may make his complaint by appeal to the Justices at the Quarter

Sessions on giving the valuer fourteen days notice in writing of such appeal, together with a statement in writing of the grounds thereof:—Held, that notice of intention to appeal, given to the valuer within the four months, against the stopping up of a highway under the powers of the General Inclosure Act, is good, although the Sessions be not held nor the appeal heard until after the four months have expired.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 41.]

1864. } FISHER, appellant, v. HOWARD,
Nov. 26. } respondent.

Sunday Trading—Alehouse—Sale of Fermented Liquors within prohibited Hours—"Traveller"—2 & 3 Vict. c. 47. s. 42.

A person who has taken a ticket at a railway station and is about to start by a train from that station is a "traveller" within the exception in the 42nd section of the 2 & 3 Vict. c. 47; and the keeper of a refreshment-room at the station is not liable to be convicted, under that section, for opening his house for the sale of beer, fermented liquor, &c., before one p.m. on Sunday, by reason of having supplied fermented liquor to such person.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 42.]

1864. } THE GREAT WESTERN RAIL-
Nov. 28. } WAY COMPANY, appellants,
v. BAILIE, respondent.

Weights and Measures—Weighing Machine—Incorrectness—5 & 6 Will. 4. c. 63. s. 28.

The appellants (a railway company) kept a weighing machine, which for a fortnight had been so out of repair that, when anything was weighed by it, the weight appeared to be four pounds more than was really the weight:—Held, that the appellants were liable to be convicted under 5 & 6 Will. 4. c. 63. s. 28. for having in their possession a weighing machine which on examination was found to be incorrect or otherwise unjust.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 31.]

CASES ARGUED AND DETERMINED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL FROM THE QUEEN'S BENCH.

HILARY TERM, 28 VICTORIÆ.

1865. }
Jan. 19. } WILSON v. RANKIN.

Ship—Policy of Marine Insurance—16 & 17 Vict. c. 107. (Customs Consolidation Act) ss. 170, 171, 172.—Deck Cargo—Illegality of Voyage—Owner—Master.

To a declaration on a policy of insurance upon freight on a voyage from R. to Liverpool, averring a total loss by perils of the sea, the defendant pleaded, fourthly, that the cargo consisted of timber and wood, that R. is a port in British North America, that the voyage commenced after 1st September and before 1st May, and the master stowed a portion of the cargo on deck, contrary to the 16 & 17 Vict. c. 107. ss. 170–2, and sailed without the certificate required by that statute, and that the plaintiff was the owner of the ship. Fifth plea, the same as the fourth, with a further averment that the plaintiff intended that the vessel should sail so loaded, and made the policy for the express purpose of protecting the adventure.

At the trial the following facts appeared: The whole of the cargo that was on freight

was properly stowed below deck; but the master placed some spars on deck to be carried to Liverpool for the owner, having no instructions from the owner to do so. The vessel was not made unseaworthy by the mode of loading, nor did the owner know of it till after the policy was made and the ship had sailed:—Held, first, that these spars were within the meaning of the Customs Act, 16 & 17 Vict. c. 107. s. 171. Secondly, that the fifth plea was good, but not proved. Thirdly, that no authority from the owner to the master could be implied to do that which was unlawful, though the act might be otherwise within the ordinary scope of the master's authority, and though it might be done for the benefit of the owner; that the master, therefore, in stowing the cargo on deck, contrary to the statute, could not be taken to be acting by the authority of the owner, nor was the owner bound by the knowledge of the master; and that consequently, on the authority of *Cunard v. Hyde* (1), the fourth plea

(1) E. B. & E. 670; s. c. 27 Law J. Rep. (N.S.) Q.B. 408; and 2 E. & E. 1; s. c. 29 Law J. Rep. (N.S.) Q.B. 6.

was bad, and the plaintiff entitled to recover on the policy.

Declaration—That the plaintiff by a certain policy of insurance caused himself to be insured, lost or not lost, at and from Restigouch to Liverpool, upon any kind of goods, &c., in the ship called the *Jane*... the said ship, &c., goods and merchandises, &c., for so much as concerned the assured by agreement between the assured and assurers on the said policy were and should be valued at 1,400*l.* on freight, and valued thereat. And it was declared that the said insurance was against perils of the seas, and all other perils, losses and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandises and ship, or any part thereof, and which are usually covered by marine insurance, and the defendant for a certain premium paid to him by the plaintiff subscribed the said policy for 80*l.*, and became an insurer thereon to the plaintiff for that amount on the said freight valued as aforesaid. And the plaintiff says, that certain goods of great value were shipped on board the said vessel, to wit, at Restigouch aforesaid, to be carried as cargo on the voyage in the policy described for certain freight therefore payable to the plaintiff, and afterwards the said ship with the cargo on board thereof sailed on the said voyage, and during the continuance of the said risk the said ship, cargo and freight were by the perils of the seas, and by perils insured against, wholly lost; and the plaintiff was then and thence, and always, and until and at the time of the loss interested in the said freight to the amount of all the monies insured by him thereon. And the plaintiff says that all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to be paid the said 80*l.* by the defendant, yet the defendant has not paid the same, or any part thereof.

Pleas—And for a fourth plea the defendant says, that the said policy of insurance was made, and the cargo, the freight in respect of which was insured as in the declaration alleged, was shipped on board the said ship after the passing and coming into operation of the 16 & 17 Vict. c. 107,

intituled 'An act to amend and consolidate the laws relating to the Customs of the United Kingdom,' &c., and that the aforesaid cargo consisted of timber and wood goods, and that Restigouch in the said policy mentioned was and is a British port in North America, and that the said ship with the said cargo cleared out and sailed from Restigouch aforesaid after the 1st of September 1861, and before the 1st of May 1862, to wit, on the 13th of November 1861, and that before and at the time of the said ship so sailing as hereinbefore mentioned the whole of the said cargo was not below deck, but, on the contrary thereof, the master of the said ship, before, and at and after the time of the said ship so sailing as aforesaid, placed and permitted and caused to be placed, and to remain and be upon and above the deck of the said ship part of the said cargo, contrary to the statute in that behalf made and provided; and that at the time of the said ship so sailing as aforesaid, the master of the said ship had not obtained from the clearing officer any certificate that the whole of the cargo of the said ship was below deck, contrary to the statute in that behalf made and provided, and that before and at the time of the said ship so sailing as aforesaid, and until and at the time of the alleged loss, the plaintiff was the owner of the said ship, and the said freight so insured as aforesaid was payable to him as such owner in respect of the said cargo.

And for a fifth plea the defendant repeats the several allegations contained in the fourth plea, and says that they are respectively true in substance and in fact; and the defendant further says, that at the time of the defendant's subscribing the said policy and becoming an insurer as alleged, it was known by the plaintiff that a considerable part of the said cargo was then loaded and that a considerable part of the said cargo was intended to be loaded upon and above the deck of the said ship, and that at the time of the defendant so subscribing the said policy and becoming an insurer as aforesaid, it was intended by the plaintiff that the said ship should sail on the voyage in the declaration mentioned after the 1st of September 1861, and before the said 1st of May 1862, with part of the said cargo stowed

and loaded above and upon the deck of the said ship, and remaining so stowed as in the said fourth plea mentioned, and the plaintiff effected the said policy of insurance for the express purpose of insuring and covering the freight of the said cargo, including the portion thereof so stowed and loaded above and upon the deck of the said ship as aforesaid.

Demurrers and joinder in demurrer.

There were also traverses of the pleas on which issue was joined.

On the trial, before Shee, J., at Liverpool, it appeared that the vessel did, in fact, sail on the 13th of November 1861, with the whole of the cargo that was on freight properly stowed below deck; but that the master took on board a quantity of spars and other articles for his owner to be carried to Liverpool, which were placed on deck. This he did in the exercise of his general authority as master, without any instructions from the plaintiff, his owner, to do so; his object, it would appear, being to save expense to his owner in obtaining the materials necessary for refitting the vessel in Liverpool after the voyage.

The jury found that the vessel was not, in fact, rendered unseaworthy by this deck load; that the spars and other articles on deck were more than were required for the ship's use on the voyage; and that the plaintiff was not aware of the conduct of the master till after the policy was made and the ship had sailed.

The learned Judge ruled, on the construction of the proviso in the 171st section of the 16 & 17 Vict. c. 107, that the spars, &c., in excess of what were required for the voyage, were cargo within the meaning of the enactment; and he directed the verdict to be entered for the defendant on both pleas, giving the plaintiff leave to move to enter the verdict for him.

A rule having been obtained accordingly, the rule and the demurrers came on for argument together.

Mellish and *Cohen* (Nov. 8), for the defendant.—It cannot be denied that the fifth plea is good, but the defendant is also bound to admit that it was not proved, and that therefore the verdict upon that issue

must be entered for the plaintiff. The question arises upon the 171st section of the Customs Consolidation Act, and it has been partially discussed in the case of *Cunard v. Hyde* (1), which has been twice before the Court; but neither of the decisions exactly touches the present question, which is, whether the ship-owner is prevented from recovering, because the master has, without any authority from him, violated the enactments of the statute.

[CROMPTON, J. — The penalty is, by section 172, very plainly imposed upon the master, and not upon the owner.]

This must not be looked at as a simple question of illegality under the provisions of a Customs Act, but as a particular enactment, for the express purpose of preventing the navigation of ships in such a dangerous condition, and further preserving life and property. It is like a provision that a ship must take a pilot on board on entering a particular port, when the failure to do so would prevent the owner from recovering against the underwriter—see *Law v. Hollingsworth* (2). If the voyage is illegal, the policy is void. The necessity of obtaining a certificate is simply a kind of machinery for carrying out the intention of the legislature. The underwriter makes his policy, and takes his premium upon the understanding that the ship will not carry any deck cargo; the statute positively forbids its being done; and the penalty is imposed upon the master to insure the prohibition being effectual. Even if the section imposing the penalty was left out of the act, the prohibition would equally apply. There is an implied warranty that there shall be no deck cargo; and Lord Campbell, C.J. said, in the second case of *Cunard v. Hyde* (3), "The absolute prohibition in the statute upon the ship sailing makes the voyage illegal, irrespective of any penalty." In every case of an illegal voyage, it has been held that the owner cannot recover, and without raising any question whether the illegality is the act of the master or not—*Bird v. Appleton* (4). *Farmer v. Legg* (5) is an authority

(2) 7 Term Rep. 160.

(3) 2 E. & E. 8.

(4) 8 Term Rep. 562.

(5) 7 Id. 186.

to shew that the certificate of the clearing officer could not be dispensed with. See also *Bell v. Carstairs* (6). Lastly, the direction of the learned Judge was clearly right, that the verdict should be entered for the defendant.

Brett and Milward, contra.—It may be admitted that the fifth plea is good, but the verdict on it must be entered for the plaintiff, as it was not proved. The plaintiff, however, is entitled to recover upon the policy. There is no hardship upon the underwriter; he is protected by the warranty of seaworthiness, and therefore he needed no protection from the legislature. The fourth plea discloses no defence to the action, the ship having been chartered to take a cargo below deck; and the jury having found that the plaintiff never authorized the captain to go beyond the charter, and that he did not know that there had been any infringement of the law till after the ship had sailed. The captain, either from miscalculation or by reason of want of judgment, takes more timber than he could stow below deck; but the jury have found that the ship did not thereby become unseaworthy, and, in point of fact, the risk of the underwriter was not altered or increased. It is quite consistent with the plea that the ship was seaworthy. If it be put that the loading on deck amounts to a statutable unseaworthiness, the objection is met by *Cunard v. Hyde* (1) when first before the Court. There the plea was stronger than it is here, inasmuch as it averred that the persons interested in the cargo knew that the ship sailed without a certificate; and Blackburn, J., who was counsel in the case, having argued that it was consistent with the plea that the plaintiff had protested against the ship sailing so loaded, Lord Campbell, C.J. assented, saying in his judgment (7), "It is quite clear that, without shewing privity in the illegality or knowledge of it at the time of insuring on the part of the persons interested as insured, the defence must fail; and I should say the same if the statute contained a positive prohibition only on the voyage, and no penalty were imposed upon the master in particular." In order to prevent the plain-

tiff from recovering, it must be made out that the illegal act of the master amounted to illegality in the owner. In 1 *Phil. on Insurance*, p. 133, the doctrine is laid down as follows: "It is a general principle of law that if a contract be intended to indemnify the owner from loss on property by reason of its being implicated in an illegal trade, or applied to an illegal use, or which, according to the laws of the country where the contract is made, it is criminal for the owner to hold, such contract is void; and, accordingly, the owner has no legally insurable interest." But it would not be so, if the owner is no party to the act of the master. In order to avoid the policy, it ought to be shewn that the purpose of the voyage was illegal—see *Metcalf v. Parry* (8), *Havelock v. Hancill* (9) and *Carruthers v. Gray* (10).

[COCKBURN, C.J.—Is not the voyage illegal when it is prohibited by statute?]

It does not follow, because an illegal act is done in the course of a voyage, that the voyage became illegal, as appears from *Phillips on Insurance*, p. 136, where it is said, "So, when the master in the course of a voyage took on board a smuggled chain-cable, though he had intended to do so at the time of sailing, Mr. Justice Story said it was a collateral act, no more touching the legality of the voyage than if they had been taking on board some illegal ship stores, and accordingly held that the policy on the ship was not thereby defeated."

[COCKBURN, C.J.—We are bound by the decision in *Cunard v. Hyde* (1) to hold that the voyage was illegal, and any one who acts in the voyage with knowledge of such illegality is implicated in it.]

It may be an illegal act of the master, if he does it alone, or of the owner also, if done by his permission, but there is no illegality in the owner if he knows nothing about it. Lastly, as to the way the verdict ought to be entered; the findings of the jury are entirely in favour of the plaintiff, except that the spars were on deck and that there were more than were wanted for the voyage. The fourth plea alleged, that

(6) 14 East, 374.

(7) See 27 Law J. Rep. (N.S.) Q.B. 410.

NEW SERIES, 34.—Q.B.

(8) 4 Campb. 123.

(9) 3 Term Rep. 277.

(10) 15 East, 35.

the part of the cargo on deck was part of that which was carried as freight, and the jury have found that was not so.

[*Per Curiam*.—The plea means that there was cargo carried on deck; and if necessary, the plea might be amended, under section 222. of the Common Law Procedure Act, 1852.]

If there be immaterial allegations in a plea, they need not all be found; but if they cannot be separated, they must all be found: and here so much of the plea has not been found.

Cur. adv. vult.

The judgment of the Court (11) was now delivered by—

COCKBURN, C.J.—This was an action on a valued policy on freight from Restigouch to Liverpool, for a total loss by perils of the sea. The fourth plea is to the effect that the ship cleared out and sailed from Restigouch, a British port in North America, after the 1st of September 1861 and before the 1st of May 1862; that her cargo consisted of timber and wood goods, and that the whole of the cargo was not below deck, but on the contrary; and that the master, contrary to the statute (16 & 17 Vict. c. 107. ss. 170, 171. and 172), placed and kept a portion of the cargo on deck, and sailed without the certificate required by the statute, and that the plaintiff was the owner of the vessel. The fifth plea adds the additional averment that the plaintiff intended the vessel should sail so loaded, and made the policy for the express purpose of protecting the adventure so prohibited by the statute in question. Both these pleas were traversed and also demurred to.—[His Lordship then stated the facts which appeared at the trial; the ruling of the learned Judge, and the leave reserved, precisely as they have been already set out, and then continued as follows:—] A rule was accordingly obtained which came on for argument along with the demurrer. On the argument it was not disputed that the fifth plea was good, and that the judgment on the demurrer to that plea must be for the defendant; but it was also not disputed that this plea was not proved, and that the verdict on it must be entered for

the plaintiff. We expressed our opinion during the argument, that our Brother Shee's ruling that the spars in question were cargo was correct, and that consequently the fourth plea was proved in substance. It was objected that the plea was so framed as to aver that the portion of cargo loaded on deck was part of that which was carried on freight, but we expressed our opinion that this was an immaterial variance, the substance of the plea being that cargo was illegally carried on deck; and that if necessary an amendment in the plea might be made accordingly. The verdict, therefore, on the fourth plea must stand for the defendant; but the real question between the parties is, whether the fourth plea is good in substance, and on this point we took time to consider. The result of our deliberation is, that in our opinion the plea is bad.

While the cases of *Cunard v. Hyde* (1) establish, that where the provisions of the sections in question of 16 & 17 Vict. c. 107, in respect of the stowage of timber on deck are violated, the voyage is illegal, and a policy of insurance on such a voyage will not attach, they equally decide that knowledge on the part of the assured of the timber being so stowed is necessary to avoid the policy, and that in the absence of such knowledge the assured may recover. In the present case the assured did not in fact know of timber being stowed on the deck, or of any intention on the part of the master so to stow it. But, the insurance being on freight, it is said that as the stowing of the cargo is immediately within the province and duty of the master, the assured, the shipowner, must be considered as bound by the act of the master as his agent, and that the knowledge of the latter must, in law, be taken to be that of the owner. Admitting, of course, the general rule that a principal is bound by the acts and knowledge of his agent, while acting within the scope of his authority, we are of opinion that that rule has no application in the present case. For, although it is true that the stowing of the cargo is undoubtedly within the authority of the master, yet, in the absence of proof to the contrary, it must be taken that his authority, in this as in other respects, is by his instructions limited to that which

(11) Cockburn, C.J., Blackburn, J., and Mellor,

is lawful. "The trust reposed in a captain of a vessel," says Lord Ellenborough in *Earle v. Rowcroft* (12), "obliges him to obey the written instructions of his owners where they give any; and where his instructions are silent he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage; because, in the absence of express orders to the contrary, obedience to the law is implied in their instructions. Therefore, the master of a vessel, who does an act in contravention of the laws of his country, is guilty of a breach of the implied orders of his owners." Applying this principle to the present case, it follows, that no authority can be implied in the master, in the discharge of his duty, to do that which, with reference to this part of his duty, was a violation of the law. Again, it is a well-established distinction that, while a man is civilly responsible for the acts of his agent, when acting within the established limits of his authority, he will not be criminally responsible for such acts, unless express authority be shewn, or the authority is necessarily to be implied from the nature of the employment; as in the case of a bookseller held liable for the sale, by his shopman, of a libellous publication (13). Under ordinary circumstances, the authority of the agent is limited to that which is lawful. If, in seeking to carry out the purpose of his employment, he oversteps the law, he outruns his authority, and his principal will not be bound by what he does. Now in the present case, as has been already pointed out, not only are there no circumstances from which an authority to contravene the statute can properly be implied, but according to the authority of *Earle v. Rowcroft* (12), the reverse is to be presumed. It appears to us therefore impossible to say that the master, in stowing the cargo on deck, contrary to the act of parliament, was acting by the authority of his owner; or that the latter was bound by his knowledge. This view of the law, as here applicable, becomes materially confirmed, if the case be looked at in another point of view. It

seems clear, on the authority of *Earle v. Rowcroft* (12) that if the master of a vessel, acting within what otherwise would be the extent of his authority, contravenes some positive law, and thereby causes injury to his owners, this will be barratry in the master, notwithstanding that the purpose of the thing done was to benefit the owners. In the case referred to, the master, having instructions to make the best purchases with despatch, had gone into an enemy's port to complete his cargo, which could be most speedily and cheaply obtained there, in consequence of which the ship was seized and confiscated. This proceeding on the part of the master, though within the general scope of his authority, and though done in the interest of his owners, was held to be barratrous; and the owner, on a policy in which barratry of the master was insured against, was held entitled to recover. Within the principle of this decision, the soundness of which never has been questioned, the conduct of the master in the present case would have amounted to barratry, as being an unlawful act done in contravention of his duty, though with the intention of benefiting his owners. Had the statute attached the forfeiture of the vessel as the penalty of the offence, and the vessel had been confiscated, the owner would have recovered on an insurance against loss by barratry. But, to constitute barratry, there must necessarily be an absence of consent and knowledge on the part of the owner. Where an act, which would otherwise be barratrous, is done with the assent and knowledge of the owner, it ceases to be barratrous. If, therefore, the knowledge of the master could be taken to be the knowledge of the owner, an illegal and otherwise barratrous act, done by the master, would not in case of loss occasioned thereby give the owner a right to recover. But *Earle v. Rowcroft* (12) directly establishes that on loss occasioned by the illegal act of the master, without the authority of the owner, the latter may recover; and therefore shews that, where the master does an illegal act, which, but for its illegality, would be within the scope of his ordinary authority, but which, being illegal, is barratrous, this will not amount

(12) 8 East, 133.

(13) See Com. Dig. 'Libel,' (B. 1).

in point of law, to assent or knowledge on the part of his employer. For these reasons, it appears to us, that the plaintiff in this action cannot be taken to have constructively, any more than he had actually, knowledge of the illegal act of the master, and that, consequently, within the decision in *Cunard v. Hyde* (1), he is entitled to recover; and that our judgment, therefore, should be in his favour. I should add, that this judgment should be taken as that of my Brothers Blackburn and Mellor and myself. My Brother Crompton, having been obliged to leave the Court before the argument was concluded, takes no part in the judgment.

Judgment for the plaintiff.

1865. { *BILLS AND ANOTHER, assignees*
Jan. 28. { *of WILLIAM SMITH, a bankrupt,*
 { *v. CHARLES SMITH.*

Bankrupt — Fraudulent Preference — Direction to Jury.

Prima facie a trader who, on the eve of bankruptcy, hands over to a creditor assets which ought to be rateably distributed among all his creditors, must be taken to have acted in fraud of the law. But if circumstances exist which tend to explain and give a different character to the transaction, and to shew that the debtor acted from a different motive, these circumstances ought to be left to the jury; and the proper direction in such a case is that, unless the jury come to the conclusion that the debtor had the intention of defeating the law, and preventing the due distribution of his assets, by preferring one creditor at the expense of the rest, the transaction stands good in law. The whole question turns upon the intention of the trader in disposing of his goods to the particular creditor.

Declaration by the assignees of a bankrupt, containing the common money counts.

Plea, never indebted.

Issue joined.

Upon the trial, which took place before Blackburn, J., at the last Summer Assizes

for Lincolnshire, it appeared that the action was brought by the assignees of William Smith, a bankrupt, against his brother, to recover back a sum of money paid to him by the bankrupt, as it was alleged, by way of fraudulent preference. Evidence was given that William Smith became a bankrupt on the 24th of September 1862. Before his bankruptcy, and at the end of April 1862, he had applied to the defendant for a loan of money. The defendant told him that he had not the money, but that he thought he could get it from his bankers, upon pledging himself to pay it on a particular day. It was arranged between them that William Smith should repay the money on the 1st of July, and the defendant procured it from his bankers on the express contract that he would repay it on that day. On the 1st of July, William Smith of his own accord paid to the defendant the sum of money advanced, with the bankers' charges and commission. From the time of applying for the money in the month of April, William Smith was in embarrassed circumstances, and was hopelessly insolvent on the 1st of July. The defendant knew nothing of this, and acted in a *bona fide* manner throughout the transaction.

The learned Judge directed the jury that if the bankrupt, though he was aware that bankruptcy was unavoidable, and though no application had been made for payment, paid this debt simply in discharge of the obligation he had entered into to pay on a given day, without any view of giving preference to this particular creditor at the expense of the other creditors, the payment would not be a fraudulent preference within the meaning of the bankrupt law. The jury found for the defendant.

A rule was subsequently obtained, calling upon the defendant to shew cause why the verdict should not be set aside, and a new trial had between the parties on the ground of misdirection.

Macaulay and Fitzjames Stephen shewed cause (Jan. 13).—They referred to *Harman v. Fishar* (1), *Vacher v. Cocks* (2),

(1) Cowp. 117, 128.

(2) 1 B. & Ad. 145.

Hunt v. Mortimer (3), *Cook v. Rogers* (4), *Strachan v. Barton* (5), *Abell v. Daniel* (6) and *Gibson v. Boutts* (7).

Hayes, Serj., and *A. Wills* supported the rule.—They referred to *Crosby v. Crouch* (8), *Alderson v. Temple* (9), *Ogden v. Stone* (10), *Morgan v. Brundrett* (11), *Hartshorn v. Slodden* (12), *Thompson v. Freeman* (13) and *Edwards v. Glynn* (14).

The arguments are fully referred to in the judgment of the Court.

Cur. adv. vult.

The judgment of the Court (15) was now delivered by

COCKBURN, C.J.—This was an action by the assignees of William Smith, a bankrupt, to recover back a sum of money paid to the defendant, as it was alleged, by way of fraudulent preference. On the trial, evidence was given that W. Smith became a bankrupt on the 24th of September 1862. Before his bankruptcy, and at the end of April 1862, he had applied to the defendant, Charles Smith, who was his brother, for a loan of money. C. Smith, according to the evidence, which the jury must be taken to have believed, told him that he had not the money, but that he thought that he could procure it from his bankers on pledging himself to repay it on a particular day, and he asked his brother William when he would be able to repay the money, and was told, on the 1st of July then next. The defendant then went to his bankers and obtained from them an

advance of the sum required, on the deposit of some title-deeds, on the express contract that he, the defendant, would repay the money on the 1st of July. He returned to W. Smith and informed him of the terms on which he had obtained the money, and the money was lent by the defendant to W. Smith on the 29th of April, on the security of a promissory note payable on demand. A few days before the 1st of July the brothers again met, when W. Smith, without any fresh application, told the defendant that he should be prepared to pay him on the 1st of July, and requested to know the amount of the bankers' commission and other charges, that he might pay the whole sum at once. He was told what they were, and on the 1st of July, without any further application, he brought the money to the defendant, and paid him. W. Smith was in good general credit till some time after this payment; but the fact was, that he was, during the whole period of this transaction, and had long been, in very embarrassed circumstances; and the money he thus obtained was wanted to pay off a creditor then pressing him for payment. But the defendant was not at all aware of these facts, and it was admitted at the trial, that the whole transaction was perfectly *bona fide* on his part. The evidence shewed that the affairs of W. Smith continued to get worse, and that on the 1st of July they had become hopeless. On the 22nd of August he issued a circular to his creditors, and on the 24th of September he became a bankrupt.

It was left to the jury as a question of fact, whether at the time of the payment to the defendant C. Smith, bankruptcy was contemplated by W. Smith; and they were told, that if the payment was in contemplation of bankruptcy, and voluntary, they ought to infer that it was intended to prevent the equal distribution of the property amongst the general creditors; in which case it would be void as against the assignees. So far, no complaint is made of the direction; but my Brother Blackburn, who tried the cause, further told the jury, that if the bankrupt, though he was aware that bankruptcy was unavoidable, and though no application had been made for

(3) 10 B. & C. 44.

(4) 7 Bing. 438.

(5) 11 Exch. Rep. 647; s. c. 25 Law J. Rep. (N.S.) Exch. 182.

(6) M. & M. 370.

(7) 3 Sc. 229.

(8) 2 Campb. 166, 168.

(9) 4 Burr. 2235, 2240.

(10) 11 Mee. & W. 494.

(11) 5 B. & Ad. 289; s. c. 2 Law J. Rep. (N.S.) K.B. 195.

(12) 2 B. & P. 582, 585.

(13) 1 Term Rep. 155.

(14) 23 Law J. Rep. (N.S.) Q.B. 350; s. c. 2 E. & E. 29.

(15) Cockburn, C.J., Crompton, J., Blackburn, J., and Mellor, J.

payment, paid this debt simply in discharge of the obligation he had entered into to pay on a given day, without any view of giving a preference to this particular creditor at the expense of the rest, the payment would not be a fraudulent preference within the meaning of the bankrupt law. The jury having found for the defendant, we must take it as a fact, that the payment was made by the bankrupt *bonâ fide*, and without any intention of giving an undue preference to the defendant. And the question is, whether the direction of the learned Judge to the jury was wrong, in telling them that a payment made under such circumstances was good, as against the assignees, on bankruptcy supervening.

On the part of the plaintiffs, it was contended that the payment, having been made without any application from the defendant, must be taken to have been purely voluntary on the bankrupt's part; and it was urged, that as the effect of such a payment would necessarily be to prevent the rateable distribution of his effects among his creditors, and so to defeat the bankrupt law, and as a man must be taken to intend that which is the necessary consequence of his acts, a payment made spontaneously by a debtor on the eve of bankruptcy must necessarily be a fraudulent preference. The cases were also relied upon, in which the question had been discussed whether the payment had been made voluntarily or on the demand of the creditor; and the language of the Judges, in pointing out this distinction as the criterion of the validity of the payment was also adverted to, as shewing that the absence of any demand by the creditor must be considered as conclusive of the payment being a fraudulent preference. In effect, the argument for the plaintiff came to this, —that no payment made by a debtor, on the eve of bankruptcy, out of a fund which would otherwise be distributable among his creditors, without a demand from a particular creditor, would be other than a fraudulent preference. We are unable to assent to this proposition. There is no doubt that, in the great majority of cases, the question of fraudulent preference would be determined by the fact of the payment having been made spontaneously by the debtor,

without pressure on the part of the creditor. Unexplained, a payment so made would carry with it the presumption, that the intention of the debtor was to act in fraud of the bankrupt law. Hence the importance of requiring proof of pressure on the part of the creditor, in order to rebut the inference which would otherwise arise from the apparent spontaneousness of the act; and hence the language of the Judges, in the cases referred to, in distinguishing between a voluntary payment and one made on the pressure of the creditor. But it by no means follows because, in the majority of cases, the absence of pressure by the creditor may properly lead to the inference that the debtor intended to act in fraud of the law, that that circumstance must necessarily be conclusive in a case where other circumstances are found sufficient to rebut the presumption of fraudulent intention; for it must be borne in mind that the true question in all these cases is, whether the intention with which the payment was made was to defeat the operation of the bankrupt law. It is this intention to act in fraud of the law which stamps the preference of the particular creditor, however morally honest, with the character of fraud.

It may not be unimportant to observe how the law as to fraudulent preference has arisen. The statutes relating to bankruptcy contained no provision invalidating payments made prior to the act of bankruptcy; but the Courts, from the time of Lord Mansfield, held, that if a trader, in contemplation of bankruptcy, with a view to evade the bankrupt law, preferred a particular creditor to the detriment of the rest, such a preference was a fraud upon the law and the transaction could not stand. Lord Ellenborough, in *Crosby v. Crouch* (8), says, "this was an excrescence on the bankrupt laws," and that in his opinion the cases had gone far enough, and ought not to be further extended. Be this as it may, the intention of the party, making the payment, to defeat the law was always considered as the cardinal point on which the whole question turned. "Where an act is done which is right to be done," says Lord Mansfield, in *Harman v. Fishar* (1), (by which of course he means "right" irrespectively of the bankrupt law), "and the

single motive is not to give an unjust preference, the creditor will have a preference." "A bankrupt," says Heath, J., in *Hartshorn v. Slodden* (12), "has the disposition of his property till the moment when he commits an act of bankruptcy; and unless he dispose of it in *fraudem legis*, his transfer will be good. Fraud, indeed, changes the complexion of things both in civil and criminal cases." It is with reference to the intention and motives of the party making the payment, that the fact of threats or importunity on the part of the creditor becomes in the majority of cases a matter of so much importance. Not, indeed, that the hostile attitude of the creditor will of itself legalize the payment, if the debtor was uninfluenced thereby, and the payment made voluntarily by the debtor and with a view to prejudice his other creditors—*Cook v. Rogers* (4). The pressure of the creditor becomes material, because, as is said by Lord Ellenborough, in *Crosby v. Crouch* (8), "his demand repels the presumption that the bankrupt, on the eve of bankruptcy, made a distinction among his creditors and spontaneously favoured one of them to the prejudice of the rest." The pressure of the particular creditor does not make the payment any the less contrary to the policy of the bankrupt law, which seeks to insure the rateable distribution of the insolvent trader's assets, but which distribution is defeated by the payment to the single creditor whether importunate or not. Neither can it be said that the pressure operates to compel payment by the debtor; for the latter, if he knows that bankruptcy is inevitable, must also know that it will protect his property and his person against the individual creditor. The effect of pressure, therefore, in legalizing the payment is only that it rebuts the presumption of an intention on the part of the debtor to act in fraud of the law, from which fraudulent intention alone arises the invalidity of the transaction. But if the fact of pressure by the creditor only operates in the way pointed out, why may not any other circumstance, which in like manner would serve to repel the presumption of fraudulent intention, be available for this purpose? The question, whether an intention to defeat the law and to prevent the due

distribution of his assets existed in the mind of the trader in handing over the portion of them in question to the creditor, is one of fact for the jury. If the act was spontaneous on the part of the debtor, and there are no circumstances to rebut the presumption which arises from the act having been done purely voluntarily on his part, the jury should be told to infer that the preference was fraudulent and wrongful. But if there are circumstances by which the presumption may be rebutted, these circumstances, whatever they may be, are for the consideration of the jury, and cannot properly be withdrawn from them; and a direction to the jury that, although the transaction was apparently voluntary on the part of the debtor, if the effect of the evidence on their minds is to satisfy them that the desire to give a fraudulent preference was not the motive operating on the debtor in handing over his assets to the particular creditor, they ought to uphold the transaction, is in our opinion perfectly correct.

In the present case we must take it, on the finding of the jury, that the motive, operating on the mind of the debtor, was his sense of the obligation arising from the undertaking to return the money on the appointed day. We are not called upon to say whether we approve of the verdict of the jury, or whether it would not have been more satisfactory if the jury, looking to the desperate pecuniary position of the debtor, and the near relationship of the parties, and to the absence of any demand of payment, had come to a different conclusion as to the motive of the payment; we have only to deal with the direction of the learned Judge, that if the desire to fulfil an undertaking, believed to be peremptory, was the motive of the debtor, the payment would be legal and valid.

This case, no doubt, does not fall within the principle of *Toovey v. Milne* (16) and cases of that class, in which it having been agreed that a fund should be specifically appropriated to a particular purpose, as equity would enforce the specific application, the money would not pass to the assignees. In the present case the agree-

ment was not to pay out of a particular fund, but to pay on a particular day, and the payment was made accordingly. But there is authority for holding that where money is paid under a special contract for repayment made when the money was lent, this will not amount to a fraudulent preference. In *Hunt v. Mortimer* (3), where a trader in insolvent circumstances, having an order from the East India Company which he had not funds to execute, borrowed money on an agreement that the lender should receive the money for the order and repay himself, and this was accordingly done, this Court upheld the transaction, as not amounting to a fraudulent preference. Parke, J., it is true, puts it upon the principle of the fund being bound in equity to the specific appropriation; but Lord Tenterden, Bayley, J. and Littledale, J. appear to have proceeded on the more general ground. Littledale, J. expressly says, "That a payment is not voluntary if it is the subject of a special contract made before the money was lent." In *Vacher v. Cocks* (2), in which case an army agent, on receiving credit from his bankers, the defendants, engaged to pay over to them, on receipt, sums which usually came to his hands half-yearly from government for the discharge of pensions, and paid them accordingly, Lord Tenterden, at Nisi Prius, directed the jury that if the payments were made in pursuance of an antecedent contract entered into on opening the new account, or with a view to enable the bankers to honour the bankrupt's drafts, that he might go on for a time, then to find for the defendants; whereupon the counsel for the plaintiffs elected to be nonsuited. A rule to set aside the nonsuit having been obtained, the Court held that, as the direction was admitted to be right on the second point, the nonsuit must stand; so that it became unnecessary to decide whether the direction on the first point was right. But Bayley, J. expresses his opinion, that the questions left to the jury were both proper. His language appears very much to the present purpose. He says, "The question of fraudulent preference depends on what passes in the mind of the party making the payments at the time they

are made; if he acts in pursuance of a contract or engagement, or otherwise under such circumstances that he cannot have a choice, the payments are evidently not the result of preference." Littledale, J. appears to have concurred in this view, although Parke, J. expresses doubts as to the direction on the first point, and appears to have thought it incorrect. In another case of *Abell v. Daniel* (6), where a sum of money had been granted by a trader shortly before his bankruptcy, to his son, whom he was in the habit of maintaining, Lord Tenterden left it to the jury to say whether the money was given in the ordinary course of maintaining the son, or for the purposes of securing an advantage to the latter over the creditors, and with a view to benefit him at their expense. This, it is true, amounts to no more than a ruling at Nisi Prius, but the ruling does not appear to have been questioned.

In our opinion, founded both on the reason of the thing and on the result of the authorities, the whole question turns on the intention of the trader in disposing of his effects to the particular creditor. *Prima facie*, a trader who, on the eve of bankruptcy, hands over to a creditor assets which ought to be rateably distributed among all his creditors, must be taken to have acted in fraud of the law; but if circumstances exist which tend to explain and give a different character to the transaction, and to shew that the debtor acted from a different motive, these circumstances must be left to the jury, who should be told that, unless they come to the conclusion that the debtor had the intention of defeating the law, and preventing the due distribution of his assets, by preferring one creditor at the expense of the rest, the transaction will stand good in law. This, it appears to us, was in substance and effect the direction of my Brother Blackburn to the jury. We, therefore, hold that the direction was right, and, consequently, that this rule must be discharged.

Rule discharged.

1865. }
Jan. 16. } ROBERTS v. EVANS.

Arbitration—Award—Enlargement of Time—Rule of Court—Affidavit.

Where matters in difference had been referred to an arbitrator by Judge's order, and the arbitrator, after twice enlarging the time, had made his award, the order of reference may be made a rule of Court without an affidavit verifying the dates of such enlargement.

This was a rule calling upon the defendant to shew cause why a rule obtained to make an order of reference a rule of Court, should not be discharged on the ground that the affidavit did not verify the dates at which the enlargements of time for making the award had been made.

This case had been before the Court in Michaelmas Term, 1864 (1), and now the following additional facts were disclosed. The order of reference shewed that two enlargements of time had been made. The plaintiff had wished to have the award set aside, and had endeavoured to obtain from the arbitrator an affidavit that the time had not been duly and properly enlarged by him as it appeared to be from the award itself. The arbitrator refused to make the affidavit, and the plaintiff then filed a bill in Chancery in relation to the same matters as those which were decided on the reference. The defendant, wishing to set up the award as an answer to the bill, obtained a rule to have the order of reference made a rule of Court upon an affidavit verifying the handwriting of the arbitrator. The present rule was then obtained on an affidavit that the time had not been duly enlarged. The arbitrator, having been examined in obedience to the order of this Court (1), swore that the time had been twice duly and properly enlarged, as appeared on the face of the award.

Mellish and Robins shewed cause.—This rule must be discharged, the affidavit having been sufficient according to the practice of this Court. The arbitrator has now been examined, and the Court will assume that he has spoken the truth, and that the time has been duly enlarged.

They referred to *Dickins v. Jarvis* (2) and to *In re Smith v. Reeves* (3).

[COCKBURN, C.J. (after consulting with the Masters.)—According to the practice of this Court and of the Court of Exchequer, established since the passing of the Common Law Procedure Act, 1854, it is sufficient if the affidavits are in the form used in this case. That being so, if a party endeavours to prevent the order of reference being made a rule of Court, and it turns out, as it does here, that the enlargements of time have been properly made, it would seem that he ought to pay the costs.]

Bovill and Shaw, in support of the rule.

—It was supposed that the affidavit used was not sufficient, and when it was found that the arbitrator refused to make an affidavit, the plaintiff was justified in inferring that there was something wrong. The only provision in the Common Law Procedure Act, 1854, which can be said to apply to the matter, is that in the 26th section, namely, that it shall not be necessary to call the attesting witness, if there be one; and there is no reason why the old practice of verifying each enlargement should not be followed—see *Davis v. Vass* (4) and *Moule v. Stawell* (5). The practice is laid down in 2 *Chitt. Archbold's Practice*, p. 1631, as follows: "Also, when it is necessary to make any enlargements of the time for making of the award a part of the rule of Court, there should be an affidavit that the enlargements have been duly made. If a cause has been referred by a Judge's order, or an order of Nisi Prius, no affidavit is necessary; unless indeed it is necessary to make any enlargement of the time for making the award a part of the rule of Court, in which case there must be an affidavit of the enlargement."

COCKBURN, C.J.—I am of opinion that this rule must be discharged. It appears to be the existing practice of this Court that it is not requisite that there should be an affidavit by an attesting witness that the enlargements have been duly made, and

(2) 5 B. & C. 528.

(3) 5 Dowl. P.C. 513.

(4) 15 East, 97.

(5) 15 East, note, p. 99.

(1) *Supra*, page 7.

that the order of reference may be made a rule of Court upon an affidavit verifying the handwriting of the arbitrator. We cannot therefore expect that any further affidavit should have been made. It appears that the plaintiff applied to the arbitrator to make the affidavit, and he refused to do so. It might be expedient that an affidavit by the attesting witness, if there be one, or by the arbitrator if there be not, should be required in order to remove all doubt, but that is not the practice, and we need not now consider the expediency of it. The conduct of the arbitrator was such as was fairly calculated to engender suspicion, and that being so, the rule will be discharged, but without costs.

CROMPTON, J.—The practice in two, if not in all three of the superior Courts, is not to require affidavits of the kind here insisted on, and I am not willing to upset such practice. On a trial at *Nisi Prius* it would be supposed that the enlargement had been made at the time it appeared to have been made. The conduct of the arbitrator justified some suspicion, and I therefore agree that there should be no costs.

BLACKBURN, J.—The practice has existed for ten or twelve years, and no inconvenience has been found to result from it. Here the party might not unreasonably doubt whether the enlargement had been properly made or not.

MELLOR, J.—I am of the same opinion.

Rule discharged, without costs.

1864. } WATSON, appellant, v. MARTIN,
Nov. 26. } respondent.

Gaming—"Instrument of Gaming"—*Vagrant Act* (5 Geo. 4. c. 83), s. 4.

Persons tossing up halfpence and betting money on the number of heads and tails, are not guilty of an offence under the 5 Geo. 4. c. 83. s. 4, which makes liable to be convicted of being a rogue and vagabond "every person playing or betting in any highway, at or with any table or instrument of gaming, at any game or pretended game of chance."

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 53.]

[IN THE QUEEN'S BENCH

AND

IN THE EXCHEQUER CHAMBER.]

1864. } CATOR v. THE BOARD OF
Jan. 4; } WORKS FOR THE LEWIS-
Nov. 28. } HAM DISTRICT.*

"Metropolis Local Management Act, 1855" (18 & 19 Vict. c. 120. s. 86.)—"Metropolis Local Management Amendment Act, 1862" (25 & 26 Vict. c. 102.)—Drain into a private Stream—Action for Compensation—Damage done out of District—Nuisance.

The plaintiff was the owner of land through which the P. river flowed, such land being beyond the district of the board of works for L. The board executed drainage works within their district, by means of which the sewage was carried into a stream which flowed into the P. river. The sewage had for many years been carried into the stream, but only so as to pollute the water in an inappreciable degree. The result of the new works of the board was to do substantial injury to the plaintiff:—Held, by the Court of Queen's Bench, that under the 86th section of the "Metropolis Local Management Act, 1855," the plaintiff had a right to obtain compensation for the damage done in the manner provided by the act, and therefore that the board were not liable in an action.

But held, by the majority of the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, that the local board were not authorized by any provision of the Metropolis Local Management Act, 1855, to carry the sewage of the district by means of a new system of sewers into the plaintiff's stream, and that the plaintiff was entitled to maintain an action against them for the nuisance.

Declaration, that certain lands situate, &c. were in the possession and occupation of certain persons as tenants thereof to the plaintiff, the reversion thereof belonging to the plaintiff, and long before and until the committing of the grievances herein-after mentioned a certain stream and a certain watercourse, called the Poole River

* Coram Erle, C.J., Pollock, C.B., Bramwell, B., Channell, B., Byles, J., Keating, J. and Pigott, B.

and County Bridge Stream respectively, did flow and ought of right to flow, without being fouled and polluted as hereinafter mentioned, near to and through the said land, and the plaintiff and his tenants were entitled to the use and benefit of the water of the said stream or watercourse, and to have the said stream or watercourse flow and run without being so fouled and polluted, and the defendants well knowing the premises wrongfully caused and permitted large quantities of soil, filth and water to flow permanently into the said stream and watercourse, whereby the same became and were permanently fouled and polluted, and the water thereof became and was and always will be impure and unfit for domestic or other necessary purposes, and of noxious appearance, &c., and the said lands became unhealthy and much lessened in value, and the plaintiff was greatly injured, &c.

Pleas, first, not guilty; secondly, not possessed; thirdly, a traverse of the plaintiff's right to have the water flow through the land without being polluted; fourthly, that the several acts, matters and things whereof the plaintiff complains were lawfully done and caused and permitted to be done by the defendants under or in pursuance and in exercise and by virtue of the powers contained in and given to the defendants, by an act of parliament made in the session of parliament holden in the 18th and 19th years of the reign of Queen Victoria, for the better local management of the metropolis.

The plaintiff now assigned as to the last plea, that he sued not only for the grievance therein admitted and therein attempted to be justified, but also for grievances committed by the defendants in excess of the alleged rights and powers in that plea mentioned, and on other occasions and for other purposes than those referred to in the same plea.

Issues were joined and taken.

At the trial, which took place at the Summer Assizes, 1862, for the county of Kent, it was agreed that a verdict should be entered for the plaintiff, subject to a special case to be stated for the opinion of this Court.

The following CASE was accordingly stated.—

The plaintiff is owner of the reversion of certain lands through which flow a stream called the Poole River, and of a watercourse which is known by the name of the County Bridge Stream. The defendants are the board of works for the Lewisham district, constituted on the 1st of January 1856 under the "Metropolis Management Act, 1855" (18 & 19 Vict. c. 120). The Poole River is a natural stream of considerable width and depth. The County Bridge Stream flows in a deep dyke or ditch, and except in wet weather is narrow and shallow. The plaintiff's lands are not within the defendants' district nor within the area to which the "Metropolis Management Act" applies. The injury of which the plaintiff complains is the pollution of the County Bridge Stream and the Poole River, by the discharge through sewers constructed by the defendants of large quantities of filth into the said watercourse called the County Bridge Stream, which joins the Poole River at a point about 400 yards from the outfall of the sewers. It is admitted that the flow of filth into the plaintiff's watercourse and stream is such an injury to the reversion as would entitle him to maintain this action if the remedy by action be not taken away by the Metropolis Management Act, 1855. Prior to the year 1852, but few houses had been built in the district over which the jurisdiction of the defendants as a board of works now extends. The sewage from some of these houses escaped either by open drains cut for the purpose, or by percolation through the soil into open watercourses. These watercourses had a common outfall through a culvert, which has existed for more than twenty years, into the County Bridge Stream; and a small quantity of the sewage which escaped into the watercourses was carried into the County Bridge Stream, and thence into the Poole River, but without fouling either to any appreciable extent.

In the year 1852 the erection of the Crystal Palace at Sydenham was commenced, and in that and the following years a great number of new houses were built within the defendants' district. A great portion of the sewage from the Crystal Palace and from the new houses was carried off in the same manner as the drainage of

the houses previously built, *videlicet*, through the open watercourses, and thence through the culvert before mentioned into the County Bridge Stream; the flow of sewage into the County Bridge Stream was in consequence increased, and the effect was to pollute the latter, and also the Poole River, to an appreciable, but not to a serious extent. The open watercourses continued to be used for the drainage of a large number of buildings within the defendants' district down to the year 1859. About that time the condition of the watercourses had become a serious nuisance to the inhabitants of the district. Large quantities of filth accumulated in them, the effluvia from which were of the worst description, and in many places the adjacent soil was overflown and saturated with offensive matter. In order to put an end to the further use of the open watercourses for purposes of drainage, and to provide efficient means for the drainage of the whole district, the defendants, in the years 1859 and 1860, caused a number of underground sewers to be constructed, the operation of which, as regards the plaintiff's stream and watercourse, is the subject of complaint in this action.

In many instances the defendants' sewers run in the same direction, and follow nearly the same course as the old watercourses. The outfall of both is the same, *videlicet*, through the before-mentioned culvert into the County Bridge Stream. The mouth of the culvert is within the area of the defendants' jurisdiction, but is very close to the boundary. In addition to the sewers constructed by the defendants, the defendants further adopted into their plan of drainage, and took under their control certain underground sewers, which had been constructed for the drainage of houses built by the Anerley Building Society on an estate within the defendants' district, called the Anerley Building Estate. They had been originally constructed in the year 1856, with an outfall into one of the open watercourses before mentioned. In the year 1859 the defendants provided a new outfall for them into a sewer, which the defendants had substituted for the watercourse. The new system of sewers adopted by the defendants has prevented the accumulation and flow of filth in the open watercourses, and has effectually provided for the drainage of the

defendants' district; but the quantity of filth carried into the County Bridge Stream, and thence into the Poole River, was, when this action was brought, and still is, vastly in excess of what had reached it before the sewers were constructed. The effect of the increased discharge from the sewers into the County Bridge Stream and the Poole River as aforesaid is to render them foul, stinking and wholly unfit for cattle or ordinary domestic purposes.

The defendants contend that the plaintiff's remedy for the injury done to his said stream and watercourse is not by action, but by proceedings to obtain compensation, in the manner provided by the 18 & 19 Vict. c. 120. In support of their contention, the defendants rely on sections 68, 69, 86, 225. and 226. of the act.

The question for the opinion of the Court was, whether, under the circumstances of this case, the plaintiff could maintain this action against the defendants.

If the Court should be of opinion in the affirmative, then the verdict was to stand, and judgment to be entered for him for 40s., with costs of suit. If the Court should be of opinion in the negative, then the verdict was to stand for the plaintiff, except as to the issue joined on the last plea, and upon that issue the verdict was to be entered for the defendants, with judgment for the defendants accordingly.

Bovill (*Lush* and *Murphy* with him), for the plaintiff (June 5, 1863), contended that the statute referred to in the plea gave the defendants no power to cause the injury which the plaintiff complained of. He referred to 18 & 19 Vict. c. 120. ss. 2, 32, 38, 42, 68, 69, 86, 135, 138; 25 & 26 Vict. c. 102. s. 58.

Mellish (*Raymond* with him), for the defendants, contended that the plaintiff was not entitled to maintain the action, and that he was enabled to obtain compensation under section 86. of the 18 & 19 Vict. c. 120. He referred to sections 68, 69. and 86. of that statute; to the 25 & 26 Vict. c. 102. s. 58; to *Stainton v. the Metropolitan Board of Works and the Lewisham District Board of Works* (1);

(1) 23 Beav. 225; s. c. 26 Law J. Rep. (N.S.) Chanc. 300.

and to *The Queen v. the Metropolitan Board of Works* (2).

Cur. adv. vult.

The judgment of the Court was delivered on the 4th of January by—

BLACKBURN, J.—In this case, which was heard before my Lord, the late Mr. Justice Wightman, and myself, and in which no decision had been come to prior to the death of our late lamented colleague, I have now to deliver the judgment of the remaining members of the Court; and we have come to the conclusion, though not without some hesitation, that our judgment should be for the defendants. The point may be very shortly stated. The drainage of the district of Lewisham has for many years been carried into a stream called the County Bridge Stream, which stream flows into a river called the Poole River, both of which in their progress onward flow through land belonging to the plaintiff, beyond the limits of the Lewisham district. The population and the number of houses in a part of the Lewisham district, having of late years greatly increased, and the want of additional drainage having occasioned an accumulation of offensive matter causing serious inconvenience, the defendants, the board of health for the district, executed the drainage works stated in the case, availing themselves, as heretofore, of the County Bridge Stream to carry off the sewage matter. The effect of the additional and more effective drainage, has been to cause a quantity of offensive matter to pass down into the County Bridge Stream and Poole River, sufficient to pollute the water which before was affected by the drainage only in an inappreciable degree, to such an extent as to cause substantial injury to the plaintiff. It is not disputed that for such injury the plaintiff is entitled to compensation; but the question is, whether his remedy is by action, or by proceeding to obtain compensation under the 86th section of the 18 & 19 Vict. c. 120.

The drainage works executed by the defendants were, beyond all question, such as they were authorized, and indeed required, to make, and it cannot, we think, be disputed that had the damage to the plain-

tiff occurred within the district, the only redress to which he would have been entitled would have been compensation under the 86th section of the 18 & 19 Vict. c. 120. For it is plain that that section contemplates and provides for the possibility of damage being done to water rights by the execution of sewerage works, and would comprehend a case in which a stream was polluted by offensive matter being discharged into it. But it is contended, for the plaintiff, that the authority and powers of the board to carry out the drainage of the district is confined to the limits of the district, and that they are not authorized to do anything which shall cause an injury to those who are beyond the local boundary of their jurisdiction; and the 58th section of the subsequent act of the 25 & 26 Vict. c. 102. is referred to as shewing that such a board, in the absence of express statutory enactment, would have no authority beyond the limits of the district for which they are appointed. It is, however, to be observed, that the 58th section of the 25 & 26 Vict. c. 102. has reference to works to be executed beyond the limits of the district, not to an injury arising without the district for works executed within it. Here, all that has been actually done by the board has been done within their district. The injury of which the plaintiff has reason to complain, is only a consequence of what has been done within the district, and so far as the district itself is concerned rightfully done. Now, the words of the 86th section of the 18 & 19 Vict. c. 120. are sufficiently large to embrace an injury done by the pollution of a stream whether within the local limits of the district or without. And to hold that the present case does not fall within the provisions would be virtually to establish that no board of health or vestry could ever avail themselves, for the purpose of drainage, of a stream flowing beyond the local limits, if any damage should occur to proprietors or occupiers further down the stream. For if the work causing such injury beyond the boundary, ceases, because of such injury, to be within the powers of the local authority, and therefore is actionable, the injury being a continuing one, fresh actions might from time to time be brought, and the works causing the damage would have to be undone. We cannot think that

the legislature intended to place this restraint on the powers conferred by the act, and we think, therefore, that it will be safer and better so to construe the act as to make the powers of the local authority and the provision for compensation embrace such a case as the present. It follows that the proceeding by action was not open to the plaintiff, and, consequently, that our judgment must be for the defendants.

Error was brought on this judgment, and the case was argued, in the Exchequer Chamber, November 26, 1864.

Lush (Bovill and Murphy with him), for the plaintiff.—First, the defendants had no right, under the statute 18 & 19 Vict. c. 120, even if the damage had been done within the district, to convert this stream of the plaintiff into a sewer. The Metropolitan Local Management Act vests all the trunk sewers in the Metropolitan Board of Works, and the branch sewers in the vestry or local board of the district. The Metropolitan Board of Works have power, with consent of the Secretary of State, to purchase any land compulsorily for the purpose of the main sewers; but the local board have no compulsory powers to take lands: but express power is given to them to purchase any land or any river by consent. That leads to the inference that without such consent the local board have no right to take a river, or to cast the sewage into such river, any more than to cast the sewage on to any man's land against his will. They are expressly forbidden to create a nuisance. Here the local board have turned the whole sewage of the district into the plaintiff's stream, destroying the value of his land for building purposes; and they have fouled the water in such a manner that if it were in the district the same local board might call upon the plaintiff to abate the nuisance which they themselves have caused; and even though out of it, the local board of health of the district in which it is might call on the plaintiff to remove the nuisance. The Court below have construed the provisions of section 86. of the 18 & 19 Vict. c. 120. relating to compensation, as inferentially giving a power to do the act complained of; but the true meaning of that section, when looked at as a whole, is, that the local board are to

abate any nuisance, and if in so doing they cause any injury to an individual, they are to make him compensation. That would apply to cases where the local board had made a sewer alongside a stream, and had thereby drawn away some of the water.

Secondly, even if they had power to take and use any land or river within the district, the local board had no power to take or use any land or river out of the district. This scheme of drainage was carried out before the passing of the statute 25 & 26 Vict. c. 102. s. 58, which empowers vestries and local boards to execute works beyond their district. The legislature seem to have contemplated that the local board could drain into the main sewers, and section 135. of the original act gives the Metropolitan Board of Works power to take up the sewer at the end of the district and carry it away by a new sewer. It is nowhere found in the case that it is necessary to come on to the plaintiff's land. It is only more convenient for the board to do so. They can go in any other direction. It lies on the local board to point out a direct authority in the act empowering them to pollute this river. The plaintiff's counsel rest their case on an implication drawn from the section relating to compensation, whereas the act expressly says that no land nor any right to water can be taken without the owner's consent.

Mellish (Raymond with him), for the defendants.—The injury done to the plaintiff was the subject of compensation, not of action. The defendants were compellable by the statute to turn the open water-courses which ran into the river into underground drains, and necessarily to drain into the river. They were bound to make the sewers so as to drain their district. They could not drain in any other way. The act, which in section 86. says the local board shall cover in offensive open drains, and in section 67. shall "make such sewers as may be necessary for effectually draining the district," compels them to do these works. The proviso that the local board are to do their works in such a manner as not to create a nuisance, only applies to the case of their covering in open drains, and not to the works for the general drainage of the district. It is not found in the case that the fouling is injurious to the health

of any one, nor is it a nuisance to any one but to the plaintiff as riparian owner in relation to his use of his field. The prohibition against committing a nuisance means only a public nuisance, not merely an actionable wrong to an individual. It is admitted that if the water had been drawn off by the works of the local board, the case would be one for compensation, but if cutting off the water is a subject of compensation, surely merely fouling it must be so also. If it be a subject of compensation, it matters not whether the injury is done within the district or without. If the works are done in the district, the compensation must be given for injury done anywhere. The power to sell and purchase the stream is only affording another mode of giving compensation if both parties agree. The act clearly contemplates the case of the local board being obliged to injure a stream. It is not correct to say, that the Metropolitan Board could have made a sewer in this place for the benefit of the Lewisham district only. Their power to make drains out of their district is confined to making main sewers, which are charged on the general rates of the metropolis.

Lush, in reply.—By section 89. of the 18 & 19 Vict. c. 120, the local board may transfer the powers and duties of making the sewers to the Metropolitan Board. This the local board will do, if they cannot carry out their system of sewage for want of an outfall, and the Metropolitan Board may take any land necessary for an outfall sewer. The local board have not merely covered in old open drains, but have taken in a whole new district, and carried all the sewage into this river.

Cur. adv. vult.

The learned Judges now (Nov. 28) delivered their judgments *seriatim*.

PIGOTT, B.—This was an appeal from the judgment of the Queen's Bench upon a special case. The material facts stated by the case are, that the plaintiff was the owner of lands through which flowed the Poole River and a watercourse called the County Bridge Stream. The defendants are the Board of Works for the Lewisham District, constituted on the 1st of January 1856, under the Metropolitan Local Management Act, 1855. The plain-

tiff's lands are not within the defendants' district, nor within the area of the Metropolitan Local Management Act. The plaintiff complains of the pollution of the County Bridge Stream and the Poole River, by the discharge, through sewers constructed by the defendants, of filth into the watercourse which joins the Poole River 400 yards from the outfall of the sewers. Previous to 1852 there were few houses in the district of the defendants' board, and only a small quantity of the sewage found its way by open watercourses through a culvert (which had existed for more than twenty years) into the County Bridge Stream, and thence into the Poole River, but without fouling them to any appreciable extent. In 1852, and subsequently, the houses have greatly increased, and the sewage was carried off in the same way, through the same open watercourses and culvert, and being increased, the effect was to pollute the County Bridge Stream and Poole River to an appreciable but not serious extent. But in 1859 the open watercourses had become a serious nuisance to the inhabitants of the district. Large quantities of filth accumulated in them, the effluvia from which were of the worst description, and in many places the adjacent soil was overflowed and saturated with offensive matter. To put an end to the further use of the open watercourses, and to provide efficient drainage, the defendants in 1859 and 1860 executed the works mentioned in the case, availing themselves of the County Bridge Stream to carry off the sewage. For the drainage of the houses of the Anerley Society, which since 1856 had been drained into one of the open watercourses, the defendants had also made an outfall into a sewer, which was by them substituted for the watercourse. The effect of the new and additional drainage made by them has been to cause a quantity of offensive matter to pass into the County Bridge Stream and Poole River, to an extent to cause a substantial injury to the plaintiff's streams, but has effectually provided for the drainage of the defendants' district. For the injury so caused, the plaintiff brought his action, which resulted in the statement of this special case.

The defendants contended that the plaintiff is not entitled to maintain an action, but must proceed for compensation for his

injury under the 86th section of the statute 18 & 19 Vict. c. 120. It cannot be disputed that he is entitled to be compensated in some way ; and the question which we have to determine really depends on the proper construction which should be put upon that statute. In my judgment, the effect of the 86th section of that statute is to throw upon the district board the duty of draining and covering the open watercourses which are above described, and gives them power to do so by such works to be constructed in their own district as are necessary for the abatement of the nuisances. The mode of doing the work is not pointed out ; but the board are left to do what is necessary by "draining, cleansing, covering, or filling up." I think, also, that the works for draining the new houses of the Anerley estate are not distinguishable from the rest. They were within the district, and were previously drained by means of one of the open watercourses, and which was a nuisance there. So far as the works which have been constructed within their district are concerned, it appears to me that they are authorized by the statute.

I now come to consider the question of the outfall into the streams of the plaintiff, the lawfulness of which depends upon the language of the proviso. That language appears to me large enough to include every mode in which water rights may be prejudicially affected by sewerage works, and I cannot distinguish between streams within or without the local district.

It is true there is no express permission given to use watercourses for outfalls, nor, in my opinion, was it to be expected that there would be ; but, on the other hand, there is no prohibition on the subject, although the legislature must be taken to have been well aware of the universal custom to drain towns by these outlets. I therefore think that I am justified in construing the provisions of this legislation (so far as the language used will admit of) with reference to the existing and well-known state of things at the time ; and, in my opinion, the terms used in the proviso include cases of polluting water by throwing the sewage matter into it. The 150th section rather supports this view by empowering district boards to contract for the removal of weirs or other obstructions to the flow of water, "whereby sewage is impeded." Mr.

Lush argued that the proviso would be satisfied by our holding that the interference meant to include abstraction, but not pollution of water. I cannot, however, see any reason for such a distinction, or that we are justified in putting an arbitrary limit to the plain language employed. Indeed, it seems to me that, bearing in mind that sewerage is the subject-matter of the legislation, when the statute contemplates water rights being prejudicially affected thereby, it would be more likely to point to pollution as the prejudicial cause than to abstraction or other interference. I think that to adopt Mr. Lush's argument would be a virtual repeal of this section. For even without increasing the area of the drainage, the board would by merely converting an open course into a barrel-drain so confine the sewage matter and prevent percolation that the nuisance at the outfall would be increased, and the liability to an action thus incurred. In fact, it is to this as one cause, in connexion with the increase of new houses in the district, that the plaintiff's injury is attributable ; for the board have not changed the course of the sewerage or point of outfall. The case does not state that the defendants could have sent the outflow in any other direction. By the view I take I believe that I am only giving effect to the language and intention of the legislature, who have taken care that no private rights should be affected without ample compensation. The plaintiff may be deprived of the private enjoyment of his property to some extent, but he is only in the condition, now daily acted upon, of being called upon to yield a private right for the public benefit, and for as full a consideration as a jury may please to give him. The judgment of the Queen's Bench ought, therefore, in my opinion, to be affirmed ; but I speak with diffidence on the subject, finding so many of my learned Brethren take a contrary view.

BYLES, J.—I am of opinion that the plaintiff is entitled to the judgment of the Court. The question is, whether the defendants below can pour off any amount of sewage from their own land, including the sewage of any district above them, into a private stream situated beyond the limit of their district, and I may add to any distance below. The consequences of such interference with the water as has been

pointed out in the argument, would be not only the pollution of the stream, but the total annihilation of the value of the adjoining land for building purposes, and it might subject the owner of the soil to the danger of an action or to a prosecution for a nuisance. To test the result of interference of the defendants by a strong case, the power now claimed by the defendants would justify the district adjacent in pouring the sewage of confluent districts, or much more important districts, into the New River, from which a large portion of the metropolis derives its supply of water. One would expect that such a power as this, if conferred on a district board or vestry, would be at least given by express words, but no such words are to be found in the statute. Then, if the power exists it exists by inference if at all. It is now urged that the statute is imperative to compel the vestry or board to do the drainage, and that the drainage in this case cannot be otherwise effected. Therefore it is said that by inference the power is given. The necessity does not appear in this case; nor indeed can it be said that the necessity exists, in the strict sense of the word. Absolute physical necessity there cannot be. The sewage might be removed in carts or suitable vehicles however expensive that might be. Nor does necessity, in the lowest sense of the term, exist, that is, of doing the thing or an alternative so expensive as to be commercially impossible. For by section 89. the district board have the option of turning over the drainage to the general board, who have the power to cut an artificial drain which may effectually dispose of the sewage in the common stream. It is further alleged that the power to give compensation for interference with a stream and the right to the use of the water, implies a power to pollute the water to any extent and to any distance. Those provisions may well apply to cases where there has been an interference with or temporary use of the water, rightly or wrongly, with or without licence, because the power to take a mill and employ the water are both alike made the subject of purchase, not indeed of compulsory purchase, but where the contract is the voluntary act of the party. The act confers no compulsory power on these district boards

to purchase land. These reasons might go far to negative an inference that the district board could turn this sewage into a stream even within their own district, but they are stronger to shew that they cannot do so beyond their own limits.

CHANNELL, B.—I am of opinion that the judgment of the Court of Queen's Bench should be reversed, and that the plaintiff in error is entitled to our judgment. We are not called on to determine what power the general board might have with reference to such a case as is now before us, but to consider simply whether the district board have the power claimed; and I am of opinion they have not. The case for the defendants in error has been principally based on the 86th section, and the judgment that we are called on to review is founded on that section; and I think the question mainly depends on the interpretation we should put on that section. I have looked carefully through the other sections of the act, and I find, if we divest the case of the power given by the 86th section, there is nothing in the statute that would warrant the proceedings which the defendants in error have taken. It does not appear to me that the introductory words of the 86th section give any sanction to the defendants or justify them in the act which they have done. Great stress has been laid on the provisoes; but I am of opinion that neither the one proviso nor the other can apply to any case which is not met by the introductory words of the section. The two provisoes may well stand upon the construction, which I think is the true one, with respect to the proceedings which are justified by the enacting part of the 86th section; according to which there are two courses open to the board: to do the act making compensation to the party injured after the act is done; or (which in a variety of cases would be the better course to take) to endeavour to contract with the party whose water right is interfered with, and so to purchase the option of doing the act in question. It was necessary to introduce such a power as that, for the board would have no right to apply the rates in the purchase of anything, except to the extent justified by the act. I was much struck by the observation of my Brother Bramwell in the course of the argument,

that one would expect such a power as that which is claimed, if intended to be conferred, to have been conferred by express or direct words. I cannot see any such words here, or any equivalent words, which call on me to suppose that such a power was intended to be implied. For these reasons, I am of opinion that the plaintiff was entitled to maintain his action and was not driven to demand compensation, and that our judgment should be in his favour.

BRAMWELL, B.—I think that the judgment of the Court below should be reversed, and my opinion proceeds on the grounds taken by my Brother Channell. In express words, no power is given to do what the defendants have done to the plaintiff's property. One would not expect to find the power to do such an act given to the local board by implication only, when we find that in express terms they cannot purchase land by compulsion. It would be singular if, although they cannot take a man's land, they might, by implication, foul and spoil it. It is manifest that whatever reasons may be given for doing what they have done to the plaintiff's stream, the same could be given for doing it to any pond that he might have in his field. They claim the right to do it simply on the ground of convenience; and if they have a right to do this, I cannot see why they should not have a right to direct the sewage to one of the plaintiff's fields that might lie low, there to find its way out in any way it might happen to do. Still, it may be there is a power given to them by implication to do what they have done. It is said that the power is given by section 69, by which they are directed to cause to be made, and cleansed and maintain such sewers and works as are necessary for effectually draining their parish or district. In the first place, it does not appear that they could not do this in some other way. In the next place, if because they could not, they have a right to divert it into a brook, they have a right to divert it into any piece of land or place where they may find it convenient to send it. Thirdly, they may go to the Metropolitan Board, if they cannot otherwise do it. Fourthly, if they cannot do it at all, and no one can do it, then, as the legislature does not order an impossibility to be done, they must do so

as far as they can. Therefore, I cannot see that the section which directs that it is to be done, by implication directs that they should have a power, either of taking land, or fouling land, or spoiling land, or a pond, or a stream in the way in which it has been done in this case. I am certainly very much confirmed in my own mind by the words in section 69: "It shall be lawful for any such vestry or district board to carry any such sewers or works *through, across or under* any turnpike-road, or any street laid out or intended to be a road or place, or through or under"—leaving out "*across*"—"any cellar or vault which may be under the pavement or carriage-way of any street, and into, through or under any lands whatsoever"—introducing the word "*into*," leaving out the word "*across*." The expression "*into, through or under*" manifestly does not mean to take it *into*, and there to leave it. It must be read, therefore, "*into and through or under*"; that is to say, you may take it in, and you must take it out, either by, "*through or under*." That this is the meaning seems to me obvious. Now, the argument of the defendants is, that they have a right to take it into and leave it there, except so far as it may find its way out by the laws of gravitation or otherwise. I find nothing in section 86. to warrant the contention, that power is given to the local board by implication to send this sewage into a man's stream. Great reliance has been placed on section 86, more by my Brother Pigott than by the learned counsel for the defendants. It says, in so many words, "every vestry and district board shall drain, cleanse, cover or fill up, or cause to be drained, all ponds, pools, open ditches, sewers, drains, and places used for the collection of any drainage, filth, water, matter or thing of an offensive nature, or likely to be prejudicial to health," and may cause notice to be given to the persons causing any such nuisance, or to the owners or occupiers of premises on which the same shall exist, requiring them to abate it, and if not abated, the local board may abate it. That section manifestly applies itself to a case where there is an existing nuisance, and gives the local board power to abate it. It is said that there was an existing nuisance here, and that these ditches and sewers were nuisances forbidden

by the act. So be it. The defendants had a right to abate the nuisance; but they were bound to abate it in some way or other without infringing on the rights of property which the plaintiff was possessed of, unless power is given to them to do so expressly or impliedly. There is certainly nothing in the introductory part of the section to authorize the defendants to do what they have done. Further, they do not say they have done it for the purpose of abating the nuisance, nor have they given any notice to any one. Clearly, therefore, that part of the section would not justify them in what they have done. Then comes the proviso, which I agree is more extensive than the introductory part of the section, "provided also that where any work by any vestry or district board done, or required to be done in pursuance of the provisions of this act," &c., affects any right of water—(Now, I admit that does not mean in pursuance of the immediately preceding provisions, but generally the provisions of this act)—then, compensation is to be made, as a matter of right, to the person whose right of water is affected. It is said that the proviso shews that the local board may do things which would prejudicially affect water-right, and consequently, by implication, shews they have got the power so to affect them. I do not desire minutely to criticize these words, "done or required to be done." Does that expression mean done when not required, or required to be done when it is not done? There is here great looseness of language. Probably the original intention of the draftaman who drew the act was to put a mere proviso on the introductory words of the section; then it occurred to him, or to some one else, why do you not say generally that for whatever damage is done under the powers of this act compensation shall be given. I do not know that there is any necessity to interpolate words; but one may fairly read this proviso as though it had said that where any work is done, or required to be done, by any vestry or local board in pursuance of the provisions of the act,—if any can be done, except as aforesaid—compensation shall be given. To hold that this, which is a mere proviso saying they shall give compensation where they do what they may do, imports that

they may do something which otherwise they could not do, is contrary to all the ordinary principles of construction. I think, therefore, the proviso neither itself confers the power, nor shews it is conferred by any of the other preceding sections. I am not aware that it has been suggested that on any other ground the local board possess this power. The Court below seem to have assumed that the local board had such a power, provided the injury had been in their district, and they seem mainly to have directed their attention to this point,—whether the fact of the damage being out of the district made any difference. Mr. Lush has told us that this point, on which he now relies, if made at all, was very faintly made in the Court below; therefore, in expressing my opinion that the judgment should be reversed, I do not think I am differing from the opinion which would have been given by the Court below if their minds had been directed to this question.

KEATING, J.—I am also of opinion that the judgment of the Court below ought to be reversed. It is to be observed, that there is nothing in the case which is stated to us which raises at all the ground of necessity for the execution of the works; and Mr. Mellish, though not exactly relying on that as an argument, did certainly press it as a reason why it was extremely probable that the legislature should have given the power contended for. I entirely agree with the observations made by the other members of the Court, who are for reversing the judgment in reference to the construction of the 86th section. It seems to me clear, if I may be allowed to say so, that the proviso in that section does not extend the power beyond the earlier part of the enactment; therefore, so far as the 86th section is concerned, it does not in any way confer this power. I may say that I think it would be a strong thing to put on the act a construction, in the absence of express words, which should enable the board to deal with the property of an individual as the plaintiff's property appears to have been dealt with; because, if they have a right to discharge the sewage into the stream to which reference is made in the case, they might have poured it over his land under the same power. No doubt it is said that, whatever

injury they may do, they are bound to make compensation for; but it seems to me that it is not a case in which compensation could properly redress the injury which has been done to the plaintiff. That, of course, does not affect the construction of the statute. I was much struck with the observation of Mr. Lush, in the course of the argument, that the defendants' power is to abate a nuisance, and it is under their power for the abatement of a nuisance that they seek to exert the power which they have exerted on the present occasion. And it does seem rather anomalous that they, having the power to abate a nuisance, should exercise it in such a manner as to create a nuisance in the plaintiff's land, and one which the plaintiff might possibly be called on by some one else to abate. It is said that compensation might be given which would enable them to abate the nuisance; but it seems to me never to have been contemplated by the legislature to attribute compensation to an injury of this kind. Under these circumstances, it seems to me, for the reasons which have been given by the other members of the Court, that the judgment of the Court below ought to be reversed.

POLLOCK, C.B.—I am of opinion that the judgment of the Court below ought to be affirmed. It is true that the Court of Queen's Bench state that they delivered their judgment not without some hesitation. But I am not prepared to reverse that judgment, and I own, it appears to me, with most humble deference to the rest of the Court, that the view which the Court below has taken on the subject is the correct view. What fell from my Brother Byles with respect to the New River appears to me to be entirely beside the question. The New River is absolutely and strictly private property. The New River Company is not a public board, and the New River, so far as I know, has not a single drain running into it, from the fountain-head in the town of Ware down to the reservoir in Islington, whence the water is diffused all over London. The judgment of the Court below is founded on a very different state of things. It proceeded on the fact, that the streams in question, namely, the Poole River and the County Bridge Stream, had been used as drains; that the drainage of this very

district actually flowed into them, though under circumstances which at the time rendered the drainage into those streams not appreciably a nuisance. And I think it cannot be much doubted that if the local board had allowed the houses to increase, and the quantity of nuisance and filth to accumulate until it actually ran down, time would have done that which the Commissioners have done, and done as I think in obedience to the act. Where there is the drainage of the surplus-water of a brook into a stream which flows into another stream, and so at last into the ocean,—if the neighbourhood becomes more populous by the multiplication of inhabitants, the various sources of pollution which arise out of the necessities of social life will of necessity at last make the drains a nuisance which originally were harmless. The case finds that there were streams which conveyed the water and offensive matter at times, but not in a quantity sufficient to make it appreciably a nuisance. What the defendants have done, is only so to construct the drains as to enable them to carry off not merely that which heretofore was carried off, but that which ought to be carried off in order that the defendants may obey the act and render the district healthy, which otherwise would become unwholesome. The effect of this has been not to do any new act, but merely to increase that which was done before, and to make that appreciably a nuisance which before was not so. That is the foundation of the judgment of the Court of Queen's Bench. I think they were perfectly right, and that their judgment ought to be affirmed.

ERLE, C.J.—In this case the declaration was for fouling two streams of the plaintiff. The defendants pleaded that the acts complained of were done in the exercise of the powers given to the defendants by the Metropolis Local Management Act. The facts were that before 1852 the houses in the district were few, and the sewage from those passed into open watercourses which joined to those streams, but did not foul the water to an appreciable extent. If sewage there was, it probably soaked away. After 1852 the Crystal Palace increased the quantity of sewage, and it passed in the same watercourses, and fouled the water of the streams to an appreciable,

but not to a serious extent. Between 1852 and 1859 the houses increased and the watercourses became a serious nuisance from the accumulation of filth therein. The defendants, both to put an end to these nuisances, and also to provide efficient drainage for the whole district and for the Anerley Building Society's land, caused a number of underground sewers to be made and arranged, so that the outfall for the sewage of the whole district should be at the same place where the old watercourse comes. This new system of sewers has prevented the accumulation of filth in the open watercourses, but the quantity of filth carried into the streams is greatly in excess of what had reached it before the new sewers were constructed, and has rendered those streams foul, stinking and wholly unfit for cattle or domestic use. The outfall of the watercourse is not the boundary of the defendants' district; the fouling of the stream takes place out of the district. The defendants, in covering the watercourse, acted in pursuance of the powers given by the 86th section, and if any damage arises from such covering, it would be a subject of compensation under that section. But the question arises in respect of the deposit in the plaintiff's stream of a large quantity of sewage brought there by the new system of sewers for the district, made by the defendants, as to which it is admitted that an action lies, unless the defendants were empowered by the act to make the deposit. Then, does the act give that power? Section 86, empowering the defendants to cover open watercourses which are a nuisance, gives no power to use the land or water of other persons for the purpose of receiving sewage, except by agreement. It is clear from the facts stated, that no prescriptive right of fouling the water by twenty years' usage had been gained by anybody. The defendants, therefore, had no right of outfall for the sewage there collected into the plaintiff's stream, unless the act created it; and I can find no such right given either by this or any other section of the act. Section 86, after requiring drains to be covered, so that the nuisance shall be removed, goes on to provide that when any work by any district board done or required to be done in pursuance of the provisions of this act, prejudicially affects any right to the use of water, full compensation

shall be made in the manner hereinafter provided, or the board may purchase such right in the manner provided for the purchase of other rights. If the defendants had done no more than covering the open watercourse, and so removing the existing nuisance, they would have acted in pursuance of the powers given by section 86, and the remedy for the plaintiff would have been compensation merely; but as they have made a new system of sewers, and thereby collected a much larger quantity of sewage than reached the stream before, and caused that quantity to fall into the plaintiff's stream, they have exceeded their powers, and are liable to an action. The other sections of the act are framed in accordance with that construction. Section 69. gives the general power over the sewers in the district whereby the district board are required to repair and maintain the sewers vested in them, and to cause such alterations of sewers to be made as will be necessary for effectually draining their district, and it is made lawful for the district board to carry any sewers under any houses or any land whatever, making compensation for any damage done thereby, in manner thereinafter provided. Sections 150, 151. and 152. provide for the compensation to be made if any land or any right or easement in or over any land is to be taken. Section 150. enables the Metropolitan Board and every district board to take any land, or any right or easement in or over any land which may be necessary for the formation or protection of any works which they are authorized to execute under this act. Section 151. enacts that the provisions of the Lands Clauses Act, 1845, shall, subject to the provisions in this act, be incorporated therewith for the purpose of enabling the Metropolitan Board and every district board to take land or any rights or easements in land. Then section 152. provides that the provisions of the Lands Clauses Consolidation Act, with respect to the purchase and taking of land otherwise than by agreement, shall not be incorporated with this act save for the purpose of enabling the Metropolitan Board to take land or any right or easement in or over any land. From those provisions it is clear that the district board cannot take land or any right or easement in land by compulsion. They can take only by agreement. Thus they could not acquire the easement

of depositing sewage in the plaintiff's stream unless by agreement with him as proprietor of the stream. We are confirmed in this construction of the act by considering the other sections to which Mr. Lush referred as sections containing provisions for the vesting trunk sewers in the Metropolitan Board with the proper outfalls, and enabling district boards to connect branch sewers with the trunk sewers, and also provisions enabling any district board to give up to the Metropolitan Board the branch sewers in their district, if they think right, and the Metropolitan Board has power, both in and beyond their district, to take lands both by compulsion and by agreement, so as to dispose of the collection of sewage. If the defendants could maintain the right they have claimed, the plaintiff would probably be liable at his own expense to cover the stream so as to prevent a nuisance, in other words, to be at the expense of making a sewer to carry off the sewage from the plaintiff's district. Also, if the defendants can maintain their right, they would permanently deteriorate the value and enjoyment of the plaintiff's property for residential and agricultural purposes, and would in effect produce a sale by compulsion, which the statute has expressly excluded. The power to purchase streams, which is given by section 86, is subject to the provisions with respect to the purchase by the district board above mentioned—that is, they can purchase by agreement only, and not by compulsion, when damage has been caused by a work done in the exercise of the powers given by this act. For these reasons, I am of opinion that the defendants in doing the act complained of were not acting in pursuance of the powers given by the statute, and therefore that the plaintiff has a right of action, and is not restricted to a right to compensation. In this judgment I consider the point relied on in the Court below, namely, that the damage was done to the plaintiff out of the district of the defendants, to be immaterial. I ground my judgment on the point on which Mr. Lush has relied, as above explained, and which does not appear to have been pressed on the attention of the Court below. With respect to that point, the place of damage makes no difference.

Judgment reversed.

1865.
Jan. 18.

{ WERE, *appellant*, v. THE CLERK
OF THE PEACE OF DEVON,
respondent.

County Rate—Police Rate—Borough having separate Court of Quarter Sessions—Non-Intromittant Clause—Charter—15 & 16 Vict. c. 81.

By a charter of James the First, the mayor and recorder of the borough of B, in the county of D, for the time being, were empowered to be Justices to keep the peace in the borough, and to have full power and authority to inquire concerning whatsoever trespasses, misprisions, and other minor offences, defaults and articles done, moved, or committed within the borough, which ought or might be inquired into before the keepers and Justices of the Peace in any county, so that they should not in any manner proceed to the determination of any treason, murder, or felony, or of any other matter touching the loss of life or limb, &c. By the same charter was granted to them the same and similar courts of record, customs, liberties, privileges, franchises, &c. which they had theretofore holden and enjoyed, or ought to have holden and enjoyed. The mayor and recorder had always held a separate Court of Quarter Sessions, and had tried felonies and misdemeanors without any interference by the county Justices, although there was not any non-intromittant clause in the charter under which the privileges of the borough were claimed.

In making a county and police rate the borough had been ordered to pay its proper proportion, although it had never contributed before, and although the Justices had been in the habit of making a rate in the nature of a county rate, and had their own police.

Upon appeal against such rate, it was held, that in the absence of a non-intromittant clause, it must be taken that the county Justices had at any rate concurrent jurisdiction in the borough, and that, under 15 & 16 Vict. c. 81, the borough was liable to pay its proportion.

So held, also, with regard to the police rate.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 47.]

BAIL COURT. { **KELLETT v. THE LOCAL BOARD**
 1864. { **OF HEALTH OF TRANMERE.**
 Nov. 24. { **THE LOCAL BOARD OF HEALTH**
 { **OF TRANMERE v. KELLETT.**

Arbitration — Umpire — Public Health Act, 1848, 11 & 12 Vict. c. 63. — Duration of Authority — Power of Court to enlarge Time for awarding.

The authority of an umpire appointed under the Public Health Act, 1848, to make an award, endures only twenty-one days from the date of his appointment, unless he enlarge the time, which he may and ought to do during his twenty-one days, notwithstanding the arbitrator's time has not expired.

The Court has no power under the Common Law Procedure Act, 1854, section 15, or otherwise, to enlarge the time in arbitrations under the Public Health Act.

A rule had been obtained by Kellett to set aside an award which had been made between him and the Local Board of Health of Tranmere, respecting the proportion to be paid by Kellett of the expenses incurred by the local board in paving certain streets.

The ground of the motion was, that the award had not been made within the time prescribed by law.

The local board obtained a cross-rule to enlarge the time for the umpire making the award till the 31st of December.

Both rules came on for argument together.

It appeared on the affidavits that Kellett was the owner of some houses fronting on certain streets in the district of Tranmere, which the local board required the owners to pave. This the owners neglecting to do, the board did the work, and under section 69. of the Public Health Act, 1848, 11 & 12 Vict. c. 63, had the expenses apportioned. Kellett disputing the propriety of the amount charged on him, the matter was referred to arbitration under the act. The local board appointed their arbitrator on the 5th of January last, and Kellett his on the 15th of January. The arbitrators appointed the umpire on the 3rd of February. The arbitrators enlarged their time till the 30th of April. The umpire made no enlargement at all. The arbitrators did not finally differ till

the 27th of April, on which day they gave notice to the umpire that they could not agree. By arrangement the arbitrators and umpire sat together and heard the evidence. The umpire made an award dated the 2nd of May last, but no notice was given of it to Kellett until August last.

Field shewed cause against the rule to set aside the award. — The award was made in time. The umpire had three months to make his award from the time of the duty devolving upon him. Though the statute refers to the time of appointment as the date from which the time runs, that must mean from the time when the appointment is called into operation, that is, when the arbitrators have failed to make an award. To put a literal construction on the words of the statute, leads to the absurd result that in almost all cases the appointment of an umpire would be nugatory, for if the arbitrators enlarge their time beyond the twenty-one days from the date of the umpire's appointment his power is gone. Until the arbitrators have finally disagreed, or their time has expired, the umpire could not even enlarge his time. Under the similar provision of the Lands Clauses Consolidation Act, section 23. of the 8 & 9 Vict. c. 18, the Courts have held that the umpire's time runs from the time of the duty devolving on him — *Skerratt v. the North Staffordshire Railway Company* (1) and *Bradshaw's case* (2). At any rate the umpire has three months in which to award.

F. Russell, in support of the rule. — The umpire, not having enlarged his time, was bound to make his award within twenty-one days from the date of his appointment. The appointment is made when the arbitrators sign it. By the express words of the statute, sections 124. and 125. of the 11 & 12 Vict. c. 63, the time runs from the appointment. Neither in the case of an umpire, nor in the case of arbitrators, does the power of entering on the reference commence at once from the appointment. Before either arbitrators or umpire can act, they must make a declaration before a Justice. It is clear that the act, section 125, contemplates that the umpire shall be

(1) 2 Phil. 475; s. c. 17 Law J. Rep. (N.S.) Chanc. 161.

(2) 12 Q. B. Rep. 562; s. c. 17 Law J. Rep. (N.S.) Q. B. 362.

* Decided in Michaelmas Term.

appointed at least three weeks before he can be called on to act. The natural construction of the statute leads to no absurd result. The great object of the statute was to obtain a speedy decision. The legislature probably contemplated that, which is the usual course, the arbitrators and umpire should act together, and that the arbitrators would allow ample time for the umpire. At any rate, the umpire would always have some time for awarding in, for the umpire must have the number of days between the appointment of the last arbitrator and his own appointment; and there would have been no difficulty here had the umpire enlarged his time. He had the power to enlarge his time while the arbitrators were considering the matter. It was necessary for him to do so to keep his power alive—*Doddington v. Bailward* (3). The cases cited, decided on the Lands Clauses Act, do not apply, for there the statute says, that if the arbitrators or umpire fail for three months to make an award their power shall cease, without saying if they fail for three months from any particular date. Here the date from which the time is to run is stated.

F. Russell then shewed cause against the rule to enlarge the time.—The Court has no power to enlarge the time. There is no common law power to enlarge. The statute 3 & 4 Will. 4. c. 42. s. 39. applies in terms only to references of an action or to references by agreement under the statute 9 & 10 Will. 3. c. 15. Nor does the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. s. 15, give any such power. That only applies to compulsory references of matters of account under the act, to references in an action or suit, and to references by agreement, specified in section 5. The whole purview of the statute shews that it is so limited. There is no instance of an attempt having ever been made before to apply this provision to compulsory references under the Public Health Act or the Lands Clauses Act. It would be inconsistent with the provisions of the Public Health Act, which say that the award shall be made within three months, to hold that the Court could enlarge the time indefinitely. Again, section 15. of the Common

Law Procedure Act says that the arbitrators and umpire shall have originally, and without enlargement, three months to award in. The Public Health Act says twenty-one days. The same remarks apply to references under the Lands Clauses Act. It cannot be supposed that by the Common Law Procedure Act, 1854, the legislature intended to repeal the special provisions of the Public Health Act and the Lands Clauses Act in reference to arbitration.

Field, in support of the rule.—The Court has power to grant this enlargement under section 15. of the Common Law Procedure Act. Section 12. of that act is universal in its terms. It says "in any arbitration" the Court may appoint an umpire. Section 15. refers to section 12, because it refers to the document therein mentioned. Here the statute and the submission form a sufficient document. It is a very reasonable power for the legislature to grant to the Judges, to enable them to enlarge the time fixed by the earlier statutes.

SHEE, J.—As to the first rule, I am of opinion that it must be made absolute. It is an application to set aside an award under the Public Health Act. The umpire did not make his award within twenty-one days from the date of the appointment, nor did he enlarge his time. At one time I had a doubt about the construction of the statute, arising from the words in section 125, that if the arbitrators fail to make an award the matter shall be decided by the umpire. But the case of *Doddington v. Bailward* (3), shewing that the umpire has power to enlarge his time before the arbitrators' time has expired, reconciles all difficulties, and prevents any difficulty of putting the plain construction on the words of the act. The award, therefore, is not made in time, and must be set aside.

With respect to the rule to enlarge the time, I am of opinion that the Common Law Procedure Act, 1854, section 15, does not authorize the Court to enlarge the time in compulsory references under the Public Health Act, 1848. The fact that no similar application has been previously made confirms my view. The second rule, therefore, must be discharged.

Rules accordingly.

1865. { ANDREW AND ANOTHER v.
Jan. 17. { WALTER MACKLIN, REUBEN
MACKLIN, AND CORNELIUS
MACKLIN.

Debtor and Creditor—Bankruptcy Act, 1861, (24 & 25 Vict. c. 134.) s. 192.—Composition Deed—Release of Joint Debtors.

A deed of composition by a debtor with his creditors under section 192. of the Bankruptcy Act, 1861, containing a release of the debtor by each of the creditors from all debts due from him to them respectively, cannot be pleaded in bar by a joint debtor to an action by a non-assenting creditor; for if it extends to joint debts so as to release a joint debtor, it is bad, and not binding on non-assenting creditors.

Declaration for goods sold and delivered and on an account stated.

Plea, by defendant Reuben Macklin, that after the accruing of the plaintiffs' claim, and after the Bankruptcy Act, 1861, came into operation, the defendant Cornelius Macklin executed a composition deed within the meaning of that act, whereby he covenanted to pay his creditors a composition of 6s. in the pound, and each of his creditors released him from all debts due from him to them respectively, and which deed is as valid and effectual on the plaintiffs and all other creditors of the said Cornelius as if the plaintiffs and all other creditors had executed it, &c., all the requisites of the statute having been complied with.

Demurrer and joinder. (There was also a replication, setting out the deed in terms, to which there was a demurrer, the clause of release was in the terms set out in the plea.)

Kemplay, for the plaintiffs.—This plea raises a novel but untenable point, that when a debtor enters into a deed under the 192nd section of the Bankruptcy Act, 1861, and that deed contains a release by the creditors, it operates as a release not only to the debtor himself, but to his co-debtors.

[BLACKBURN, J.—Do you concede that such a deed would operate as a release at common law?]

Not unless it apply to joint debts. This deed must be taken to apply only to sepa-

rate debts. (He was then stopped by the Court.)

Gibbons, for the defendants, argued that the release was a general release of *all* the debts by each of the creditors; that it therefore applied to joint as well as separate debts, and consequently was a release of the joint debtors.

COCKBURN, C.J.—The 192nd section of the Bankruptcy Act, 1861, cannot have been intended to extend beyond the separate debts of the debtor executing the deed. At any rate, if the release in terms extended to release the joint debtors it is quite plain it would be bad, and not binding on non-assenting creditors; and it makes no difference if the effect, as Mr. Gibbons argues, is the same, though the actual terms do not extend so far. The defendant, therefore, is in this dilemma: either the deed does extend to joint debtors, and is therefore bad; or it does not, and then it affords no bar to the defendant.

CROMPTON, J., BLACKBURN, J. and MEL-
LOB, J. concurred.

Judgment for the plaintiffs.

1865. } POPE, appellant, v. WHALLEY,
Feb. 4. } respondent.

Market—Market and Fairs Clauses Act, 1847, (10 Vict. c. 14.) s. 13.—Seller's "own shop."

In order to ascertain whether a structure of wood be a person's "own shop" within the exception of the 13th section of the Market and Fairs Clauses Act, 1847 (10 Vict. c. 14), the proper elements to take into consideration are: whether it is of a substantial character; whether it is merely an alteration of a stall in order to evade the provisions of the act; whether it would admit of a purchaser coming inside, and would protect goods from the weather, and admit of their being sufficiently secured if left in it at night; and also the nature and duration of the holding from the owner by the person using the structure for the sale of goods.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 76.]

1865. }
Jan. 17. } JONES v. MORRIS.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192. Sched. D.—Trust Deed—Plea in Bar.

A deed, under section 192, and in the form Sched. D. of the 24 & 25 Vict. c. 134, by which the debtor assigned all his estate and effects to trustees for the benefit of creditors, if it contain no release, cannot be pleaded in bar to an action by a creditor who has assented to and undersigned the deed.

Declaration on a bond for 1,000*l.*, dated the 27th of September 1858.

Plea, that after the accruing of the cause of action, and after the Bankruptcy Act, 1861, came into operation, and before this suit, the defendant being indebted to divers persons, and unable to pay, he, and certain persons as trustees, entered into and executed a deed in the form in Schedule D, of the act, made between the defendant of the one part and the trustees of the other, on behalf and with the assent of the plaintiff and other creditors; and which deed the plaintiff undersigned as a creditor; by which deed the defendant conveyed all his estate and effects to the trustees absolutely, to be applied and administered for the benefit of the creditors of the defendant in like manner as if the defendant had been at the date of the deed adjudged a bankrupt. The plea then alleged the consent of the requisite majority of the creditors, due registration, with certificate thereof, &c.; that immediately on the execution of the deed by the defendant possession of all the property comprised in it, of which the defendant could give or order possession, was given to the trustees; and that everything had happened and been done by the defendant and the trustees and the creditors necessary to make the deed, and the same is, as valid and binding on all the defendant's creditors as if they were parties to and had executed it.

Demurrer and joinder.

H. James, in support of the demurrer, cited *Eyre v. Archer* (1) as directly in point

(1) 16 Com. B. Rep. N.S. 638; s. c. 33 Law J. Rep. (N.S.) C.P. 206.

for the plaintiff, that a deed like the present without a release cannot be pleaded in bar to an action.

[CROMPTON, J. referred to a case decided the day before in the Exchequer—*Clarke v. Williams* (2).]

Macnamara, for the defendant. — The plaintiff is an assenting party to the deed, and has, therefore, agreed to take under the *cessio bonorum* to be distributed as in bankruptcy. Where a deed is executed according to the form in Schedule D. to the act of 1861, it becomes a substituted contract between the debtor and each of his creditors, and their original debts are extinguished. It would be a fraud on the other creditors for the plaintiff first to assent to the deed and then bring an action.

[BLACKBURN, J.—Have you any case to shew that a creditor executing this deed would at common law have been bound by it as a release of his debt?]

Good v. Cheesman (3) is an authority to that effect.

[CROMPTON, J.—The present deed cannot be brought within that; all that the act intends by one of these deeds is to give the same protection as in bankruptcy. The debtor is protected from an execution unless the Court orders it; but how could it do that, if the effect of the deed is *ipso facto* to stop any action? BLACKBURN, J.—There is nothing on the face of the deed to bind the creditors. Is there any case at all in point on the old trust deeds?]

Whitmore v. Turquand (4) bears upon the point. In that case Lord Campbell, C., says, "Although this deed contains no release nor declaration that the dividend is to be taken in full satisfaction of the debt, the arrangement is in the nature of a *cessio bonorum* under the Roman civil law; and I think that when a dividend has been received satisfaction is to be inferred."

[BLACKBURN, J.—That case, as far as it goes, makes against the defendant, as it seems to have been assumed that obtaining judgment without execution was not a dissent from the deed.]

The judgment obtained in that case was before the deed had been executed. Here,

(2) *Post*, Exch. 60.

(3) 2 B. & Ad. 328.

(4) 30 Law J. Rep. (N.S.) Chanc. 345; see page 354.

bringing the action is directly contrary to the intention of all parties.

COCKBURN, J. — The case of *Eyre v. Archer* (1) is conclusive against the defendant. There must be judgment for the plaintiff.

CROMPTON, J., BLACKBURN, J. and MELLOR, J. concurred.

Judgment for the plaintiff.

1864. } BURTON v. LE GROS AND
Nov. 7.* } ANOTHER.

Action—County Court, Liability of High Bailiff of—Notice of Action—9 & 10 Vict. c. 95. ss. 106, 138.

The high bailiff of a county court is liable, to the same extent as the sheriff, for the wrongful act of a person employed by one of his sub-bailiffs, to whom a warrant is delivered for execution.

Where, therefore, a warrant to the high bailiff, to levy on the goods of B, was delivered for execution to one of the sub-bailiffs, and he seized goods of B. on the 3rd of December, and left C. in possession, and C. the next day wrongfully sold the goods, contrary to the 9 & 10 Vict. c. 95. s. 106, the high bailiff was held liable.

The notice of action signed by B, the plaintiff, under the 9 & 10 Vict. c. 95. s. 138, was: "It is my intention at the end of one calendar month from the date hereof to commence an action against you" (the high bailiff) "in the Court of Queen's Bench, to recover compensation in damages for a trespass and excessive levy committed by you and your officers on the 3rd of December 1863, by selling and disposing of certain goods upon the premises, No. 80, Derbyshire Street, &c., to satisfy debt and expenses under an order recovered against me in the S. county court:"—Held, sufficient.

*Declaration—That a warrant was issued out of the county court of Middlesex, holden at Whitechapel, to the defendants who are the high bailiffs of that court, to levy on the plaintiff's goods 1*l.* 9*s.* 6*d.* recovered against him by one Robert Cousins; that the de-*

*fendants seized certain goods of the plaintiff, to wit, &c., of much greater value than 1*l.* 9*s.* 6*d.* and expenses, and wrongfully, negligently and improperly sold them for a much less sum than they were really worth, and converted the proceeds to their own use.*

Second count, for the conversion of the plaintiff's goods.

Plea—not guilty by the various County Court Acts.

At the trial, before Cockburn, C.J., at the Sittings in Middlesex after Trinity Term, it appeared that one Robert Cousins having obtained judgment against the now plaintiff in the Shoreditch County Court, a warrant was issued to the defendants as the high bailiffs of the Whitechapel court to levy 1*l.* 6*s.* 6*d.* debt and 3*s.* costs. The warrant was handed by the defendants to one Sykes, one of their under-bailiffs, for execution, and he levied on the goods in the plaintiff's house, No. 80, Derbyshire Street, Bethnal Green, on the 3rd of December 1863; and the plaintiff being unable to pay, Sykes put and left one Crane in possession, and he (instead of keeping possession for five days as required by the 9 & 10 Vict. c. 95. s. 106.) himself sold the goods on the next day, the 4th of December, for 2*l.*, offering the plaintiff 8*s.* 6*d.*, being the balance after payment of levy and expenses; this the plaintiff refused to take, and then Crane appeared to have paid the debt and costs to Cousins, and retained the 8*s.* 6*d.* himself. The defendants had in no way personally interfered, nor had they any knowledge even of Crane.

The plaintiff caused the following notice to be served on the defendants:

"To R. B. Le Gros and S. B. Williams, high bailiffs of the Whitechapel County Court, &c.

"Gentlemen,—I hereby give you notice that it is my intention at the end of one calendar month from the date hereof to commence an action against you in Her Majesty's Court of Queen's Bench, at Westminster, to recover compensation in damages for a trespass and excessive levy committed by you and your officers on the 3rd day of December 1863, by selling and disposing of certain goods and chattels in and upon the premises, No. 80, Derbyshire Street, Bethnal Green, in the county

* Decided in Michaelmas Term, 1864.

of Middlesex, to satisfy the sum of 1*l.* 6*s.* 6*d.* and expenses, under an order recovered against me at the suit of Robert Cousins in the Shoreditch County Court of Middlesex on the 3rd day of June 1862. Dated this 8th day of January 1864.

"James Burton."

And in due course he commenced this action.

A verdict was found for the plaintiff for 20*l.*, with leave to the defendants to move to enter a verdict for them, or a nonsuit, if the Court should be of opinion that the defendants were not liable for the acts of Crane, or that the notice of action was insufficient.

Parry, Serj. moved accordingly.—First, the defendants are not liable for the wrongful act of Crane, who acted without their authority or knowledge, and the whole of whose proceedings were in direct violation of the duties imposed by the County Court Act and Rules.—(See 9 & 10 Vict. c. 95. s. 106, and rule 107.)

[BLACKBURN, J.—Unless the defendants can make out any distinction between the position and liability of the high bailiff of a county court and those of the sheriff, they are liable. *Gregory v. Cotterell* (1) is directly in point. In that case the Exchequer Chamber held, that the sheriff was liable for the wrongful act of a third person whom the bailiff, employed by the sheriff, had employed. And Jervis, C.J., delivering the judgment of the Court, cites, with approval, *Smart v. Hutton* (2), where the sheriff was held liable for the act of the bailiff in acting directly contrary to his duty and to the mandate, by seizing the person of the debtor under a *fi. fa.* CROMPTON, J.—This is not a question of master and servant. COCKBURN, C.J.—The sheriff is always considered to be himself in possession by the hands of his minister. CROMPTON, J.—He is liable for every act of his officer civilly, though not criminally.]

Secondly, the notice of action is bad; there is no statement that the goods seized were the property of the person giving that notice, and no amount of damages is stated. The 9 & 10 Vict. c. 95. s. 138. requires

"notice in writing of *such* action" (that is, an action for anything done in pursuance of the act), "and of the *cause* thereof, shall be given to the defendant one calendar month at least, before action." In *Eltob v. Wright* (3) an action was brought for breaking and entering the plaintiff's house, and taking his goods; and the notice of action, under this very section, was held bad which stated that the defendants broke and entered the plaintiff's house, and took goods therein, without mentioning whose goods: and the objection was also held fatal, that the amount of damages claimed in the action was not mentioned in the notice. Lord Campbell, C.J. says: "I think the notice is not sufficient, as it does not disclose a material part of the claim in the declaration, namely, that part of it which relates to the taking of the goods; the notice does not state the goods to be the goods of the plaintiff, indeed it seems to studiously avoid stating the goods to be *hers*. The declaration contains a different cause of action from that stated in the notice. We must look to the purpose for which the notice is intended, that is, that a tender of amends may be made, and I therefore think that the declaration and the notice should contain the same complaint. I think also that there is much weight in the third objection, as to the special damage not being stated; it would be very unfair that a large sum should be claimed at the trial, which is not mentioned in the notice of action."

[BLACKBURN, J.—In this case the notice does not charge a trespass to the plaintiff's house, but only charges the wrongful act of selling goods, which must mean the plaintiff's goods. COCKBURN, C.J.—The notice in *Eltob v. Wright* (3) mentioned the wrong court, which was clearly fatal, so that there was no necessity to give much consideration to the other points.]

There is a third objection: the wrongful act of sale is charged to have taken place on the 3rd of December 1863, whereas it really took place on the 4th of December. The time and place of the wrongful act charged ought to be correctly stated—*Breese v. Jerdein* (4). In that case the

(1) 5 El. & B. 571; s. c. 25 Law J. Rep. (N.S.) Q.B. 33.

(2) 8 Ad. & E. 568, n.; s. c. 3 Law J. Rep. (N.S.) K.B. 52.

(3) 3 Car. & K. 31.

(4) 4 Q.B. Rep. 585; s. c. 12 Law J. Rep. (N.S.) Q.B. 234.

action was against a metropolitan police-constable, and the notice was for wrongfully taking the plaintiff into custody on or about the 27th of May last past; and the Court held, that the notice was insufficient, for that "the want of time and place rendered the notice void, under the 10 Geo. 4. c. 44. s. 41," on the authority of *Martins v. Upcher* (5), decided on the 24 Geo. 2. c. 44.

[MELLOR, J.—Section 138. of the 9 & 10 Vict. c. 95. requires a notice in writing of the action, and the cause thereof; whereas *Jervis's Act* (11 & 12 Vict. c. 44. s. 2.) and the older acts protecting Justices, require that in the notice of action the cause of action shall be clearly and explicitly stated (6).]

COCKBURN, C.J. — We are of opinion that none of the points are tenable.

Rule refused.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Queen's Bench.)

1864. }

Nov. 29. }

WATSON v. RUSSELL.*

Money Had and Received—Cheque improperly negotiated.

K. had chartered a vessel of the defendant at the hire of 30l. a week, payable every four weeks in advance, with liberty for the defendant in case of non-payment to re-take the ship. A month's payment of 120l. in advance being due, K. applied to the plaintiff to assist him, and the plaintiff gave K. a cheque for 60l. payable to the defendant or order, on the terms that K. should inform the defendant that the cheque was given on the consideration of the defendant's allowing the vessel to proceed on a certain voyage. K. paid the cheque to the defendant, but did not tell him of the plaintiff's conditions. As the whole of the 120l. was

not paid, the defendant stopped and re-took the vessel. The cheque being presented at the plaintiff's bankers, on the part of the defendant, was duly cashed:—Held, that as the defendant had received the plaintiff's cheque, which was a negotiable security, without notice of any conditions, and for a valuable consideration, the debt due to him from K, the plaintiff was not entitled to recover from the defendant any portion of the proceeds.

This was an appeal, by the plaintiff, against the judgment of the Court of Queen's Bench, discharging a rule to set aside the nonsuit and enter a verdict for the plaintiff (1).

The action was for money had and received in respect of 60l., the proceeds of a cheque of that amount drawn by the plaintiff, and payable to the defendant or order.

The defendant had chartered a vessel, on the 16th of November 1860, to one Keys of Liverpool, who had hired her for six months. The charterer agreed to pay as hire for the ship at and after the rate of 30l. sterling a week, to be paid every four weeks in advance, the first payment of 120l. to be made on the vessel being placed at the charterers' disposal. In default of payment of the sums stated at the times and in the manner provided, there was liberty to the shipowner to withdraw the ship without prejudice to any claim for payment. The ship was placed at the service of Keys. The first payment of 120l., due on the 17th of November 1860, was paid. The second payment for the four weeks ensuing becoming due on the 17th of December was not paid by Keys; thereupon the defendant threatened to take the ship away. On the 22nd of December Keys sub-chartered the ship to another person through the plaintiff; and on Keys applying to the plaintiff for assistance, the latter then drew the cheque for 60l. and gave it to Keys, payable to the defendant or order, on the terms that he should inform the defendant that the cheque was given on condition that he (the defendant) would allow the ship to perform the sub-charter. Keys forwarded the cheque to the defendant, but did not inform him of the

(5) 3 Q.B. Rep. 662; s.c. 11 Law J. Rep. (N.S.) Q.B. 291.

(6) The 10 Geo. 4. c. 44. s. 41, under which *Breese v. Jerdein* was decided, is in precisely the same terms as the 9 & 10 Vict. c. 95. s. 138.

* Decided in the Sittings after Michaelmas Term, coram Erle, C.J., Pollock, C.B., Bramwell, B., Channell, B., Byles, J., Keating, J. and Pigott, B.

(1) 31 Law J. Rep. (N.S.) Q.B. 304.

terms on which it had been given. The defendant received the cheque on the 24th of December. The defendant, however, not having received the whole 120*l.* on that day, stopped the vessel, and from that time the vessel never was again in Keys's possession. The defendant passed the cheque to his bankers, and it was cashed at the plaintiff's bankers' on the 27th of December 1860.

On the trial the plaintiff was nonsuited, but leave was given him to move to enter a verdict for the 60*l.*

The case was argued, in the Exchequer Chamber, by

Brett, for the plaintiff, the appellant (Nov. 29, 1864).—The plaintiff was entitled to recover back from the defendant the whole 60*l.*, the amount of the cheque. Even if the defendant had a right to retain it as against Keys, he had no right to keep it as against the plaintiff. Had it been money or a mercantile negotiable instrument, it is admitted that the instructions given by the plaintiff to Keys could have had no effect upon the defendant's rights. But the cheque was not negotiable in the hands of Keys, being intencionally made payable to the defendant or order. It was given to Keys as a mere agent for the plaintiff, with a conditional and limited authority. Keys therefore had no right to hand it over except on those special conditions. It was of no value at all to Keys. Had it not been cashed by the bank, the plaintiff might have recovered the cheque in trover, because it was handed over without authority. So, though it has been paid, the plaintiff may say that the defendant has wrongfully and without authority received 60*l.* of his money. Secondly, if not entitled to recover the whole, the plaintiff is entitled to at least 30*l.* The defendant had no right both to take the ship and keep the money. It would be an unjust interpretation of the charter-party to hold that he could do both. The consideration for the hiring of the ship is 30*l.* per week. The mode of payment being a month in advance does not affect the question. The consideration for the payment is the use of the ship. The power to withdraw the ship gives the shipowner an option of claiming payment or of withdrawing the ship and cancelling the charter, without prejudice to any claim

the defendant might have in respect of any week's hire during the time in which the charterer had the use of her. Had the defendant taken the ship on the second day of the month, he could not have sued Keys for the month's hire, for he would have had to aver in his declaration that he was ready and willing to let Keys have the use of the ship during the time.

Edward James, for the respondent, was not heard.

ERLE, C.J.—We are of opinion that the judgment should be affirmed. The plaintiff's cheque was a negotiable security, and if taken by the defendant for value without notice, may properly be held by him, though as between the plaintiff and Keys the former may have been the true owner. Now it was taken for value by the defendant, for when the defendant received it 120*l.* were due to him from Keys for the hire of the ship. But then it is said, that the consideration failed, that the defendant had no right to withdraw the vessel in default of payment, and at the same time retain the sum which had been paid. This is questionable, as a right of action for the 120*l.* having once vested, it is not easy to see how it became divested by the subsequent seizure of the ship, whether rightful or wrongful. But supposing that it did, supposing that the defendant is not entitled, as against Keys, to retain the 60*l.*, or that Keys can maintain an action for the seizure of the ship, still that is a matter between Keys and the defendant, and we think that the plaintiff cannot avail himself of it to maintain this action. It is clear, if the seizure was wrongful, that Keys could sue for it; if not wrongful, and the money is to be returned, and Keys can sue for it, it seems to follow that the plaintiff cannot. We therefore agree with the majority of the Court below, and for the reasons given by them, we think that the judgment ought to be affirmed.

The other JUDGES concurred.

Judgment affirmed.

1865. }
Jan. 26. } ANONYMOUS v. PARR.

Evidence—Practice—Interrogatories before Declaration—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 51, 52.

The Court will not allow interrogatories before declaration, at least where the plaintiff does not shew in his affidavit what his cause of action is.

This was a motion for leave to administer interrogatories to the defendant, after appearance, but before declaration.

It appeared, from the affidavit, that the plaintiffs, a firm of attorneys and solicitors, had clients against whom proceedings in Chancery had been instituted by the defendant, and certain papers were in the plaintiffs' possession connected with the hotel company as to which the proceedings had been taken. At an interview with one of the plaintiffs the defendant produced a book containing copies of several of these papers, and on examination it appeared that the papers in the plaintiffs' custody had been disturbed and tampered with, and a sheet of a confidential letter from one of the plaintiffs' clerks had disappeared; and the defendant displayed a knowledge of the contents of this letter. On this affidavit it was proposed to administer interrogatories as to how the defendant became possessed of the copies, &c.

Watkin Williams, in support of the motion, referred to the terms of section 51. of the Common Law Procedure Act, 1854, as allowing interrogatories to be delivered with the declaration, or at any other time.

COCKBURN, J.—I am of opinion that there should be no rule. The 51st section points to the delivery of the declaration as the time at which the application for leave to deliver interrogatories should be made. Now, in the present case, not only is there no declaration, but the ground of the application is, that the plaintiff does not know how to declare, so that the plaintiff does not even know what his cause of action is. I doubt, in the absence of authority (1), whe-

ther it was the intention of the legislature to allow interrogatories, not to establish a particular cause of action, but to find out what cause of action, if any, the plaintiff has. At all events, I think that, in the exercise of our discretion, we ought not to allow them in the present case; when, although the proceeding may be somewhat intricate, the plaintiff can frame his declaration in any particular form he may think most likely to meet the conjectured circumstances of the case, and can then afterwards amend if necessary; or he can insert several counts, and resist an application to strike any of them out on the ground of the doubtful circumstances of the case.

CROMPTON, J.—I do not see how we can interfere at present. By the 51st section an order is in all cases necessary, and putting the widest construction on the enactment, there must be something to shew the relevancy of the interrogatories proposed to be administered. The general rule as acted on by several Judges, the late Mr. Justice Wightman especially, was not to allow interrogatories till after issue joined. There can be no difficulty in framing a count in trover or trespass, and the plaintiff can easily amend if necessary.

BLACKBURN, J.—I also think we cannot interfere at present. The object of the application is not to save time, but on the ground that the plaintiff does not really know what his cause of action is; but the very essence of our jurisdiction to allow interrogatories is, that we should see what the cause of action is, in order to judge whether the interrogatories are relevant. We must see whether they are ancillary to and in furtherance of a particular cause of action; so that the plaintiff in order to ground his motion ought to shew what his cause of action is.

MELLOB, J.—The necessity of an affidavit that the plaintiff has a good cause of action shews that the Court must know what the cause of action is. Now, here the plaintiff shews that he has been damaged, but is unable to say whether there has been an actionable injury.

Rule refused (1).

(1) As to allowing interrogatories before declaration, see *Crookes v. Morrison*, 5 E. & B. 984, and *James v. Barns*, 17 Com. B. Rep. 598; s. c. 25 Law J. Rep. (N.S.) C.P. 182.

[IN THE EXCHEQUER CHAMBER.]
(Error from the Court of Queen's Bench.)

1864. { THE QUEEN, on the prosecution
Nov. 29. { of THE BURIAL BOARD FOR
 { THE PARISH OF AMERSHAM,
 { v. THE OVERSEERS OF COLESHILL.*

Burial Board—Parish with separate Divisions—Joint Burial-ground—Charging for Money borrowed on Rates—Proportions of Payment—Statute 18 & 19 Vict. c. 128. s. 11.

The vestry of a parish, one for ecclesiastical purposes but divided into two parts for the relief of the poor and other temporal purposes, appointed a burial board, which borrowed a large sum for the formation of the burial-ground, and by deed charged the future rates to be levied on part A, and also the future rates to be levied on part B. for the relief of the poor of the same parish or any part thereof, with the payment of the principal and interest. After a time a sum becoming due for an instalment of the loan and interest, the burial board apportioned the amount between the two parts in the proportion of the value of the property in each part as then rated to the relief of the poor, and demanded payment of the overseers of each part for its respective portion:—Held, that the charge was duly imposed by the deed, and the apportionment made on a correct principle, and a mandamus was granted to compel payment.

Error was brought, by the defendants, to reverse the judgment of the Court of Queen's Bench on a special case stated after proceedings commenced on a mandamus.

The case and pleadings are set out at great length in the report below (1), but the following summary of the facts will be sufficient for the purpose of the question in the Court of Error.

The parish of Amersham consists of two parts, Amersham Proper, in the county of Bucks, and the hamlet of Coleshill, in the

county of Hertford. There is one church for the two (situate in Amersham Proper), and one parish vestry, and the two constitute one parish for ecclesiastical purposes. But each part separately maintains its own poor, appoints its own overseers, surveyors of highways and constables, and makes out its own jury lists and lists of voters, and each returns a member to the board of guardians. The ratepayers of each part have separate meetings for their respective parts for the transaction of their separate affairs.

Amersham Proper has about 3,100 inhabitants, with a rateable value of 8,966*l.*; Coleshill about 600 inhabitants with a rateable value of 1,758*l.*

The united vestry resolved that a burial-ground should be provided for the parish, and appointed a burial board, and the inhabitants of Coleshill, in a separate meeting, resolved that it was inexpedient to provide a separate burial-ground for Coleshill. The approval of the Secretary of State was given to the appointment of the burial board. The burial board, with the sanction of the vestry, and of the Commissioners of the Treasury, borrowed 1,600*l.* for the purpose of providing and laying out two burial grounds, one to be consecrated and the other to be used as unconsecrated ground, and charged the payment of the principal and interest on the future poor-rates of the parish.

The deed of charge, reciting that the burial board of the parish of Amersham had borrowed 1,600*l.* towards the expense of providing and laying out two burial-grounds, to be paid with interest, and to be charged on the future rates for the relief of the poor to be assessed and levied on the said parish, witnessed that the burial board did "charge the future rates to be made and levied within that part of the said parish of Amersham, which is in the county of Buckingham, and also the future rates to be made and levied within that part of the parish of Amersham which is within the county of Hertford, for the relief of the poor of the same parish, or any part thereof, with the payment of the said principal sum of 1,600*l.* and interest thereon at the rate of 4*l.* 10*s.* per cent. per annum in the manner and at the times following; that is to say, the said principal sum to be repaid by

* Decided in the Sittings after Michaelmas Term, coram Erle, C.J., Pollock, C.B., Bramwell, B., Channell, B., Byles, J., Keating, J. and Pigott, B.

(1) 31 Law J. Rep. (N.S.) M.C. 240.

equal instalments of 80*l.* payable annually," &c. The interest was made payable half-yearly. Afterwards the burial board, requiring 152*l.*, that is, 80*l.* for payment of an instalment of the principal debt and 72*l.* for interest, charged Coleshill with 24*l.* 15*s.* 1*d.*, and required the overseers of Coleshill to pay that amount. The board had ascertained the amount by apportioning the whole sum of 172*l.* between Amersham Proper and Coleshill in proportion to the value of the property in the two places respectively as then rated to the relief of the poor. The overseers of Coleshill refused to pay the amount. Thereupon a mandamus was obtained by the burial board to command them to make the payment, and ultimately a special case was drawn up which stated the above-mentioned facts, and raised for the opinion of the Court the question, whether the burial board had power to charge the hamlet of Coleshill with the payment of the monies, and whether it did legally do so.

In the Court of Exchequer Chamber the first point as to the power of the said burial board was not argued, and the only question raised was, whether the charge was a legal charge as imposed by deed.

J. A. Russell, for the plaintiffs in error, the defendants below.—The burial board did not properly exercise their power of charging the poor-rates of the parish pursuant to the acts. The board were wrong in charging in the deed one sum on Amersham Proper and Coleshill jointly. They ought to have charged a separate part of the debt on each. For though Coleshill is part of the parish of Amersham for ecclesiastical purposes, it is a separate hamlet, maintaining its own poor. The question turns on the construction of section 11. of the statute 18 & 19 Vict. c. 128, which amends the original statute, 15 & 16 Vict. c. 85. By that section the first duty of the burial board was to apportion the charge on the two parts. As the deed is drawn, the lender might come on Coleshill for the whole amount, for the Court of Queen's Bench would grant a mandamus according to the terms of the deed. The amount to be paid by each part of the parish should have been fixed at first according to the then existing rateable value, and not be apportioned afterwards as the instalments were paid off.

O'Malley, for the defendants in error, the prosecutors below, was not heard.

ERLE, C.J.—We think that the deed is a legal and valid charge upon the property in the parish, and that in carrying it out the proper adjustments are to be made, and that the instalments ought to be divided between the two parts, or paid off in the proportion which the value of the property as rated to the relief of the poor in one part of the parish bears from time to time to the value of the property as rated to the relief of the poor in the other part.

The other JUDGES concurred.

Judgment affirmed.

1865. }
Feb. 25. }

LLOYD v. HARRISON.

Sheriff, Liability of—Escape—Bankruptcy Act, 1861—Invalid Deed of Arrangement, Registration of—Certificate of Registrar—Protection.

The plaintiff having recovered judgment against B. sued out a ca. sa., and delivered it to the sheriff. B. had previously entered into a deed, (to which the plaintiff had not assented,) which purported to be a deed of assignment for the benefit of his creditors, but which was in fact an invalid deed under the Bankruptcy Act, 1861. It was nevertheless duly registered, and the Chief Registrar gave a certificate of registration to B, having a note that the certificate was available as a protection in Bankruptcy. The sheriff, on the production of this certificate, allowed B. to go at large, and made a return that B. was entitled to protection from arrest, and that he was not found in his bailiwick.

An action being brought against the sheriff for a false return, and escape: it was held, by Crompton, J., Mellor, J. and Shee, J., that, under the 198th section of the Bankruptcy Act, 1861, the certificate was an answer to the action: by Cockburn, C.J., that the deed being invalid, the sheriff was liable.

The declaration alleged that the plaintiff, on the 17th of December 1862, recovered judgment against W. Baird for 29*l.* 5*s.* 10*d.* in the Court of Exchequer; that he sued out a *ca. sa.*, directed to the sheriff of Montgomeryshire, commanding him to take

the said W. Baird to satisfy the plaintiff the sum of 29*l.* 5*s.* 10*d.* The death of the sheriff was then alleged, as also that the defendant was under-sheriff and continued to execute the office; and also that the said W. Baird entered into a deed, bearing date the 16th of December 1862, which was set out in the declaration, and by which Baird assigned all his personal estate and effects to trustees for the benefit of such of his creditors as should execute or assent to the deed (1). That after the delivery of the writ, to wit, on the 26th of December 1862, an entry was made of the deed by the Chief Registrar of the Court of Bankruptcy in a book kept for such registration, and a copy of such entry was published in the *London Gazette* on the 30th of December 1862, pursuant to the Bankruptcy Act, 1861. That by a certificate given under his hand, the Chief Registrar certified that the deed was duly registered pursuant to the provisions of the Bankruptcy Act, 1861. That such certificate set forth the nature and effect of the deed. It was further alleged that on the 23rd of December 1862 the writ was delivered to the defendant, and the defendant took W. Baird on the 2nd of January 1863 and detained him in custody, but the defendant suffered him to escape and remain out of his custody until he re-arrested him on the 3rd of January, and after which he again suffered him to escape, and made a false return that the said W. Baird was entitled to protection from arrest under the said writ within the true intent and meaning, and under and by virtue of the 198th section of the Bankruptcy Act, 1861, and the other sections relating thereto, and that the said W. Baird was not found in his bailiwick. The declaration then alleged, that the return was false in that the defendant, as such under-sheriff, suffered the said W. Baird to escape upon the production of a certificate of a deed which were not a deed and certificate within the true intent and meaning of the 198th section of the Bankruptcy Act, 1861, and which did not entitle the said W. Baird to protection from arrest; and that the plaintiff had not executed or assented to the deed.

The defendant pleaded thirdly, to the first-mentioned arrest and so much of the

(1) It was admitted by Mellish for the defendant that the deed was invalid.

declaration as related thereto, that he suffered W. Baird to depart and remain out of his custody, and afterwards made such return as in the declaration mentioned, upon and by reason of the production by the said W. Baird of such certificate as in the declaration mentioned. The certificate was then set out, and it was to the effect, that the deed in question "being a deed or instrument of assignment of goods, household furniture, and all other the personal estate and effects of the said W. Baird to trustees for the equal benefit of the creditors of the said W. Baird, was, on the 26th of December 1862, brought into the office for registration, and was duly filed and registered pursuant to the provisions of the Bankruptcy Act, 1861."

(Sealed and signed R. B., Registrar, acting for the Chief Registrar.)

"Note, this certificate is available to the said William Baird for all purposes as a protection in bankruptcy."

It was then alleged that W. Baird had no real estate whatever, and that by the deed all his estate and effects were assigned to the trustees, and that before the arrest and detention all conditions had been performed to make the deed valid and effectual and binding on all the creditors, of whom the plaintiff was one.

The fourth was a similar plea to so much of the declaration as applied to the re-arrest and re-detention.

Demurrer to the third and fourth pleas, and joinder in demurrer.

Baylis (Nov. 18, 21, 22), in support of the demurrer (1).—In the course of his argument the following cases and statutes were referred to :

Ilderton v. Castrique, 14 Com. B. Rep. N.S. 99; a. c. 32 Law J. Rep. (N.S.) C.P. 206.

Ilderton v. Jewell, 14 Com. B. Rep. 665; a. c. 32 Law J. Rep. (N.S.) C.P. 256: affirmed in error, 16 Com. B. Rep. N.S. 142; s. c. 33 Law J. Rep. (N.S.) C.P. 148.

Norton v. Walker, 3 Exch. Rep. 480; a. c. 18 Law J. Rep. (N.S.) Exch. 234.

Dewhurst v. Kershaw, 1 H. & C. 726; a. c. 32 Law J. Rep. (N.S.) Exch. 146.

Ex parte Morgan, in re Pennell, 32 Law J. Rep. (N.S.) Bankr. 61.

Hodgson v. Wightman, 1 H. & C. 810; a. c. 32 Law J. Rep. (N.S.) Exch. 147.

Wallinger v. Gurney, 11 Com. B. Rep. N.S. 182; s. c. 31 Law J. Rep. (N.S.) C.P. 55.

Thomas v. Hudson, 14 Mee. & W. 353; s. c. 29 Law J. Rep. (N.S.) Exch. 283: in error, 16 Mee. & W. 885; s. c. 17 Law J. Rep. (N.S.) Exch. 365.

Tarlton v. Fisher, 2 Doug. 671.

12 & 13 Vict. c. 106, ss. 112, 113.

24 & 25 Vict. c. 134. ss. 52, 58, 101, 192—199.

Mellish (R. G. Williams with him), for the defendant, cited—

Ex parte Brooks, in *re Brooks*, 33 Law J. Rep. (N.S.) Bankr. 41.

Ex parte Morrison, in *re Clunn*, 33 Law J. Rep. (N.S.) Bankr. 47.

Saffery v. Jones, 2 B. & Ad. 598.

5 & 6 Vict. c. 122. s. 23.

Baylis replied.

Cur. adv. vult.

The Court differing in opinion, the following judgments were (Feb. 25) delivered. —

SHEE, J.—We have in this case to decide whether the defendant, an under-sheriff (acting as sheriff after the death of the sheriff during his year of office), was justified in discharging a debtor, whom he had arrested on a *capias ad satisfaciendum*, on production by him of a certificate, signed by the Chief Registrar of the Court of Bankruptcy, and sealed with the seal of that Court, that the debtor had executed such a deed as is mentioned in the 192nd and 198th sections of the Bankruptcy Act, 1861, and that the deed had been filed and registered: whereas, in fact, no such deed had been executed by him, and he was not entitled to the certificate which the Chief Registrar is by the latter of those sections empowered to grant. The question turns upon the construction of the 198th section. It has been determined by a series of cases in the Courts of law and equity, and by the Lord Chancellor in bankruptcy, that no deed, touching the matters which are the subject of the 192nd section, is binding on creditors who have not assented to it, to the extent of its being pleadable in bar of actions brought by them against a debtor, or of restraining the execution of final process against his person or goods, or preventing an adjudication against him in bankruptcy, unless it be a deed not

open to objection on the grounds of unreasonableness or inequality of its provisions as respects different classes of creditors,—a deed which satisfies the express conditions of the 192nd section, and has been duly filed, registered, and published, as that section and the 193rd prescribe. In all those cases the creditor and the debtor stood face to face upon their legal rights under the statute, the duty or liability of no third person under the provisions of the 198th section being in question. The debtor contended that the creditor was bound; the creditor denied that he was bound by a deed not executed by him, and to which he had not assented; and that issue was determined by the Court on its substantial merits: that is, on the statutory validity or invalidity of the deed. It follows from those decisions, and is also plain from the enumeration of persons in the first few lines of the 197th section, that a debtor cannot entitle himself to have his estate administered under the jurisdiction of the Court of Bankruptcy, in the new and exceptional course for which that section provides, by the execution, filing, and registration of any deed which, not being free from the objections before mentioned, and not satisfying the conditions of the 192nd section, is not binding on creditors who have not assented to it. The deed executed by the debtor in this case not being such as to be binding on the plaintiff, a non-assenting creditor, or to deprive him of his right to proceed in the ordinary course of law or in bankruptcy, he has a good cause of action against the defendant for allowing the debtor to escape, unless the defendant or his officer in so doing has acted in obedience to the express directions of the statute. The 198th section provides, that “after notice of the filing and registration of such deed” (that is, of such a deed as satisfies the conditions of the 192nd section) “has been given as aforesaid, no execution against the debtor’s person or property, other than such as may be had by writ or warrant against a debtor about to depart from England, shall be available to any creditor without leave of the Court” (of Bankruptcy), “and a certificate of the filing and registration of such deed, under the hand of the Chief Registrar and the seal of the Court, shall be available to the debtor for all purposes as a protec-

tion in bankruptcy." In the construction of this section, much, as it seems to me, depends upon the true meaning of the words which override the whole of it, "*after notice of the filing and registration of such deed shall have been given as aforesaid.*" Do they mean *after the filing and registration of such a deed as is mentioned in the 192nd section, and notice thereof given as aforesaid*? if so, the restriction on the creditors' right to execute final process, and the authority of the Court of Bankruptcy to give leave to execute final process against a debtor's person or property are limited to the case of deeds which satisfy the conditions of the 192nd section, and a non-assenting creditor has not under the 198th section as respects process against the debtor's property, nor until execution executed as respects process against his person, and then only by protest against the Chief Registrar's certificate to the sheriff's officer, and if he insists upon giving effect to it by action against the sheriff for an escape, the means of contesting the validity of the deed which has been registered as one binding upon him. If the words mean *after notice shall have been given as aforesaid, that such a deed as is mentioned in the 192nd section has been filed and registered*, the restriction on the creditor's right to execute final process and the authority of the Court of Bankruptcy to give leave to execute final process extend also to the case of deeds registered, and published by the Chief Registrar in the *Gazette* as satisfying, but not really satisfying the conditions of the 192nd section; and a non-assenting creditor who, as the Lord Chancellor said in *Ex parte Brooks, in re Brooks* is "*prima facie* bound by the registration," has the means of protecting himself, by application to that Court, against the mischief of the Chief Registrar having been surprised into registering in the book kept by him under the 193rd section a deed by which creditors not assenting to it are not bound; and into signing and sealing a certificate in which the conditions of the 193rd section are untruly stated to have been satisfied. I have arrived,—with much distrust of myself, seeing that my opinion is at variance with the decision of the Court of Exchequer in *Dewhurst v. Kershaw*,—at the conclusion that this latter construction is the right one; that

after notice has been given by the Chief Registrar under the 193rd section that a deed satisfying the conditions of the 192nd section has been filed and registered (whether those conditions are or are not satisfied), no process is available to the creditor against the debtor's property or person without leave of the Court of Bankruptcy, and that, in the authority to grant that leave is implied also authority to refuse it, and to relieve a non-assenting creditor from the hindrance of a certificate, to which its seal has been improperly affixed. In the case of *Ex parte Morrison, in re Clunn*, the Lord Chancellor gave leave to a non-assenting creditor to issue execution, on the ground that a deed which had been registered under the 192nd section and which satisfied the letter of the conditions of that section was "a fraudulent attempt to distort the forms of law from the purposes for which they were intended." On grounds not materially different, as it appears to me, the plaintiff in this case on finding that a deed not satisfying the conditions of the 192nd section, but registered and published in the *Gazette* as a deed in respect of which they had been satisfied, was set up against him, might, instead of hurrying on to the difficulty which the latter part of the 198th section threw in his way, have applied for leave to issue execution, which leave, in my judgment, the Court of Bankruptcy had power to grant. Much also depends on the construction of the words in the second part of the 198th section, "a certificate of the filing and registration of such deed shall be available." Do they mean "*the filing and registration of such a deed as satisfies the conditions of the 192nd section and a certificate of its having been filed and registered shall be available*"? or "a certificate that such a deed as satisfies the conditions of the 192nd section has been filed and registered, shall be available"? Against the latter and, I think, the correct construction,—which would have the effect, after notice given in the *Gazette*, that such a deed as satisfies the conditions of the 192nd section had been filed and registered, of making the certificate, though it ought not to have been granted, a protection to the debtor from arrest, without leave of the Court of Bankruptcy,—it must be admitted that the

clear intention of the legislature, that the Chief Registrar should give the protection provided by the 198th section to those debtors only by whom a deed satisfying the conditions of the 192nd section has been executed, raises some presumption. On the other hand, a statutory certificate that those conditions had been satisfied, under the signature of the officer whose duty it is to register deeds and grant protection, and under the seal of the Court of Bankruptcy, must have been intended by the legislature for the practical purpose of an assurance to the ministers of the law, that the matter which is certified had been inquired into and ascertained to be the truth; and the question is, whether the machinery thus employed by the legislature to effect its purpose, and in particular the peremptory rule laid down for the observance of the sheriff's officer in the 113th section of the Bankruptcy Act of 1849, incorporated by reference to it in the 198th section of the Bankruptcy Act, 1861, be not such as to make it, notwithstanding the warrant he holds from the sheriff, his personal duty to discharge a debtor, who, though not really entitled to it, possesses and produces an unrevoked certificate, under the 198th section, of his having executed and registered a deed satisfying the conditions of the 192nd section; a certificate purporting on the face of it to be *available* to him for all purposes as a protection in bankruptcy? The object of the 198th section unquestionably was to secure for a debtor, really entitled to a certificate, an immediate discharge from arrest. It may be that the legislature, —in reliance on the precautions taken by it that a certificate of a deed, satisfying the conditions of the 192nd section, having been filed and registered, should not be granted, in the case of a deed not satisfying those conditions, and on the authority vested in the Court of Bankruptcy to correct any mistake of the Chief Registrar by giving leave, notwithstanding such filing and registration, to issue execution,—has made the certificate on its production to the sheriff's officer a warrant and order to him to discharge the debtor; and the case of *Saffery v. Jones*, in which Lord Tenterden said that even if the Insolvent Court had no jurisdiction under the 7 Geo. 4.

c. 57. to discharge the debtor, the language of the 81st section of that act was sufficiently strong to make the order of the Court a protection to the gaoler who had discharged him, seems an authority for so holding. The difficulties which attend any other construction of these sections of the act appear to me insuperable. By the 52nd section the duty of granting protection is imposed upon the Registrars, and they may adjourn any matter coming before them (the question, *ex. gr.*, of the compliance or non-compliance of any deed with the conditions of the 192nd section) for the consideration of the Commissioners. By the 193rd section, after being satisfied by affidavit or by the certificate of the trustee or trustees of a deed, that the fifth condition of the 192nd section, which relates to matters *dehors* the deed, has been complied with, the Chief Registrar is to enter the dates, names, and descriptions of the parties to such deed, together with a short statement of the nature and effect of it, in a book, to be kept *exclusively* for the purpose of the registration of deeds, satisfying the conditions of that section,—words which imply the obligation on him of considering and deciding whether deeds brought to him for registration do or do not satisfy those conditions; he is next to give public notice in the *Gazette*, that such a deed has been filed and registered, and finally, by the 198th section, he is to discharge the duty of granting protection, by signing and affixing the seal of the Court of Bankruptcy to a certificate of the filing and registration of "such deed," which certificate is intended and declared by the act to be available to the debtor for all purposes as a protection in bankruptcy. "Protection in bankruptcy" has no meaning but the meaning given to it in the 112th section of the Bankrupt Law Consolidation Act, 1849, viz. "freedom from arrest or imprisonment by any creditor"; to insure which, by the 113th section of the same act (incorporated with the act of 1861), express direction is given to the officer effecting an arrest, that on production by the bankrupt of his protection, he shall be *immediately* discharged; that the officer shall not detain him, and that if the officer do detain him, except for so long as is necessary to obtain a copy of the protection, he personally shall forfeit

to the bankrupt for his own use the sum of 5*l.* for every day during which the detention lasts. In construing these provisions, the first consideration that occurs to one is, the great improbability that the legislature can have intended the words "such deed" in the latter part of the 198th section of the act of 1861 to qualify the plain meaning of the directions given by the 113th section of the act of 1849 to a ministerial officer of the humblest class, under a penalty on him personally with which it would be preposterous to visit an honest mistake or error of judgment, or any but the perverse and wilful disregard of a clear and unmistakable duty. It is hardly conceivable that such a penalty should have been imposed upon a person presumably incompetent to determine any question of legal difficulty, and to whom time for consultation and means of knowledge or advice are expressly denied, if more were required of him than that he should have no opinion of his own, but humbly and submissively obey the clear instructions set forth for his especial guidance, in the only section of an act of parliament which relates to the execution of his duty, on production to him of a document, which that section clearly describes. The unreasonableness of expecting him to understand that the words "a certificate of the filing and registration of such deed shall be available," do not mean a *certificate that such a deed has been filed and registered shall be available*, and from the words "such deed," that the instructions given to him in the 113th section are not to be the rule of his conduct, in the event (of which he can know nothing) of the Chief Registrar having mistaken his duty, and granted a false certificate, seems strong to shew that, however improperly the certificate may have been granted, the sheriff and his officer are safe, if the latter obeys it. In the case of *Norton v. Walker* it was decided that an officer was justified, under the 23rd section of the 5 & 6 Vict. c. 122. in discharging a person who had been adjudicated a bankrupt, and who produced a summons in bankruptcy, though in truth he was not a bankrupt, the words "such bankrupt" in the section being taken by the Court to mean the party so adjudged a bankrupt. "We are of opinion," said the Lord Chief

Baron, "that this is the proper construction. The remedy provided is one which admits of no delay. The party arrested is to produce his summons, and the sheriff is immediately to discharge him. The sheriff could not possibly obey the enactment, if he were bound in the first instance at his peril to ascertain that his prisoner had been a trader, that he had committed an act of bankruptcy, that a fiat had issued on a valid and sufficient debt, and that he had been adjudicated a bankrupt thereon." So here, why should not the officer be held justified in discharging a person who appears by the certificate of the Chief Registrar and the seal of the Court of Bankruptcy to have complied with the requirements of the 192nd and 198th sections by executing "such deed" as is therein mentioned, and to whom the certificate is declared by the latter of these sections to be available for all purposes as a protection in bankruptcy? The case of *Thomas v. Hudson*, an action against the keeper of the Queen's Prison for an escape, he having released a prisoner on production by him of an order for his discharge obtained from a Commissioner of the Court of Bankruptcy, was decided on the same principle. The Court of Exchequer held, that whether the debt was or was not one from which the Commissioner had power to discharge the prisoner, the defendant was protected, being bound to obey the order of the Commissioner, who was acting judicially in a matter over which he had jurisdiction. And in *Wallinger v. Gurney*, in which it was questioned whether an interim order of protection under the 5 & 6 Vict. c. 116. and 7 & 8 Vict. c. 96, was available for a debtor arrested on a *ca. sa.* for a debt contracted by him since the filing of his petition, Erle, C.J. said, "If there had been a doubt upon the construction of the statutes, the principle of the decision in *Thomas v. Hudson*, protecting the gaoler in obeying the plain words of the order for protection, would apply to a sheriff obeying the plain words of the order produced to him in this case." It is said there is a great difference, though granted by the same officer, between an adjudication in bankruptcy and a certificate under the 198th section, to which none but those who have conformed to the conditions of the 192nd

section are entitled. But the adjudication in bankruptcy, on which protection is granted, is at most a provisional proceeding, which, being obtained *ex parte*, has little but its name of a judicial character about it, whereas the filing and registration of a deed satisfying the conditions of the 192nd section (after notice thereof in the *Gazette*), and the certificate of the Chief Registrar under the 198th section, are a final release to the debtor, and as effectual for the protection against creditors of his property and person, as the certificate of conformity granted after his last examination to a bankrupt under the Bankrupt Law Consolidation Act, 1849, and the order of discharge granted to him under the Bankruptcy Act, 1861. They are in truth in the scheme of the arrangement clauses of the Bankruptcy Act, 1861, substantially the same thing, only that the release under those clauses is arrived at more quickly and in a way more satisfactory, because without the useless and in many cases undeserved torture to the debtor of repeated examination on the instructions of a small minority of his creditors, and without waste to his estate, and with less injury to his prospect of re-establishing himself in business and credit. The case of *Ilderton v. Jewell* has been cited in the course of the argument as opposed to the construction which, in justification only of the officer, Mr. Mellish asks us to adopt. I cannot see that it affects his argument. In *Ilderton v. Jewell*, to an action against bail in the Mayor's Court for not rendering in pursuance of their recognizance one Louis Castrique, or paying to the plaintiff the monies which had been adjudged to him in a suit against Louis Castrique, the defendants pleaded the execution by Louis Castrique of a deed, certified by the Chief Registrar of the Court of Bankruptcy to be a deed in conformity with the conditions of the 192nd section, but which being set out appeared not to satisfy those conditions. On these pleadings the question was, whether as against the creditors the debtor was entitled to protection. The Court held that the deed was void, and the plea therefore not an answer to the action: Williams, J. doubting whether even if the deed had been good the bail would have been exonerated. The Lord Chief Justice is reported to have said that the deed being void the certificate

was also void. And so it was in the sense of being voidable, and of no significance as between the creditor and the debtor, on whose immunity from arrest the defence of the bail was founded. Under the old system, a certificate of the defendant's bankruptcy and conformity was no answer to an action against the bail, their course being to render him, after which he applied to the Court for his discharge, on affidavit setting forth that he had become bankrupt and obtained his certificate under the Commission. The plaintiff was then entitled to an issue to try the validity of the commission and certificate, and if he could shew them to be invalid or improperly obtained, as was the case with the deed and its filing and registration in *Ilderton v. Jewell*, the application was refused, 1 *Tidd's Practice*, 292, 9th edit. That case does not appear to me to prove more than the correctness of the admissions on which Mr. Mellish bases his argument; and it is surely beside the question whether, under the combined effect of the 198th section of the Bankruptcy Act, 1861, and of the 112th and 113th sections of the Bankruptcy Consolidation Act, 1849, which latter sections were not even mentioned in *Ilderton v. Jewell*, the officer in this case was justified in discharging the debtor. In the case of *Dewhurst v. Kershaw*, also cited for the plaintiff, the Court of Exchequer refused to discharge a debtor, who had been taken on a *ca. sa.*, on the ground that he had executed and registered a deed in respect of which, though invalid under the 192nd section, a certificate had been granted. It does not appear that the certificate had been produced to the officer, and it was unnecessary to consider the effect, as respected him or his principal, the sheriff, of the latter part of the 198th section of the Act of 1861, and its connexion with the 113th section of the Act of 1849. The Court refused to set aside its legally executed process in order to defeat, as between the creditor and the debtor, what it clearly saw to be, under the provisions of the Act of 1861, the very right and justice of the case. In so doing, upon a construction apparently of the words "after notice of the filing and registration of such deed has been given as aforesaid," in which I cannot concur, it upheld when done what the Court of Bankruptcy, on the application of the creditor, must, I think,

have allowed to be done. We are, as it seems to me, in no degree fettered by the decision of that case; or rather we are bound, without being overruled by the dicta of learned Judges in cases not depending on the very point before us, to construe the act, if we can, so as to make all its sections operative and consistent. The inconvenience of allowing the process of one of the superior Courts of law to be set at naught by a sheriff's officer, under cover of a certificate which ought never to have been granted, and which may have been declared bad in the very judgment on which the process has issued, was in the course of the argument forcibly noticed by my Lord, without any entirely satisfactory answer on the part of the defendant to the objection which it suggests. The only answer that can be given is, that it is a mischief which has arisen from an imposition practised upon the Chief Registrar or a misconstruction by him of the act of parliament, a misconstruction which, if my reading of the 198th section be the right one, might have been corrected by application to the Court of Bankruptcy for leave to execute the writ; and which, after the explanation of the arrangement clauses by the Lord Chancellor in *Ex parte Morrison, in re Clunn*, and the discussion in this and other cases, is not likely to occur again, whereas, if we held that the Chief Registrar's certificate, which for the future may be expected to be a safe guide to the officer, does not in this case protect him, he will in all cases in which it has been properly granted be uncertain whether to act upon it or not. It occurs to me further, that the word "available," in the first part of the 198th section, may have been used for the purpose of not interfering with the practice which enables the plaintiff, after he has signed judgment, to prepare his writ of execution and get it sealed by the sealer of the writs, on production to him of the *postea* and judgment paper; and that the intention was at this stage of the proceedings and on production of the notice in the *Gazette*, to give authority to the Court out of which the process issues to render it un-"available," by staying the execution of it, until leave obtained from the Court of Bankruptcy. The declaration also complains that the defendant falsely returned to the said writ "that

the said William Baird was at the time of the delivery of the said writ to him the defendant, and still is entitled to protection from arrest within the true intent and meaning of the 198th section of the Bankruptcy Act, 1861." That is, as I think, a false return, the said William Baird not being entitled to such protection. But the substantial ground of action here is the escape—the allegation of a false return, for which, without damage, according to the cases of *Dawson v. the Sheriffs of London* (2), *Williams v. Mostyn* (3) and *Wylie v. Birch* (4), an action would not lie, not being material. Our judgment, in my opinion, ought to be for the defendant.

MELLOR, J.—The question to be determined in this case is, whether the sheriff is protected in an action for an escape, for having discharged a debtor, taken in execution on a writ of *ca. sa.*, out of his custody, upon such debtor producing to the sheriff a certificate, under the hand of the Chief Registrar of the Court of Bankruptcy and the seal of such Court, of the filing and registration of a deed of arrangement, purporting to be a deed of arrangement between such debtor and his creditors, under the provisions of the 192nd section of the Bankruptcy Act, 1861, such deed not being in fact a valid deed within the meaning of that section, and not having been executed or assented to by such creditor. On the argument it was admitted by Mr. Mellish, for the defendant, that the deed to which the certificate referred, could not be supported as a valid deed after the decision in *Ilderton v. Castrique* and *Ilderton v. Jewell*, and that the certificate of the filing and registration of such a deed could afford no protection to the execution-debtor, and that consequently the creditor was entitled to his execution against the person of such debtor. It was, however, contended, although such deed and certificate were both in fact inoperative to restrain the execution or give protection to the debtor, yet that the sheriff, who *bonâ fide* gave credit to a certificate, good on the face of it, under the hand of the Chief Registrar and the seal of the Court of

(2) 2 Vent. 84.

(3) 4 Mee. & W. 145; s. c. 7 Law J. Rep. (N.S.) Exch. 289.

(4) 4 Q.B. Rep. 566; s. c. 12 Law J. Rep. (N.S.) Q.B. 260.

Bankruptcy, of the filing and registration of a deed of arrangement under the 192nd section, was excused for acting upon such certificate and discharging such debtor out of custody. After a careful consideration of the various sections of the Bankrupt Act, 1861, which bear upon this question, I am of opinion that the sheriff was excused, and that consequently the action is not maintainable. Much difficulty was experienced during the argument in construing the 198th section of the Bankrupt Act, 1861, and in ascertaining the true effect of a certificate, owing to the enactment that such a certificate should be available to the debtor for all purposes as a protection in bankruptcy. Protection in bankruptcy is either interim or final, neither kind of protection is strictly applicable to cases of this description. A debtor having executed a deed, accepted and assented to by the requisite majority of his creditors and conformable to the provisions of the 192nd section, is perpetually protected against the exercise of any right on the part of a creditor affected by such arrangement other than is provided by the 198th section; but if the deed turn out to be invalid, then, as regards the debtor, who is a party to such deed and aware of its contents, it affords no protection to him, as regards execution either against his person or property. In the present case the deed, although registered under the 192nd section, which makes registration an essential condition to the validity of a good deed, cannot (being otherwise invalid) be made better, by the mere fact of registration, and therefore the certificate of the filing and registration of such a deed cannot extend to protect the debtor who is a party to it; still, it may, in my opinion, operate as an excuse to the sheriff *bonâ fide* acting under it. It appears to me that the legislature, in framing the machinery for carrying into effect the new provisions for deeds of arrangement which were to bind non-assenting creditors, intended to make the Chief Registrar of the Court of Bankruptcy, so far as regards the registration of such deeds, and the granting of certificates of the filing and registration thereof, a substitute for the Commissioner acting in the matter of an adjudication of bankruptcy. It invests the Chief Registrar with a general jurisdiction to determine, for the purpose

of registration, whether the conditions imposed by the statute have been duly complied with; and he must, in the exercise of his functions, examine the deed and ascertain whether it is a deed "relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding-up of his estate;" whether it has been executed or assented to by the requisite number of creditors of the requisite amount and value; and he must for this purpose *examine* and *determine* whether the requisite execution or assent has been duly made by the creditors; and being satisfied of these matters, he must thereupon register the particulars of the deed, with a short statement of the nature and effect thereof, in a book to be kept for that purpose, and he must also publish a copy thereof in the *Gazette*. Now, it appears to me that the functions of the Registrar, though in part ministerial, are in part judicial. As was said by the Court of Exchequer, in *Thomas v. Hudson* concerning the functions of a Commissioner in Bankruptcy, "he is to come to a decision on the petition and affidavits, not indeed a decision as to whether a petitioner, having complied with the requisites of the act, shall or shall not have his interim order or his order of discharge, for to these he is in such case clearly entitled, but whether he has or has not done what the statute imposes as the conditions on which he would become entitled to those privileges." In that case the Commissioner had nothing upon which to form his judgment, except the petition and affidavits. The Chief Registrar in determining as to the fact whether the deed in question is a deed relating to the debts and liabilities of the debtor and his release therefrom, &c., and whether it has or has not been executed or assented to by the requisite number of creditors of the requisite amount and value, must, like the Commissioner in *Thomas v. Hudson*, examine and determine those facts before he registers the deed. And so far as those facts are material as conditions of registration, he must *determine the question for himself*, subject it may be to his decision being reversed by the Court of Bankruptcy. Although he has no authority to determine as to the validity of the deed itself, he has authority

to decide provisionally that the conditions preliminary to registration have been performed, and his certificate must, I think, at least be intended to amount to a declaration evidencing the fact that a deed conforming to the provisions of the 192nd section had been duly executed and registered. Such being the functions of the Registrar, it appears to me that the certificate of such Registrar of the filing and registration of the deed under his hand and the seal of the Court of Bankruptcy, although not giving actual protection to the debtor by reason of the invalidity of such deed, in point of fact nevertheless operated to excuse the sheriff, who had no means of knowing whether the deed to which the certificate referred was in conformity with the 192nd section or not. The duty of the officer, as appears from the 113th section of the former Bankruptcy Act, in case of protection, is immediately to discharge the debtor on his producing his protection in bankruptcy. It would be so strange a conclusion that the sheriff should under such circumstances be rendered liable to an action for giving credit to the certificate of the Registrar, that, as was said by the Court in the case of *Thomas v. Hudson*, "if there be any construction of the act by which such a consequence may be avoided, we feel bound to adopt it." In the case of *Norton v. Walker* it was decided that the sheriff was protected under the 23rd section of the 5 & 6 Vict. c. 122, in discharging a person who had been adjudged a bankrupt *de facto*, although he might not turn out to be a bankrupt *de jure*. In that case Pollock, C.B., in giving the judgment of the Court, said, "In our view of the case it is not material to consider whether the bankruptcy was valid or not; a fiat had issued under which Robinson had by the proper Court been declared to be a bankrupt, and we think that this was all that the sheriff was bound to inquire into," and the Court there read the words "such bankrupt" to mean the party so "adjudged bankrupt." No doubt the Commissioner of Bankruptcy had there adjudged Robinson to be a bankrupt, and the decision of the Court of Exchequer may therefore be said to have rested on the principle of law which protects sheriffs, &c., in obedience to an

order of a Court having jurisdiction over the subject-matter, although the making of the order might in the particular instance be unauthorized. If, however, I am justified in reading the sections of the Bankrupt Act of 1861 as substituting the Registrar with reference to the registration and filing of the deeds of arrangement under the 192nd section and granting the certificate thereof, for the Commissioner acting in an ordinary bankruptcy granting protection, the case becomes at once an authority in favour of the defendant. The Commissioner in the one case and the Registrar in the other are alike creations of statutes by which their functions are assigned, and it appears to me for the reasons already given that the functions of each are analagous, to the extent which is necessary to make the certificate granted by the Registrar an excuse for the sheriff in *bond fide* discharging a debtor who produced it. I agree that there must be a valid deed in order to give jurisdiction, under the 197th and 198th sections, to the Court of Bankruptcy to administer the estate of the debtor as if he had been adjudged a bankrupt, and to deprive the creditors of their rights against his person or property, except as therein reserved. I cannot adopt a construction which would compel me to decide that, although the deed were invalid and therefore not binding on non-assenting creditors, their only remedy against the debtor's estate would be through the intervention of the Court of Bankruptcy acting under those sections. The Lord Chancellor, sitting in bankruptcy, in the case of *Ex parte Morrison, in re Clunn*, appears to have given permission to a creditor to issue execution against a debtor's property, on the ground that the deed registered was colourable and fraudulent against the creditor; but the point was not taken, nor were the cases at law cited; but it was assumed that there was authority in the Court, notwithstanding the character of the deed, to permit execution to issue. Had the point been taken, and the Lord Chancellor's attention called to the cases, and he had then decided that he had power, sitting in bankruptcy, to give the leave to issue execution against the goods of the debtor, notwithstanding the badness of the deed, I should have yielded to that decision and considered this point

concluded by authority. The single question, however, which we have now to decide is, whether a certificate of the filing and registration of a deed under the hand of the Chief Registrar and the seal of the Court good on the face of it, and disclosing no objection to its validity, can operate to excuse a sheriff who *bonâ fide* acts upon it, without notice of any objection to it and without the means of ascertaining any, although such deed be in fact invalid by reason of its not being in conformity with the provisions of the 192nd section. As regards the debtor who was a party to the deed, and who has imposed an invalid deed upon the Registrar, it is only just and right that, so far as he is concerned, the certificate should not protect him from arrest or his goods from seizure; and therefore the Courts, in refusing to discharge a debtor arrested under a *ca. sa.* out of custody upon the production of such a certificate founded on an invalid deed, were fully justified. They had the real facts brought to their knowledge, and were quite right in concluding that the filing and registration of an invalid deed could give it no validity, and that the debtor was therefore not protected from arrest. The sheriff who is called upon to act on the instant has no means of ascertaining the contents of the deed, or whether the conditions of registration have been complied with, or that the certificate is of no effect. Surely, he must, in the absence of all notice to the contrary, give credit to the certificate, as a document authorized and required by the statute to be given to the debtor, as affording sufficient evidence that a deed conforming to the provisions of the 192nd section has been duly filed and registered, and is therefore to be excused in acting under it as he could have done under a protection in bankruptcy. I am not at all prepared to decide, if the creditor could affect the sheriff with notice of the contents of the deed, or of the grounds and facts, by reason of which the certificate could afford no protection to the debtor, that the sheriff would not then be bound at his peril to execute the process of the Court; and although in actual practice the advantage to the sheriff may be small in enabling him to determine for himself upon the validity of such a deed,

still the anomaly would be got rid of, of requiring him to act in defiance of such a certificate without the means of knowledge whether it was good or bad. It is not, however, necessary to decide that question, nor whether the Court of Bankruptcy has power to cancel the registration of an invalid deed. I am strongly inclined to think that it has; but my judgment does not depend upon that suggestion, but upon the object which I conceive that the legislature had in view in the sections under consideration. No other question was made in the argument before us, and it was stated by Mr. Baylis that the declaration was drawn in this unusual form, setting out the facts specially, for the express purpose of raising the real question between the parties. It is therefore unnecessary to consider any other point which might arise on the pleadings, more especially as any amendment would have been permitted by the Court which might have been necessary in case any other point had been made. I am of opinion, therefore, with great diffidence seeing that my opinion differs from that of my Lord Chief Justice, that our judgment should be for the defendant.

CROMPTON, J. — The question argued before us in this case was, whether a sheriff was liable in an action for an escape for having discharged a debtor taken on a *ca. sa.* upon the production by him of a certificate under the 198th section of the Bankruptcy Act, 24 & 25 Vict. c. 134, signed by the Registrar, and purporting that a deed under the 192nd section had been duly registered. I think that we cannot hold the sheriff liable, for obeying what I think are the directions of the act binding upon him. I think that the effect of the enactment is, that the certificate is to be the evidence of the execution of a valid deed upon which the sheriff is to act by discharging the party. The great hardship upon the sheriff, who cannot possibly know and has no means of ascertaining many matters connected with the deed, and who is called upon to act immediately upon the production of the document and receiving the copy, is obvious, and was pointed out on the argument, as it has been in several cases of the same kind; and though there are many cases in which the sheriff has been put in great jeopardy

where he could not know the true state of facts upon which he was called to act, in many of which cases he has been relieved by statute, still the situation in which the sheriff would be placed is, as observed by the Court in several similar cases, a strong reason for a construction being put on the enactment which would prevent so great a hardship upon the sheriff.

The first branch of the 198th section of the act protects the debtor's person and property from process where "such" deed has been registered, and I think that this must be taken to mean a deed *valid* both as to the fact of execution by the three-fourths of the creditors and as to the provisions in the deed. But there follows at the end of the clause a provision that the Registrar's certificate of the registration of such deed shall be available for the debtor as a protection in bankruptcy. By the first branch of the 198th section, the execution by the three-fourths of the creditors of a valid deed prevents any process against either the body or goods being *ever* available to the creditor without the leave of the Court of Bankruptcy. The estate being in such case by the provisions of the 197th section subject to the jurisdiction in bankruptcy, this immunity from process against the goods or person would be *final*, subject to the leave of the Court of Bankruptcy, and would not be in the nature of an *interim* protection. According to this provision, however, the debtor would only be protected where the deed is valid as to its provisions and has been executed by three-fourths of the creditors, of neither of which matters can the sheriff in general have any knowledge. The legislature, however, at the end of the section makes a further provision, and proceeds to enact that the certificate of the Registrar, that such a deed so executed has been registered, shall have the effect of a protection in bankruptcy for the *person* of the debtor. Great difficulty arises from the mode of legislation by reference to the provisions of former acts of parliament, which frequently are framed so as not to fit or be adapted to the nature of the case, the subject of the new enactment. The protection in bankruptcy was to be available whilst the bankrupt was going to and returning from the court for examination, and for such

further time as the Commissioner should indorse on the summons, and the sheriff would see at once from the summons and from the extended time for how long the bankrupt was protected. It was strictly an *interim* protection. The corresponding protection under the new act, however, shews no limit as to the time during which the debtor is to be protected, and no mode is pointed out by the statute by which that protection, on its face a lasting one, could be taken away from the debtor; and there certainly would be great difficulty, as suggested on the argument, if a Court of law held the deed bad when pleaded in bar, and an execution went against the person of the debtor, and the debtor were to produce the certificate as a statutory protection. It may be that the Court of Bankruptcy might have the power to interfere with the registration of the deed, and of ordering the cancellation of the document; for, though the Court of Bankruptcy would have no power of dealing with the estate in the case of an invalid deed, it might still have the power of cancelling the registration, the act of its officers,—in like manner as the Lord Chancellor had formerly the power of superseding a commission of bankruptcy,—or the protection might possibly be deemed to enure only whilst the proceedings under the arrangement were going on, in analogy to the bankruptcy protection. When the Court of Bankruptcy gives leave to execute process,—as in a recent case of a debtor not paying his composition,—the sheriff might be informed, either by notice or on the face of the process, that it was by order of the Court; and in every case it may be that a formal notification of the deed being bad or having been held bad might operate so as to compel him to proceed. However this may be, I think that the meaning of the act, and of the reference which embodies the former enactments as to the protection in bankruptcy, is, that the debtor shall be protected on a certain state of facts, and that the sheriff shall act on the certificate as the evidence of such facts. But it is said, that there is a great difficulty in the way of this construction, by reason of the decisions by which the Courts have held that the meaning of "*such*," in the second branch of the 198th section, is "a valid

deed"; and that if not valid, the certificate is of no more value than the deed, and so that the debtor is not protected. Certainly, it has been held by the Courts, on motions for discharge, and, I believe, by all the Judges at chambers before whom applications for discharge have been brought, that the debtor has no right to be discharged if the deed be invalid; and the act stating that the certificate is to be available to the debtor, it is said that it can only be available to the sheriff if it be such a certificate as is available for the debtor. In the case of *Thomas v. Hudson*, however, the Court of Exchequer Chamber held the officer protected, although they assumed, for the purpose of the judgment, that the Commissioner of Bankruptcy had no power to discharge the debtor from the damages for the tort, to which, on that supposition, he clearly remained liable; and in other cases under the Bankruptcy Act the whole jurisdiction might be said to fail where there was no act of bankruptcy, just as in the case where the deed, the foundation of the *quasi* bankruptcy, turns out to be invalid. But for the decisions under the present act of parliament, it might have been doubted whether the certificate was not intended by the legislature to be a protection to the debtor even where the deed turned out to be invalid, they apparently thinking that such a protection as an interim protection in bankruptcy would be applicable to the new case of a deed which is to have the effect of creating a kind of private bankruptcy. The same construction might be given to the word "such" in both branches of the clause by construing the earlier part to mean, that after *such deed* (i. e. a valid deed) was registered, the person and property should be exempt from process, except by leave of the Court; and by construing the latter branch as saying that the certificate of "such" a deed being registered, that is, the certificate that *a valid deed has been registered*, was to be a protection to the *person*. The Courts, however, have thought, that where the deed is made out to be invalid, the debtor is not protected even to the extent of the limited protection of the latter branch; but they have not decided that the sheriff may not be excused for acting upon the document which the

legislature points out as the evidence upon which he is bound to act, under severe penalties and heavy responsibility. In *Ilderton v. Jewell* the Common Pleas held that the bail could not set up a certificate of a bad deed as a defence against an action on their undertaking to render their principal, and that decision was confirmed in the Exchequer Chamber, though I think that the case was not much argued in the Exchequer Chamber upon this point. I should pay great respect to these decisions of the Courts and Judges on application to discharge prisoners; though being decisions on motions and not liable to review by a Court of Error, they are not, according to modern practice, binding to the same extent as decisions against which an appeal lies. It may be, both as relates to these decisions and to the decision of the Courts in the case of the recognizances of bail, that the Courts may have thought that the debtor by whose negligence or fraud a deed has been registered, not really executed by the required proportions of *bond fide* creditors, or by whom conditions so unreasonable as to render the deed invalid have been inserted, has no right to rely on it as a protection. It may have been thought a sufficient answer as against him to his *prima facie* case of the certificate of registration, that his deed, propounded by him, is invalid, whilst the sheriff may be protected by the certificate, on the evidence of which he seems compelled to act without the means of or the time for inquiry. I do not think that we are bound by any authority to hold that the officer of the Court, acting under the express direction of the act of parliament, is not excused. He acts under a document which, whether judicial or not in the strict sense of the word, is a document which is the act of the Court just as much as a writ which protects the sheriff. It is sealed with the seal of the Court and bears the signature of the Registrar, and this authentication seems intended as a notification to the sheriff, who would otherwise be placed in so much difficulty. Whether strictly judicial or not, the document is declared by the legislature to have the effect of a protection in bankruptcy which has been held judicial. I own that I am at present inclined to doubt whether

the legislature did not intend the certificate to be a temporary protection, at least to the *quasi* bankrupt, as well as imperative upon the sheriff; but giving full effect to the decisions that the debtor is only to be discharged or protected if the deed be valid, still the act of parliament, if the deed turn out valid, clearly gives the debtor the protection, and renders the sheriff liable to the severe consequences of refusing to act upon the evidence of the certificate. He being on that supposition liable if the deed is valid, seems to me to be required to act upon the assumption that the certificate shews that a valid deed has been executed; and he is required to act immediately on the production of the certificate and receipt of the copy without having any opportunity of inquiry. If the statute says, "obey this document," and allows no time for inquiry, it seems very difficult to say that the sheriff is liable for obeying the directions of the legislature. My judgment proceeds on the ground that the legislature appears to me to have pointed out the document in question as the one on which the sheriff is to act, at all events until he has notice of the invalidity of the deed; and I think him excused by the legislature directing him not to persist in executing the process if such document be produced, just as he is where the plaintiff himself has directed him not to execute the process. I cannot construe the act of the legislature as imposing so monstrous a hardship upon the sheriff, as to direct him under severe penalties to act upon the production of the document, and yet to leave him liable in so acting as for a breach of duty, if it should turn out that circumstances of which he can have no knowledge have made invalid the deed on which the certificate is founded. The legislature throws upon the Registrar, as the officer of the Court, the responsibility of seeing that the requisite proportion of creditors have signed, and he has the affidavit before him of that fact, and he has also the deed before him from which he is to make in his book of registry a short statement of the nature and effect of the deed. The sheriff, being required to act merely on the production and having a copy of the certificate of the registration, has no means of testing its validity, either in point of fact or law.

The legislature would be putting him in a worse case than in the ordinary case of difficulty of a sheriff who can inquire, and whose duty it was in many cases at common law to inquire, into the validity of documents. Here the legislature in effect takes from him all opportunity of inquiry, and directs what is his duty on production and receipt of a copy of the certificate. It seems to me that the legislature have said that the document in question is to be evidence that "such" valid deed has been duly executed, upon which the sheriff is required to act; and that in effect he is prevented by the legislature from inquiring further, and is compelled to act at once upon such evidence, at all events, unless he has some knowledge or notification of the badness of the deed. I think, therefore, that we ought to hold that the sheriff in the case at bar was justified in discharging the debtor who produced the certificate of the Registrar in due form that such a deed had been executed, although the deed afterwards turned out to be invalid.

As the whole record is before us on the demurrer, and as it is not unlikely that this case may be carried to a Court of Error, I have thought it worth while to consider whether the defendant's case might be held deficient on the ground that it does not appear on the record that there is any answer to that part of the declaration which states that the sheriff made a false return, in stating in his return that there was a valid deed and that the debtor was not found in his bailiwick. Supposing the false return to be a substantive cause of action in itself, notwithstanding the breach of duty, the foundation of the charge being answered, and supposing that we could not construe the plea distributively, we ought, I think, under the circumstances, to make such an amendment as would divide the declaration, and give judgment as to the main part for the defendant, and leave the plaintiff to get his damages for the false return, which would seem *prima facie* at least to be merely nominal, if the defendant were protected for discharging the debtor. I think, however, that the case falls under the authority of *Wylie v. Birch* (4). The whole declaration really forms one ground of complaint, as explained by Alderson, B.

in *Lewis v. Alcock* (5), cited in *Wylie v. Birch*, where he says: "The falsehood of the return is the conclusion of law, if the facts stated in the inducement are true." And I think that a plea answering the inducement or foundation answers the whole action. The insertion of the untrue statement, that the deed was valid in the present case, seems no more fatal to the plea than was the allegation of the statement in the plea in *Wylie v. Birch* (4) that the goods remained in the sheriff's hands for want of buyers; and I do not see that there was any difficulty in making a good return by shewing the production of the certificate and giving a copy, supposing those facts amount to a defence; and at all events, *Wylie v. Birch* appears to me to shew that where the sheriff answers the supposed default in executing the process, the false return gives no right of action for nominal damages, and that the false immaterial statement does not vitiate the good part of the plea. It should be observed that this point was not taken on the argument, and, indeed, as the declaration was framed as stated by the plaintiff's counsel, in an unusual way for the purpose of raising upon the record the real question argued before us (it not being in the usual form for an escape, but proceeding to set out the expected defence and to answer it by anticipation, so as to make the real ground of the complaint as to the false return depend on the precedent matter), it would hardly have been fair to raise such a point for the purpose of obtaining nominal damages, and if it had been raised and could have been substantiated, we ought, I think, to have amended, as before suggested, in this respect as well as with regard to some other objections which might possibly be made to the plea in several views of the case. I think, therefore, that we should treat the question as it was argued before us, and that our judgment on this record should be for the defendant.

COCKBURN, C.J. — This is an action, brought against the defendant as undersheriff of Montgomeryshire, acting after the death of the sheriff, under the 3 Geo. 1. c. 15, for an escape and false return to a

writ of *ca. sa.* issued against one W. Baird; the matter of the alleged false return being that the said W. Baird (who had been arrested on the writ and set at large) was by the effect of the 198th section of the Bankruptcy Act, 1861, protected by a certificate given to Baird, under the 193rd section of that act, on the registration of a deed of composition entered into between him and certain of his creditors, and intended to take effect under the 192nd section. The deed in question is set forth on the record, and is admitted to be invalid as against a non-assenting creditor, by reason of its imposing unreasonable terms; and the question for our decision, on the demurrer to a plea of justification, is, whether a certificate given on the registration of such an invalid deed will be a justification to a sheriff in an action by the execution creditor for an escape and false return. I am of opinion that it will not.

It is now fully settled by a series of decisions that a composition-deed intended to take effect under the 192nd section, if it contains terms which are unequal or unreasonable, will not, though registered according to section 193, avail to bar an action against the debtor at the suit of a non-assenting creditor; the construction put by the Courts on that section by implication being, that it must be taken to have been intended by the legislature that terms which were equal and reasonable should alone be compulsorily binding on those who are not parties to such a deed. It being thus settled that a composition-deed containing unequal or unreasonable terms is not binding on a non-assenting creditor, as not fulfilling the requirements of the 192nd section, it follows that on such a deed a non-assenting creditor is not brought within the jurisdiction of the Court of Bankruptcy under the 197th section of the act, and is not, therefore, under the necessity of resorting to the administration of the debtor's estate under this process of *quasi* bankruptcy for the satisfaction of his claim. For the section in question not only expressly refers to a deed operative under the 192nd section by using the term "such deed," but the 197th section refers in terms to the creditors "who are parties to the deed, or who have assented thereto, or are bound

(5) 3 Mee. & W. 188; s. c. 7 Law J. Rep. (N.S.) Exch. 9.

thereby." As the section thus excludes those creditors who, not being parties to the deed, are not bound by it, which in the case of an invalid deed would be those who have neither executed nor assented to it, the section can have no application, and the Court of Bankruptcy can have no jurisdiction in the case of creditors so circumstanced. This being so with regard to the 197th section, it seems to follow as a necessary consequence that the 198th section can also have no application in the case of a creditor not bound by the deed. The effect of this section is to prohibit execution against the effects or person of the debtor by a creditor, except by the leave of the Court of Bankruptcy; with a further provision that a certificate of the filing and registration of the deed under the hand of the Chief Registrar and the seal of the Court shall be available to the debtor for all purposes as a protection in bankruptcy. But the section speaks of the deed as "such deed," which must be taken to mean such a deed as would be operative under the 192nd and 197th sections. "Such deed," says Erle, C.J. in *Ilderton v. Jewell*, "must mean a valid deed." It would be in the highest degree inconsistent to leave the creditor who is not bound by the deed, nor subject to the jurisdiction of the Court of Bankruptcy, at liberty to bring his action and recover judgment against the debtor, and then prevent him from reaping the fruit of his judgment by execution thereupon. It was urged, indeed, in the argument on the demurrer, that a creditor having obtained a judgment might resort to the Court of Bankruptcy for leave to issue execution. But this assumes that the Court of Bankruptcy has, in the case of an invalid deed, jurisdiction over a creditor not bound by the deed; the contrary of which position has been shewn. Such an application on the part of a creditor so circumstanced would, of course, be granted on the invalidity of the deed. But, as we have seen, the validity of the deed is, as regards the non-assenting creditor, the foundation of the Court's jurisdiction in respect of such creditor. How, then, under such circumstances, can such an order be necessary?

Some little difficulty is, perhaps, created by the provision that execution shall not

issue "without leave of the Court." For as a creditor bound by the deed would also be bound by the provisions of the 197th section, and would therefore be barred from bringing an action against the debtor, and would be compelled to resort to the Court of Bankruptcy to receive his share of the estate, it may be urged that this provision could only apply to a creditor who, by reason of not being bound by the deed, was entitled to proceed against the debtor. But, although at first sight there would appear to be some inconsistency between the enactment of the 197th section, which drives the creditor under a valid deed to his remedy in bankruptcy, and the construing the power, given to the Court by the 198th section, of enabling the creditor to issue execution in an action, as applicable to the case of a valid deed, yet, as it seems to me, the better view, and the one which will best consist with the construction to be put on the other sections of the act, is, that the intention and effect of this provision is to empower the Court of Bankruptcy, under very special circumstances, to enable even a creditor bound by a valid deed to proceed to execution against the debtor. Thus, in the case of *Ex parte Morrison, in re Clunne*, the Lord Chancellor, on appeal in bankruptcy, allowed a creditor to take out execution where it appeared that the deed, though otherwise satisfying the requirements of the 192nd section, had been executed for the express purpose of defeating the creditor, who had already brought his action and recovered judgment. The provision is, therefore, as it seems to me, quite consistent with the position that, in the case of an invalid deed, the Court has no jurisdiction, and that, consequently, execution may be issued without reference to its authority.

For these reasons I consider it clear that, in the case of an invalid deed, execution may issue against the goods of the debtor, notwithstanding the 198th section. Indeed, in the course of the discussion, Mr. Mellish, who argued for the defendant, being pressed by the observations of the Court, felt constrained to concede the point as to execution against the goods, but endeavoured to distinguish as to execution against the person, relying upon the con-

cluding part of the section, which gives to the debtor, on the production of the certificate, all the protection which an adjudication in bankruptcy would afford. It appears to me that no such distinction can be made in this respect. The prohibition to issue execution against the person occurs not only in the same section as that which prohibits execution against the goods, but also in the same sentence; and the same principle and the same reasoning apply equally to both. Nor can it be supposed that the legislature intended to distinguish between execution against the goods and execution against the person, and to give protection to the person of the debtor where, by reason of the invalidity of the deed, the whole matter was not brought within the operation of the Bankrupt Law, and the property of the debtor remained liable to be taken in execution under legal process. Even in the absence of authority I should be prepared to hold an execution might issue against the person in such a case. But the question has been three times before the Courts, and in each instance it was held that the person of the debtor was not privileged from arrest. In the case of *Dewhurst v. Kershaw* the Court of Exchequer refused to discharge a debtor who had received a certificate on the registration of an invalid deed. In *Ilderton v. Jewell* the Court of Common Pleas held, that a certificate, given under such circumstances, afforded no protection in an action against bail who had undertaken to render a debtor in the Lord Mayor's Court. Erle, C.J., in giving judgment, says, "A certificate given in respect of a void deed gives no protection. 'Such deed' means a valid deed. The certificate is as void as the deed itself." Again, in *Leigh v. Pendlebury* (6), the Court of Common Pleas held, that a debtor, who had received a certificate and had been taken in execution, was not entitled to be discharged out of custody. We must, therefore, take it as now settled by authority, which is binding upon us, that a certificate, given on the registration of an invalid deed, affords no protection to a debtor against execution against his person, any more than against his goods.

But it is said that, though a certificate given on the registering of an invalid deed will be inoperative to protect the debtor from arrest, it may, nevertheless, be available to the sheriff on a plea of justification in an action for an escape or for a false return. Such a position is, in my opinion, untenable. When once it is established that the 198th section affords no immunity from arrest where a certificate has been given on an invalid deed, but that, on the contrary, the judgment creditor is entitled to issue his execution, and that the certificate affords no protection to the debtor if the sheriff thinks proper to disregard it, it seems to me to follow, as a necessary consequence, that the sheriff is bound to execute the process. For the prohibition to the sheriff's officer to arrest the debtor, which is involved in the concluding passage of the 198th section, which extends to the debtor the protection which bankruptcy would have given, is obviously ancillary only to the immunity from process which is conferred by the earlier part of the enactment. And it appears to me to be a startling inconsistency to say, that the certificate, being void for its primary purpose, shall yet be valid for a subordinate one; and having been intended as a protection to the debtor against the sheriff in the execution of legal process, shall, while it wholly fails to protect the party for whose benefit it was designed, yet protect the sheriff, against whom it was intended to take effect. It seems to me a contradiction in terms, to say that the judgment creditor is entitled to have execution against the person of the debtor, the latter not being privileged from arrest, and at the same time to say that the sheriff can nevertheless justify the not executing the process against the debtor. It is the right of the suitor, who has obtained judgment and taken out execution, to have the process of the Court executed. If the sheriff fails herein, and proceedings are taken against him by the creditor, it seems to me that, in the absence of a statutory indemnity against such an action, he can only defend himself by shewing either that the execution of the writ was impossible, or that the debtor was privileged by law from arrest. Although it may be granted that the order or other act of a Court of competent jurisdiction affording protection to the debtor,

(6) 15 Com. B. Rep. N.S. 815; s. c. 33 Law J. Rep. (N.S.) C.P. 172.

although founded in error, will still justify the sheriff in not arresting or detaining the debtor, I am at a loss to see how an instrument which is void for the purpose of giving protection to the debtor, can justify the sheriff in liberating the debtor and returning that he was not liable to be arrested.

And here it may be not unimportant to observe, that the return made in this case is clearly untrue, inasmuch as the debtor was certainly not entitled to protection. And though it is true that the substantial cause of action in such a case is the non-execution of the process, and not the false return, yet it appears to me by no means an imperfect test of the legality of the proceeding of the sheriff in not executing the process that the return to the writ is untrue. Still more strikingly would this be so if no good return under the circumstances of the case could be made. Now, I am at a loss to see what return could have been made in this case which would have been good in law, inasmuch as the sheriff cannot say either that the debtor was entitled to protection, or that the sheriff was bound by the certificate.

No doubt, if the legislature, notwithstanding the inconsistencies which must result from such a provision, has enacted that the sheriff shall respect the certificate of registration without reference to its validity or invalidity, the existence and production of the certificate will be sufficient justification for not arresting or for discharging the debtor. But I should certainly expect to find express enactment to this effect, before I should give credit to the legislature for having intended to bring about such an anomalous state of things as that which I have referred to. But far from finding anything in the language of the 198th section which amounts to a direction to the sheriff to respect a certificate without reference to its validity, I cannot but think that, when that section is carefully examined, it becomes plain that a contrary construction must be put on it. The concluding passage of the section is obviously supplemental to the leading enactment which precedes it. First comes the provision that, on the registering and filing of a deed valid under the 192nd section, for such, according to judicial exposition, is the meaning of the term "such deed," the debtor shall have,

except by leave of the Court, immunity from execution against his property or person : then follows immediately the provision that the certificate of the filing and registration of "such deed" shall be available to the debtor to all intents and purposes as a protection in bankruptcy. Now, it appears to me, that the words "such deed" in the latter part of the section must necessarily be read in the same sense in which they are to be understood in the former; and that, consequently, the protection in bankruptcy will only arise where the certificate has been given on a valid deed. That the latter part of the section must be taken as contingent on the first part coming into operation will, I think, become further apparent from the following consideration. By the first part of the enactment the Court of Bankruptcy has power to grant leave to issue execution notwithstanding the certificate. It cannot be doubted that in such case the sheriff would be bound to execute the writ, notwithstanding the production of the certificate. This shews that the certificate does not afford an absolute protection, but is conditional on the debtor being entitled to the protection of which the certificate is only the ostensible sign. It seems plain from the fact that both provisions of the section rest on the hypothesis of the same deed, as well as from the whole scheme of this legislation, that (as I have already observed incidentally) the protection in bankruptcy is only ancillary to the immunity from process, and, therefore, only attaches when this immunity accrues.

According to my view of the matter the section is to be read thus : if a valid deed be filed and registered, the debtor is to be privileged from arrest; and a certificate of the filing and registration of such a valid deed shall on its production entitle him to be discharged, or to recover 5*l.* a day against the officer of the sheriff for every day he is detained. According to the opposite construction the section is to have this effect, a valid deed, and a valid deed only, will privilege the debtor from arrest; but, though the debtor is liable to be arrested, a certificate which is inoperative to protect him, if the sheriff thinks proper to arrest him, will leave it at the option of the latter whether he will execute the process of the law or not. It seems to me, with the greatest

deference for the opinion of those from whom I have the misfortune to differ, that this is a *reductio ad absurdum* which ought to be conclusive of the question.

The decisions to which our attention was called during the argument, on cases arising on the Bankrupt and Insolvent Acts, have, as it seems to me, no application to the present case; first, because the protection to the debtor there resulted from judicial acts of Courts of competent jurisdiction; secondly, because in those cases the debtor was clearly entitled to immunity from arrest, or there was an express enactment protecting the sheriff when acting in obedience to the order of the Court; all of which circumstances are wanting in the present instance. The case of *Saffery v. Jones* arose on the Insolvent Act, 7 Geo. 4. c. 57, the 81st section of which expressly indemnifies the sheriff for anything done in obedience to any order of the Court. The jurisdiction of the Court to make the order for the discharge of the debtor having been questioned, Lord Tenterden says, "Even if the Insolvent Court had no jurisdiction, the language of the clause is sufficiently strong to make the order of the Court a protection to the gaoler." Taunton, J. says, referring to the 81st section, "But for this section the gaoler was between two fires; if he did not discharge the prisoner pursuant to the order of the Insolvent Court, he would probably be liable to an action by him; if he did discharge him he might be liable to an action for an escape at the suit of the creditor. This section was framed to meet that difficulty." In *Norton v. Walker*, which turned on the provision of the Bankrupt Act, 5 & 6 Vict. c. 122, as to the discharge of a bankrupt arrested on a writ of *ca. sa.*, the Court of Exchequer held that the words of the section, "if such bankrupt shall be arrested, he shall on producing his summons be immediately discharged," were to be taken to mean "the party so adjudged bankrupt"; and that consequently it was not necessary for the sheriff, in an action against him for an escape, to shew the validity of the bankruptcy. It was enough that the party had been adjudged a bankrupt to entitle him to protection. In *Thomas v. Hudson*,

which was an action against the keeper of the Queen's Prison for an escape, the Court of Exchequer held that the defendant, who, in obedience to an order of a Commissioner in Bankruptcy acting under the 5 & 6 Vict. c. 116. and 7 & 8 Vict. c. 96, had discharged a prisoner in custody on an execution in an action of tort, though the jurisdiction of the Commissioner did not extend to discharging an insolvent in custody in such an action, was justified in obeying the order, on the ground that the order was "that of a Judge acting in a matter over which he had jurisdiction." Alderson, B., in delivering the judgment of the Court, goes into an elaborate argument to shew that, to use his words, the Commissioner is "exercising functions strictly judicial," and that "his judgment is conclusive." This judgment was afterwards affirmed in the Exchequer Chamber, the Court adopting the reasons given for it in the Court below. There can be no doubt that the adjudication of bankruptcy, upon which the summons which gives protection issues, taking place, as it does, after proof of the petitioning creditor's debt, the trading, and the act of bankruptcy, is a judicial act; as is necessarily the giving of the certificate of conformity whereby the bankrupt obtains his final release. Equally clear is it that the act of an Insolvent Commissioner in adjudging, after hearing all parties concerned, that an insolvent prisoner should be discharged, was a judicial proceeding; and the reasoning of Alderson, B., in *Thomas v. Hudson*, shews that the order of a Commissioner in Bankruptcy acting under the 5 & 6 Vict. c. 116, was also an exercise of judicial authority. Can the same be said of the act of the Chief Registrar in granting the certificate of registration under the 198th section of the present act? I think not. The Chief Registrar is bound to register any deed brought to him for registration within the prescribed time, which purports to be a deed within the 192nd section, if accompanied by such an affidavit as the section requires. There is nothing which makes it incumbent on him to ascertain whether the deed is one which will be binding on all the creditors; he is not empowered to make any order for the protection of the bankrupt; he is

simply to certify that the deed has been filed and registered. It seems to me that this is much more in the nature of a ministerial than of a judicial proceeding. And what to my mind materially confirms this view is, that the proceeding being altogether an *ex parte* one, no power is given either to the Registrar or the Court to withdraw or annul the certificate at the instance of a non-assenting creditor, if the deed should be shewn to be invalid. Under the Bankrupt Act, the adjudication of bankruptcy might be annulled, or the interim protection withdrawn on the refusal of the final certificate. Under the 5 & 6 Vict. c. 116. the interim order for protection made in the first instance fell to the ground, if the Commissioner on the hearing of the case on the merits refused to make the final order. Under the Insolvent Act, 1 & 2 Vict. c. 110, no discharge could be made till all the requirements of the act had been fulfilled and all parties concerned had been fully heard. But here, while the proceeding is *ex parte*, there is no authority to annul the certificate, if it has been improvidently granted upon a deed which turns out to be void; and the result of holding that the granting of such a certificate is a judicial act, and that the certificate will justify the sheriff in not arresting, will be that, while the Courts hold that the judgment creditor is entitled to his execution against the debtor, and that the latter is not privileged from arrest, the sheriff, who is in the difficulty before pointed out, will never fail to give effect to the certificate unless indemnified by the creditor, whereby a burden will be cast on the creditor, which he may not always be able to satisfy, and to which, unless imposed on him by the authority of the Court, he ought not to be subject.

I cannot think that the legislature can have intended to give to an *ex parte* proceeding like the present, which it provides no means of opposing or reviewing, the character and effect of a judicial act. But, however this may be, the main and the essential difference between the cases referred to and the present is, that in the former the party who had been discharged by the sheriff's officer or the gaoler was

clearly entitled to his discharge; and if, instead of having been set at liberty by those officers, he had applied to the Court out of which the execution issued to be discharged, the Court must have ordered him to be released from custody. The reasoning of Alderson, B. in *Thomas v. Hudson* is directed to shew that, under the 5 & 6 Vict. c. 116, the order of the Commissioners in Bankruptcy was conclusive against all the world. Nor, as it seems to me, can it be doubted that the orders of the Court, under the Bankrupt and Insolvent Acts, in granting either provisional or final protection, are, as regards the right of the bankrupt or insolvent to protection from arrest, conclusive and binding upon every one, and entitled to have effect given to them by any Court upon whose process a person who has obtained such protection may be in custody. But, under the sections of the recent Bankrupt Act now under consideration, the debtor who has obtained a certificate is not, as we have seen, entitled to protection, unless the deed, on the registration of which it is granted, is a valid one. Here, if the debtor had been before the Court on an application for his discharge, the application would have been refused. The case is, therefore, clearly distinguishable from those which arose on the former acts.

It is true that if a defendant is held liable, under such circumstances as the present, a sheriff will be placed in a position of exceeding hardship. If a party taken in execution produces a certificate, the sheriff's officer has no means of knowing whether the deed on which the certificate has been granted was a valid deed or not. If he discharges the debtor, and the certificate proves void, the sheriff becomes responsible to the execution creditor; if the debtor is detained, and the certificate turns out to be good, the officer becomes liable, under the combined operation of the 198th section of the recent act and the 113th section of the 12 & 13 Vict. c. 106, to forfeit 5*l.* a day to the party so detained. But it is not for us, on this account, to interfere with that which, *ex debito justitiæ*, is the clear right of the execution creditor, namely, to have his writ executed, or to have redress against the minister of

the law, whose duty it is to execute it, and who fails in that duty. We must leave it to the legislature, which has brought the sheriff into this dilemma, to extricate him from it. This is not the first time sheriffs have been placed in a position of difficulty from having to execute writs at their peril. Prior to the Interpleader Act, 1 & 2 Will. 4. c. 58, sheriffs were often embarrassed where property which they were directed to take in execution was claimed by a third party. But the sheriff had to act at his peril. If, from uncertainty as to whether the goods belonged to the execution debtor or not, he omitted to seize and returned *nulla bona*, and the goods turned out to be the goods of the debtor, he was liable in an action by the creditor. It is true the Court resorted to certain contrivances to protect the sheriff, such as delaying the proceedings of the creditor, so as to drive him, where it was possible, to contest the question of property with the opposing claimant before the sheriff should be compelled to act; but if the sheriff took upon himself to act without the interposition of the Court, and made a return, he was obliged to stand or fall by the return so made. If the return proved untrue in law or fact, the execution creditor could not be barred of his right of action against the sheriff. It was a sense of the hardship of the position in which the sheriff was thus placed that led to the provision of the Interpleader Act in favour of sheriffs. In like manner, a sheriff might be embarrassed by a claim of privilege from arrest. In some cases, he might make himself liable to serious consequences by making the arrest. Out of regard to this difficulty, the Court would sometimes insist on an indemnity being given, and would delay the return till this had been done—see *Delvalle v. Plomer* (6). If, however, the sheriff chose to allow the privilege, he might do so, and return accordingly; but he did so at his peril, for if the party was not, in fact, privileged, the sheriff was liable in an action for a false return.

It is not now necessary to consider how far, if this had been an application for the exercise of our summary jurisdiction, either

to assist the creditor or to protect the sheriff, we might have taken into consideration the difficulty in which the latter is placed. As I have before observed, the question on this demurrer is, whether the sheriff was justified in taking upon himself to discharge the debtor, and returning that he was protected by the certificate from arrest. To this, for the reasons I have stated, there can, in my judgment, be but one answer; unless, indeed, we were prepared to overrule the cases of *Dewhurst v. Kershaw*, *Ilderton v. Jewell* and *Leigh v. Pendlebury*, which, I think, it is not competent to us to do. And as against the hardship of the position in which a sheriff is thus placed must, I think, be set the position of the creditor who, being entitled to execution against the debtor, will have that which, as the law stands, is his undoubted right, frustrated by the refusal of the sheriff to execute the writ. It may perhaps be doubted whether the difficulty which has arisen from the presence of unequal or unreasonable terms in composition-deeds had presented itself to the mind of those by whom the recent Bankruptcy Act was framed. Possibly, the decisions of the Courts, whereby the implied condition that the terms of such a deed shall be equal and reasonable has been superadded to the express requirements of the act, may have been an encroachment on the province of the legislature. The effect of these decisions, and of the consequent ones as to execution issuing against the debtor, have tended to unhinge the machinery of this system of what may be called *quasi* bankruptcy. But we are bound by these decisions; and it appears to me that it flows from them as an inevitable consequence that, the debtor being disentitled to protection, the sheriff is bound to execute the writ at his peril, and is liable in an action for not doing so.

In my opinion, therefore, our judgment should be for the plaintiff.

The majority of the Court being of a contrary opinion,—

Judgment for the defendant.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Queen's Bench.)

1865. } GARNETT AND MOSELEY GOLD
Feb. 2. } MINING COMPANY v. SUTTON.*

Limited Liability Act, 1856 (19 & 20 Vict. c. 47).—Old Company newly Registered as Limited—Remedy for Company's old Debts—Liquidators—Winding-up.

If a joint-stock company, registered under the statute 7 & 8 Vict. c. 110, while it is in debt obtains registration as a company with limited liability under the statute 19 & 20 Vict. c. 47, and proceedings are afterwards taken to wind it up, the liquidators appointed under the last-mentioned act may make a call upon the old shareholders for a sum per share exceeding the amount of the sum remaining unpaid on such share, and for any sums per share that may be requisite to discharge the old debts.

This was an appeal, by the defendant, against the decision of the Court of Queen's Bench.

The defendant was a holder of 2,000 shares of 1*l.* each in a company called the Garnett and Moseley Gold Mining Company of America, which had been completely registered as a joint-stock company under the statute 7 & 8 Vict. c. 110. The defendant had paid 1,500*l.* in respect of those shares. Subsequently the company was registered as a company with limited liability, under the statute 19 & 20 Vict. c. 47. At the time of such registration the company was largely in debt.

The company afterwards failing, proceedings were taken to wind it up. Liquidators were appointed under the last-mentioned act, and they made a call of 1*l.* per share on the defendant among other shareholders. This call was requisite to raise the sum necessary to discharge the debts due from the company before its registration as a limited company. All the present shareholders had been shareholders in the old company.

The defendant refused to pay the call.

* Coram Erie, C.J., Pollock, C.B., Willes, J. and Channell, B.

Hall, for the appellant, the defendant (Feb. 1).—Though this company was registered originally under the statute 7 & 8 Vict. c. 110, before the Limited Liability Act (the 19 & 20 Vict. c. 47.) passed, and the defendant was indebted for his shares before that act, yet, after the company had been registered under the Limited Liability Act with a limited liability, the liquidators appointed under that act had no power to make a call on any shareholder for any sum greater than the sum, at the time of the winding-up of the company, remaining unpaid by the shareholder in respect of his shares. It is clear that such would be the limit of the liquidators' authority, if this company had been a new company for the first time registered under the Limited Liability Act. Section 116. of the act reserves the rights of creditors of the old company against the company and its shareholders; but by the express terms of section 113, all the provisions of the Limited Liability Act are to apply to an old company newly registered, as much as to a new company registered for the first time under it, and an old company newly registered is placed on the same footing as a new company, in all respects except one, viz., that by section 116, the rights of old creditors to proceed against the company and its shareholders are reserved. This is provided plainly with the view of preventing any injustice being done to individual creditors. But that section gives no new rights to creditors. It does not apply to the case of new creditors, nor does it give the old creditors a new remedy. In fact, the reservation in section 116. is much against the supposition that the liquidators have a right to make unlimited calls in the case of such a company as the present, for if the liquidators had such power, it would not be necessary that the old rights of the creditors should be retained. Section 59. is a plain enactment that the winding-up powers of the act are to apply to old registered companies; and section 61. limits the powers of the liquidators under sections 84. and 104. to make calls on the shareholders to the amount yet remaining unpaid on their shares. *Ex parte Stevenson* (1), which will be cited as an authority in support of the

(1) 32 Law J. Rep. (N.S.) Chanc. 96.

contention on the other side, is a decision of Turner, L.J., only; Knight Bruce, L.J., expressing a doubt as to the correctness of Turner, L.J.'s opinion. That decision proceeded on a misconception of the case of *The Plumstead Water Company* (2), and under a misapprehension of the terms of section 113. of the Limited Liability Act.

After the argument for the appellant the Court rose. On the following morning,

Garth (*Bovill* with him) was prepared to argue for the respondents, the plaintiffs, but he was stopped by the Court, and the following judgment was delivered by—

ERLE, C.J.—The question for the Court is, whether the defendant is liable to certain calls made by the liquidators in respect of the company being wound up. The company existed as an unlimited company under the Joint-Stock Companies Act, prior to the act of 1856, and afterwards became registered as a limited company, and became thereby a new corporation under the Joint-Stock Companies Act, 1856. The defendant objects to pay calls made by the liquidators of 1*l.* per share, which is the full value of the share, because he has already paid 15*s.* per share, and is therefore, if it is a limited company, only liable to 5*s.* per share more. Section 61. of the statute of 1856 says, that "if the company be limited, no contribution shall be required from any shareholder exceeding the amount, if any, unpaid on the shares held by him." 5*s.* per share is unpaid, and therefore if this is to be taken absolutely as a limited company, the call of 1*l.* is too much and cannot be sustained. But before the registration under the statute of 1856, the company, of which the defendant was a member (and all the shareholders were in the same position), had been a joint-stock company, and had incurred debts, which are still existing, and which require a call of 1*l.* per share to liquidate them. The question is, whether the liability of the defendant, by reason of his having been a shareholder in the unlimited company continues, notwithstanding that the unlimited company became a limited company. We are of opinion that

the statute of 1856 has saved that liability. Now, the statute of 1856, section 107, repeals all the statutes creating joint-stock companies, and would repeal liabilities in respect of being a member of those joint-stock companies, were it not that, by section 109. of the same statute, which is the statute under which the defendant claims, it is enacted, that "no repeal hereby enacted shall affect any right acquired or liability incurred under any such acts before such repeal came into operation." Therefore there is an express saving of the liability under the former acts. It would be a huge injustice if a joint-stock company under the earlier acts, becoming registered as a limited company under the act of 1856, could get rid of their liabilities and debts. They have the power of becoming registered as a limited company and being incorporated, and they must do that which the law requires of them, namely, pay their debts under the former statutes. Then section 113, which gives the registration to a limited company, says, that an old company when registered under the act as a limited company shall become a limited company, and shall be incorporated, and that "all the provisions of this act shall apply to such company, in the same manner in all respects as if it had been originally incorporated under this act." Those words, had they not been qualified, would have had the effect of clearing off all the debts; but they are followed immediately by the clause—"subject nevertheless to the reservations hereinafter contained with respect to the existing rights of creditors and other persons." It is therefore an incorporated company from the date of the registration, subject to its liabilities under its already existing debts. Then comes section 116: "The registration of any existing company under this act, shall not nor shall any act of the company subsequent to such registration, prejudice any right which previously to such registration has, or which would, if no such registration had taken place, have accrued to any creditor or other person against the company in its corporate capacity, or against any person then being or having been a member of such company, but every such creditor or other person shall be entitled to all such remedies against the

(3) 2 De Gex, F. & Jo. 20; s. c. 29 Law J. Rep. (N.S.) Chanc. 741.

company in its corporate capacity, and against every person then being or having been a member of such company, as he would have been entitled to in case such registration had not taken place." The intention of the legislature is perfectly clear to prevent what I call the great injustice of the company's clearing off its debts by merely taking out a certificate of registration as a limited company. It must pay its debts before it can have the benefit of the registration. We are of opinion that the effect of this clause is to make this a limited company *quoad* the liabilities incurred while they had a certificate of registration as a limited company, and to leave it an unlimited company *quoad* the liabilities existing prior to the time it took out such a certificate. Therefore section 61, which limits the right of the liquidators to make a call for the amount remaining unpaid on the shares in the limited company, does not apply to the defendant as a shareholder in the unlimited company, which we consider him to be in respect to the debts of the unlimited company incurred prior to the registration. The judgment, therefore, will be affirmed. The judgment of the Lords Justices, or one of them, in *Ex parte Stevenson* (1), is in accordance with the view which we have enunciated.

Judgment affirmed.

1865. }
Jan. 26. } *Ex parte* KNOWLING.

County Police—Police Districts—Single Parish.

The Quarter Sessions, under the 27th section of the 3 & 4 Vict. c. 88, have power to constitute a single parish a separate police district.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 68.]

[IN THE EXCHEQUER CHAMBER.]
(*Error from the Court of Queen's Bench.*)

1865. } THE QUEEN v. THE JUSTICES
Feb. 8. } OF SUSSEX.

Order of Removal—Appeal—Grounds of Appeal, when to be delivered—Right of Adjournment—Discretion of Justices—Practice of Adjourned Sessions—Statutes 4 & 5 Will. 4. c. 76. ss. 79. and 81. and 11 & 12 Vict. c. 31.

The delivery of grounds of appeal, against an order of removal, with the notice of appeal, is as valid for all purposes as a delivery of them fourteen days at least before the Sessions begin.

The appellants have not, by the statute 11 & 12 Vict. c. 31. s. 9, twenty-one days, plus the fourteen days after the delivery of the depositions, for giving notice of appeal absolutely, so as to entitle them as of right to have the appeal entered and respited, if after those days have expired there does not remain enough time before the Sessions to deliver an effective notice of appeal according to the practice of the Sessions; and the Sessions may, in their discretion, refuse to respite if they deem that the appellants have been guilty of unreasonable delay in giving their notice of appeal.

Though the time for giving notice of appeal must be calculated with reference to the first day of the Sessions, yet when for practical convenience the county is divided into distinct divisions, and a distinct Court is held in each division, by adjournment from one to the other, and the rules of practice made by the Court in each division assume that the day when the Court for that division begins its sittings is the first day of the Sessions, it is sufficient if the grounds of appeal are delivered fourteen clear days before the first day of the sitting of the Court for the division in which the appeal is according to the practice to be tried.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 69.]

1865. { THE MAYOR, ALDERMEN, AND
Jan. 25. { BURGESSES OF WYMOUTH, ap-
pellants, v. NUGENT, respondent.

Prerogative of the Crown—Wharfrage Duties—Harbour Tolls—Exemption.

By 6 Geo. 4. c. cxi. certain wharfrage duties were authorized to be taken in respect of certain specified goods, including stones, which should be imported into the harbour of W, and the same were to be vested in the mayor, &c., for the purpose of repairing, improving, and maintaining the harbour, wharfs, &c., within the borough and town of W. There were no words in the act binding the Crown to pay such duties, but there were provisions exempting the Crown from liability in respect of coals imported into the port, for the use of His Majesty's steam-packets, and actually used on board the same, and also from the tolls to be taken for passing over a bridge connected with the harbour. Certain stones were brought from P. by a barge, into the harbour of W. for the purpose of being used upon government works which were being carried on there, and which, if they had been brought by any private individual, would have been liable to the duties given by the act of parliament:—Held, that the Crown was not liable to be called upon to pay such duties.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 81.]

1865. }
Jan. 31. } In re ROBINS.

Attorney and Solicitor, Re-admission of.

An attorney having been struck off the roll in Easter Term 1859, for misappropriating to his own use money received from a client for a particular purpose, the Court, in Hilary Term 1865, allowed his name to be restored to the roll, on affidavits of numerous attornies to his good character and conduct in the interval.

This was an application on behalf of Richard John Saltren Robins, late an attorney of Plymouth, to be restored to the roll of attornies. In the year 1857, having received the sum of 18*l.* from Mrs. Smale, a client, for the purpose of

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paying succession duty, he appropriated it to his own use, and in Easter Term 1859 he was struck off the roll of attornies for this misconduct.

He applied to be restored in Trinity Term 1860, but unsuccessfully; and again in Hilary Term 1864; but on the last occasion the Court intimated that, if after the lapse of another year the applicant was able to produce vouchers of his good conduct, they would be inclined to re-admit him.

Sir R. P. Collier (*Solicitor General*) moved accordingly, on affidavits shewing the above facts, and that the applicant had repaid the money misappropriated to the representatives of Mrs. Smale, deceased; that he had been employed as an attorney's clerk since he had been struck off the roll; and on affidavits of the gentlemen in whose employ he had been, and of other attornies to the number altogether of fifteen, vouching for his past good conduct; and, in addition, a memorial, signed by thirty-eight attornies of Plymouth and its neighbourhood, recommending him to the merciful consideration of the Court.

No opposition being offered on the part of the Law Society, the Court (1) directed that the applicant should be re-admitted.

Order accordingly (2).

1865. }
Jan. 31. } In re PYKE.

Attorney and Solicitor, Re-admission of.

An attorney having been struck off the roll, in order to be called to the bar, was afterwards disbarred for professional misconduct; the decision of the Benchers being affirmed, on appeal, by the fifteen Judges. After the lapse of twenty years an application was made on his behalf to be re-admitted an attorney; but the Court refused the application, on the ground that there were no affidavits of professional persons and others as to his good conduct and character in the interval.

This was an application on behalf of Henry Hugh Pyke to be restored to the roll of attornies.

(1) Cockburn, C.J., Mellor, J. and Shee, J.

(2) See the next case.

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In 1836 Mr. Pyke, having been a practising attorney for about six years, was struck off the roll at his own request, with a view to being called to the bar. Having been called to the bar by the Society of Gray's Inn in 1838, in October 1843 he was summoned before the Benchers to answer the charge, "that after he was called to the bar, he participated, by previous agreement, in the profits of an attorney"; and also the additional charge "that he had acted both as attorney and counsel in or about the year 1840 in getting up and conducting an indictment against one William Thompson, at the Middlesex Sessions, for a poisonous nuisance which affected not only his (Pyke's) health, but also his freehold estate, as well as that of his neighbours in the place in which he then resided."

After hearing his defence, the Benchers disbarred him; and on appeal to the fifteen Judges, after two days' hearing, their decision was affirmed.

In November 1845 Mr. Pyke applied to this Court to be restored to the roll of attorneys, but the application was refused (1).

Since he had been disbarred, Mr. Pyke had been engaged in assisting his father in conducting his business of a law and general agent, and since his father's death in carrying on such agency on his own account; and he had kept up his professional knowledge by reading the law reports and other law books.

Stammers, in support of the application, contended, that as the offences of which the applicant had been found guilty were simply offences against the conventional regulations of the Bar, the fact of his having been disbarred ought not to affect him in his character of attorney, as he had committed no offence nor any malversation in that character; and that even if it were to be considered that he had violated the rules of the profession in general, he had suffered by his long exclusion from the profession sufficient punishment to vindicate the dignity and character of the profession. He cited *Anonymous* (2), where a solicitor who had

been struck off the roll for misconduct, was restored after ten years, during which he had maintained an irreproachable character, the application being supported by a memorial signed by a very large number of solicitors. In that case the counsel in support of the motion cited *In re Smith*, before Lord St. Leonards, in which Mr. Smith's name, after having been struck off the roll for some irregularity in practice as Master Extraordinary, was ordered to be restored, but with a proviso that he should be suspended from practising for six months. They also referred to *The King v. Greenwood* (3), where an attorney about two years previously had been struck off the roll for malpractice, and was upon petition reinstated; the Court declaring that the striking off the roll was not to be understood as a perpetual disability, but was sometimes only meant as a punishment, and might be considered in the light of a suspension only if the Court saw cause. The Master of the Rolls said, "though he was very properly struck off, yet considering the great length of time that has elapsed, and the great suffering that he has endured, considering the testimonials to his character, and that the Law Institution does not oppose, he had determined to restore him to the roll." He also cited *In re Robins* (4) and *Ex parte Calland* (5); also *Dugdale's Origines Juridicales*, p. 311, cap. 70: "Orders relating to all the Innes of Court. Orders made and agreed upon to be observed and kept in all the four Houses of Court xxii Junii A.D. MDLVII. 3 & 4 Ph. & M. . . . 2. That none attorney shall be admitted into any of the Houses. And that in all Admissions, from henceforth this condition shall be implied; that if he, that shall be admitted, practise any Attorneyship, that then *ipso facto* to be dismissed; and to have liberty to repair to the Inn of Chancery from whence he came, or to any other, if he were of none before." — This is all, in effect, that Mr. Pyke now asks to be allowed to do.

Bovill (with him *Garth*), on behalf of the Incorporated Law Society, submitted that Mr. Pyke was in exactly the same

(1) See *In re Pyke*, 1 New Prac. Cases, 330.

(2) 17 Beav. 475.

(3) 1 W. Black. 222.

(4) *Ante*, p. 121.

(5) 2 B. & Ald. 315, n.

position as he was when his application was refused in 1845.

[COCKBURN, C.J.—Except that he has undergone twenty years' exclusion.]

Bovill then intimated, that a transcript of the shorthand-writer's note, verified by affidavit, of Lord Chief Justice Denman's judgment when the case was before the Court in 1845 (which was rather fuller than the report in 1 *New Practice Cases*, 330) being before the Court, the Law Society wished to leave the matter entirely in the hands of the Court.

COCKBURN, C.J.—We think that enough has not been done to entitle Mr. Pyke on the present occasion to the order for his re-admission, which he seeks at our hands, because he has not produced that evidence which has been required on all other similar occasions, of good conduct from the time when he was unfortunately excluded from the legal profession up to the present moment. We must take it that the sentence of the Benchers of Gray's Inn disbarring Mr. Pyke, confirmed as it afterwards was by the decision of the Judges, was perfectly right; and that the conduct with which Mr. Pyke was charged, and of which he was found guilty, was such as to render him unfit for the profession of the bar, of which he was then a member; and I think there is nothing which we should more anxiously uphold than that the same honour and the same integrity which are essential to the character of a barrister are also essential to the character and position of an attorney; and therefore I quite feel that an individual who is unfit to fill the position of a member of the bar, from dishonest or dishonourable conduct, ought certainly not to be admitted into the other branch of the profession. Still, however, I cannot but feel that, both on principle and precedent, sentences of exclusion, either from the one or the other branch of the profession, need not, because, looking at the terms in which they are pronounced, they are of a perpetual character, be considered, therefore, under every state of circumstances, to be inexorably an exclusion for all time; and when we find that for a breach of professional conduct a gentleman has been excluded, and has suffered twenty years' exclusion, if we were perfectly satisfied that that sen-

tence, however right it was when it was pronounced, had had the salutary effect of awakening him to a higher sense of honour and of principle, and that he could shew us that, having suffered the humiliation, and all the serious consequences as affecting his interests in life, which such a sentence must necessarily carry with it, he had been awakened to a higher sense of honour and principle,—I do not think we should have been inexorable to an application of this kind. I think we ought to look at the case as though Mr. Pyke had never been on the roll of attorneys at all, and had no occasion to come to this Court to have his name removed from the roll, in order to be admitted as a barrister. Suppose Mr. Pyke had been simply a member of the bar, and was disbarred, and after the lapse of twenty years had articulated himself to an attorney, and had served his articles, and he had proposed himself for examination and admission, would it have been an insuperable bar to his admission as an attorney that twenty years before he had been removed from the position and *status* of a member of the bar? I think that would depend upon how far the examiners in the first instance, or the Court if applied to, felt that in the interval the conduct of the individual had been so irreproachable as to lead to the conclusion that, notwithstanding the delinquency in early life, he might be safely intrusted with the interests of the clients who might commit their affairs to him, and he might be admitted to an honourable profession without that profession suffering any degradation by his being so admitted. On applications to strike an attorney off the roll, or to re-admit an attorney under peculiar circumstances, we ought to bear in mind that it is not with regard to the individual himself, or the punishment that he may have deservedly brought on himself, that the circumstances are to be inquired into; we have a duty to perform to the suitors of the Court, and not only to the suitors of the Court, but to the profession of the law, by taking care that those permitted to practise in it are persons on whose integrity and honour reliance can be placed. Nevertheless, I do not think that rule should be so inexorable as that after a man has undergone a long period of exclusion and punish-

ment and suffering that that carries with it, if we are satisfied that his conduct has been such in the mean time as to insure confidence in his character, we might not either admit him in the first instance or re-admit him. I think, therefore, if Mr. Pyke can satisfy us, whatever the business has been he has been carrying on—I understand it to have been that of a law agent, either assisting his father or as principal—that his conduct and character have been unimpeached, and are unimpeachable, by evidence of trustworthy persons, especially members of the profession, we should be disposed to listen to this application; but as it stands now, we have simply the fact that Mr. Pyke was disbarred as being unworthy to remain a member of the profession, and so long as that stands, without anything more to satisfy us that Mr. Pyke is a person that ought to be admitted to the roll of attorneys, we cannot give effect to the application that has been brought before us, certainly with great ability, and with the greatest propriety, by Mr. Stammers. The application may be renewed if Mr. Pyke can furnish us with such evidence as I have referred to; but the want of it is a difficulty, and until that difficulty is removed we cannot accede to the application.

BLACKBURN, J.—I am of the same opinion. On the fact of a gentleman being disbarred, two things are to be considered on his application to be admitted to practice as an attorney: one is, whether he has suffered sufficient punishment,—twenty years' exclusion may be sufficient punishment; but the other is his fitness to be trusted with the office: and the fact of his being disbarred raises a presumption against his fitness; and until he shews, not that no charge has been made against him, but, affirmatively, that during the interval his conduct has been such as to rebut the presumption against him, we cannot admit him.

MELLOR, J.—I quite agree with the observations of the Lord Chief Justice, and concur in all his reasons.

Application refused (6).

(6) See the preceding case.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Queen's Bench.)

1865. } GUMM v. TYRRE.*
Feb. 3. }

Error—Interpleader—Ship, Mortgage of—Freight.

S. and F., owners of a ship, mortgaged her to the plaintiff, and also assigned to him all the freight to be earned by the ship. S. and F. retained possession of the ship, and sent her to Cuba, expecting to find there a return cargo; but none was ready. The captain of the vessel, therefore, determined to buy for his owners a return cargo for an English port, and he obtained a cargo of wood from T. & Co., who supplied it to him, and took a bill of lading for the wood from the captain, who, by the bill of lading, bound himself "to deliver it in the like good order in the said port, or in such other my manifest may appoint, to order —, who, on faithful delivery being shewn, shall pay me — for freight and conveyance." A black line was drawn through the space in the bill of lading usually filled up with the amount of the freight. T. & Co. sent to M. & Co., of Havannah, the bill of lading, and the invoice of the goods, stating them to be "shipped by order of M. & Co., of Havannah, and for account of risk of whom it may concern." M. & Co. paid T. & Co. for the goods, and drew bills for the price on an English merchant, who refused to accept them. The defendant thereupon accepted the bills for the honour of the drawer, and paid them when due. He also received the bills of lading indorsed in blank by T. & Co. S. & F. became bankrupt. The plaintiff took possession of the ship on its arrival in England and claimed freight for the cargo. The defendant sold the cargo, and paid the freight, under protest, to the dock company, with whom the cargo had been deposited. On an interpleader issue whether the plaintiff was entitled to claim freight,—Held, that he was so entitled, as the goods remained the property of T. & Co. under the bill of lading.

* Coram Erie, C.J., Pollock, C.B., Willes, J., Channell, B. and Pigott, B.

Error will lie on a special case stated in proceedings on an interpleader issue.

Error was brought by the defendant, on the judgment of the Court of Queen's Bench in favour of the plaintiff on a SPECIAL CASE.

The case is set out at great length in the report below (1); but the following summary will suffice to explain the arguments and judgment.

Messrs. Skeene & Freeman, the owners of a vessel called the *Shakespeare*, had mortgaged her to the plaintiff, and had assigned to him all the freight to be earned by the ship. Messrs. Skeene & Freeman, retaining possession of the ship, sent her afterwards to Manzanilla, in Cuba, having previously arranged with some merchants there to supply a return cargo of wood for the vessel. The ship was greatly delayed getting to Cuba, and when she arrived the captain found that there was no return cargo ready for him, that which had been prepared for him having, in consequence of the delay, been otherwise disposed of. He then tried to charter the ship, but failed. The captain thereupon determined to purchase a cargo of wood, and applied to Messrs. Torres & Co., at Manzanilla, for the purpose.

On the 9th of June 1858 Messrs. Torres & Co., writing to Messrs. Morrison & Co., of Havannah, stated that they had agreed to give the captain a large quantity of mahogany, cedar and lancewood spars, which was specified that they might serve him as ballast to proceed to England. They added, "If this bargain be ratified we believe that the owners may be content." "When we despatch the *Shakespeare* we shall send your invoice and bill of lading of our shipment and disbursement, drawing on you for the amount."

On the 13th of June Messrs. Torres & Co. wrote again to Messrs. Morrison & Co. that the captain had succeeded "in contracting with Messrs Ramirez & Co. for one part of mahogany and three parts of cedar, in such manner that with this wood and that which we have sold him he will have almost a complete cargo for account of the vessel, if not conformably with the desires of the owners, at least with the greatest advantages

which could be hoped for in the present circumstances. We have agreed to pay Messrs. Ramirez & Co. the amount of the wood which the captain has bought of them, and for its account, as well as ours, and our disbursements, we shall draw upon you when we send you the bills of lading and invoice."

Messrs. Morrison & Co. promised to honour the drafts. The cargo mentioned was shipped on board the *Shakespeare*.

A bill of lading, dated the 17th of June 1858, was given by the captain, stating that he had received on board the vessel then ready to sail for Falmouth from Messrs. Torres & Co. certain mahogany and cedar; and it proceeded, "which I acknowledge to have been delivered to me to my entire satisfaction, and bind myself on my arrival in safety with my said vessel to deliver in the like good order in the said port, or in such other my manifest may appoint, to order —, who, on faithful delivery thereof being shewn, shall pay me — for freight and conveyance."

The blank space in the bill of lading, in which usually would be stated the amount of the freight, was filled up by a black line being drawn along it. Messrs. Torres & Co. sent to Messrs. Morrison the bill of lading, with an invoice which stated that they had shipped the effects on board the *Shakespeare* "by order of Messrs. Morrison & Co., and for account of risk of whom it may concern."

Messrs. Morrison & Co. paid Messrs. Torres & Co. the amount of the invoice price. Messrs. Morrison & Co. drew for the price on some English merchants, who refused to accept the bills. The bills, however, were accepted by the defendant for the honour of the drawers, and ultimately paid by him.

The bill of lading was accordingly handed to the defendant indorsed by Messrs. Torres & Co. in blank.

Messrs. Skeene & Freeman stopped payment on the 28th of June 1858.

In September 1858, when the *Shakespeare* reached Gravesend, the plaintiff took possession of the vessel and cargo under his mortgage. The defendant when the vessel arrived in dock claimed the cargo under the bill of lading. The plaintiff refused to allow the defendant to have the cargo, except on

(1) 38 Law J. Rep. (n.s.) Q.B. 27.

payment of freight. The defendant protested against his liability to freight, but ultimately paid it under protest to the dock company, with whom the cargo had been deposited. The cargo was never offered to the assignees of Messrs. Skeene & Freeman. The defendant afterwards sued the dock company to recover back the amount so paid for freight, and the dock company having interpleaded, it was by an interpleader order directed that the plaintiff should be the plaintiff, and the defendant the defendant, in an issue to try whether any and what freight was payable for the goods; whether the plaintiff was entitled to any freight legally and equitably as against the defendant, and whether the captain was entitled to any freight as against the defendant.

The Court below having given judgment for the plaintiff, error was brought. On the case coming on for argument

Montagu Smith (*Matthew* with him), for the plaintiff below, the defendant in error, took a preliminary objection, that error could not be brought on a special case, stated on an interpleader issue; that the Interpleader Act, 1 & 2 Will. 4. c. 58, intended that the judgment of the Court in which the issue was tried should be final. He relied on the cases of *King v. Simmonds* (2), *Snook v. Mattock* (3) and *Thorpe v. Plowden* (4) to shew that error did not lie on a judgment on a feigned issue, under the Interpleader Act, nor except where there was an action; and he contended that section 32. of the Common Law Procedure Act, 1854, which permits of error being brought on a special case, applied only to special cases where there was an action; and he further urged that the case of *Withers v. Parker* (5), in which the Court decided that an appeal might be brought in an interpleader case, was distinguishable, on the ground that the right of appeal was a new right given by the statute, while proceedings in error were governed by long-established rules and practice.

(2) 7 Q.B. Rep. 289; s.c. 14 Law J. Rep. (N.S.) Q.B. 248: affirmed 1 H.L. Cas. 757, 767.

(3) 5 Ad. & E. 239; s.c. 5 Law J. Rep. (N.S.) K.B. 206.

(4) 2 Exch. Rep. 387; s.c. 11 Law J. Rep. (N.S.) Exch. 235.

(5) 4 Hurl. & N. 810; s.c. 28 Law J. Rep. (N.S.) Exch. 383.

Honyman (*Lush* with him) was not heard on this objection.

[ERLE, C.J.—We think that error will lie on a special case stated on interpleader proceedings.]

Honyman (*Lush* with him), for the plaintiff in error, the defendant below, argued that the plaintiff was not entitled to freight, on the ground that the cargo was the property of Messrs. Skeene & Freeman, the shipowners, and that, consequently, no freight could have been payable to them in respect of a cargo which was their own property; that the plaintiff, as mortgagee, could not stand in a better position than the mortgagors, as he had not taken possession of the ship till the end of the voyage—*Alexander v. Simms* (6); and in order to support the contention that the cargo was the property of the mortgagors, he relied on the expressed intention of the captain to buy a cargo for them, and of Messrs. Torres & Co. to sell the wood to the captain, and on the blank in the bill of lading, where the amount of the freight is usually inserted, being filled up with a line, denoting, as he contended, an agreement that no freight at all was to be payable. He cited *Sanders v. Vanzeller* (7).

Montagu Smith, for the defendant in error, was not called upon to argue.

ERLE, C.J.—We are of opinion that the judgment of the Court below ought to be affirmed. The ship belonged to Messrs. Skeene & Freeman, and while it was earning freight, the plaintiff took possession of her as mortgagee. It appears that the ship at that time was carrying a cargo, which, it was contended, was the property of the shipowners, Messrs. Skeene & Freeman, and that therefore no freight would be due. But the whole fallacy of the argument lies in the assertion that the cargo had become the property of Messrs. Skeene & Freeman. Messrs. Torres & Co. had caused certain goods to be put on board the vessel, which, on certain contingencies, would have become the property of Messrs. Skeene & Freeman. But those contingencies never were realized. Messrs. Torres & Co. kept

(6) 5 De Gex, M. & G. 57; s.c. 28 Law J. Rep. (N.S.) Chanc. 721.

(7) 4 Q.B. Rep. 260; s.c. 12 Law J. Rep. (N.S.) Exch. 497.

the control over the property, and did not intend to part with it until the price was paid; for the bill of lading was to the order of the loaders of the goods. The goods were never offered to Messrs. Skeene & Freeman. The defendant took up the bills drawn by Messrs. Torres & Co. for the honour of the drawer, and took to the bill of lading, and demanded the cargo. We think that it was his duty to pay the freight. The reasons assigned in the judgment of the Court below seem to us to be perfectly sound.

The other JUDGES concurred.

Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]

(Error and Appeal from the Court of Queen's Bench.)

1865.

Feb. 4. }

PUST V. DOWIE.*

Charter-party—Freight payable on Condition of Ship taking a Cargo 1,000 tons of Weight and Measurement—Condition Precedent — Part-Performance of Contract.

By a charter-party, made at Liverpool by the plaintiff, chartering his ship to the defendant for a voyage from Liverpool to Sydney, the defendant was to pay for the use of the vessel in respect of the voyage a lump sum in full, "on condition of her taking a cargo of not less than 1,000 tons of weight and measurement." The plaintiff placed the vessel at the disposal of the defendant, who loaded her with 525 tons weight goods and 330 tons measurement goods. The ship could not safely carry any more. There were left 150 tons vacant space. The ship sailed with this cargo. A cargo of 1,000 tons of weight and measurement is usually, and at Liverpool, loaded one-third weight goods and two-thirds measurement goods; but the ordinary cargo for the Sydney market reverses these proportions, being two-thirds weight and one-third measurement. The vessel was capable of carrying 1,000 tons of weight and measurement in the ordinary proportions of one-third

weight and two-thirds measurement. In an action by the plaintiff for the freight, it was held that the defendant was liable; that the condition was not broken, since the charter-party meant that the ship was to be capable of taking an ordinary cargo of 1,000 tons weight and measurement at the port of loading, and not a Sydney cargo; and further, that even if the condition had meant a Sydney cargo, and had not been complied with, and was in terms a condition precedent to the right to the freight, still, as the defendant had received part of the consideration for the contract in having the ship placed at his disposal, and in having loaded her with his goods, with which she had sailed, he could no longer treat it as condition precedent to defeat the claim to the freight wholly, but must avail himself of the breach of the condition in reduction of the amount claimed.

Appeal by the defendant against the judgment of the Court of Queen's Bench.

In this case the declaration was framed on a charter-party made at Liverpool by the plaintiff as captain of the vessel and the defendant as charterer, that the vessel should receive and take on board from the charterer a full and complete cargo of lawful merchandise and proceed to Sydney, New South Wales, and there deliver her cargo; in consideration whereof the defendant was to deliver the cargo alongside to be loaded on board, and was to pay "for the use and hire of the vessel, in respect of the voyage, the sum of 1,550*l.* in full, on condition of her taking a cargo of not less than 1,000 tons of weight and measurement, payment to be made; the captain to receive the freight payable abroad as per bills of lading, or an order handed over to him by the charterer at the current rate of exchange and the balance to be paid in cash on sailing, less three months' interest." It went on to state "that such goods only as the charterer may direct shall be received on board," and provided that the master was, at the charterer's request, to sign bills of lading for any rate of freight that might be filled in, and payable in any manner that the charterer might choose. The captain to have an absolute lien for freight on the cargo, and to have no recourse on the charterer for

* Coram Erle, C.J., Pollock, C.B., Martin, B., Channell, B., Keating, J. and Pigott, B.

any freight due abroad for bills of lading if not paid.

The breaches alleged were, that the charterer made default in loading the ship with the cargo as agreed, and did not pay the 1,550*l.* over and above the freight payable abroad as per bills of lading, and which on the whole amounted to a sum less than the sum of 1,550*l.*

Plea, first, as to the alleged default in loading, that the defendant did not make default in loading the ship; secondly, as to the same, that the plaintiff was not ready and willing to take the cargo, nor was the ship ready or able to receive it; thirdly, as to the non-payment of the balance of the said sum of 1,550*l.*, that the vessel did not and could not take a cargo of not less than 1,000 tons of weight and measurement pursuant to the said conditions; but, on the contrary, could and did take only a cargo of very much less than 1,000 tons weight and measurement; fourthly, payment.

The Issue was joined on these pleas. There was also a demurrer to the third plea.

On the trial, before Blackburn, J., it appeared that the action was brought to recover 219*l.* 12*s.*, the difference between the sum of 1,550*l.* stated in the charter-party and 1,330*l.* 8*s.*, for which bills of lading had been given for freight payable at Sydney.

The charter-party was entered into at Liverpool, and in pursuance of it the defendant proceeded to load the vessel, and when he had loaded 525 tons weight goods and 330 tons measurement goods, making together 855 tons, the ship was deep enough for her intended voyage. There were then 150 tons of vacant space. The ship sailed with this cargo on board her. A ton measurement is equal to 40 cubic feet, and the vessel's cubic contents were 800 tons. In ordinary cases one-third of the cargo is weight, and two-thirds measurement goods; but a Sydney cargo is ordinarily two-thirds weight and one-third measurement.

The learned Judge directed the jury, that the meaning of the charter-party was that the ship would hold 1,000 tons if loaded with a full cargo in the ordinary proportions of weight and measurement goods. The jury found that the vessel was

exactly of 1,000 tons capacity according to the ordinary loading. They also found that the cargo put on board was the ordinary Sydney cargo.

On this finding a verdict was entered for the plaintiff, with leave to the defendant to move to enter a verdict. Pursuant to this leave a rule was obtained by the defendant, which was ultimately discharged (1).

On the demurrer also judgment was given for the plaintiff (2).

Baylis, for the appellant, the defendant below (*E. James* with him).—The defendant, the charterer, was entitled to put on board any cargo of lawful merchandise, the charter-party not limiting the cargo to any special kinds, and to load what amount of weight goods and what amount of measurement goods he pleased, as the charter-party does not specify what quantity of weight goods and what quantity of measurement goods are to be loaded—*Moorsom v. Page* (3), *Cockburn v. Alexander* (4) and *M'Lachlan on Merchant Shipping*, 378. Even if the defendant has not an unlimited option of selecting the cargo, it is reasonable to suppose that the 1,000 tons cargo intended by the charter-party, has reference to the ordinary and usual cargo suitable for the place mentioned in the charter-party as the place to which the ship is to proceed, and not to the general capacity of the ship. Now, the jury have found that the Sydney cargo is usually two-thirds weight and one-third measurement, and that this ship will not carry a cargo of more than 855 tons on those proportions—*Cuthbert v. Cumming* (5). If it be said that the cargo ought to be a reasonable proportion of measurement and weight goods, then it must be taken that 525 tons weight and 330 tons measurement goods is a reasonable proportion. The proportion cannot be limited to exactly half and half.

(1) See the report, 33 Law J. Rep. (N.S.) Q.B. 172.

(2) See the report, 32 Law J. Rep. (N.S.) Q.B. 179.

(3) 4 Campb. 103.

(4) 6 Com. B. Rep. 791; s. c. 18 Law J. Rep. (N.S.) C.P. 74.

(5) 11 Exch. Rep. 405; s. c. 24 Law J. Rep. (N.S.) Exch. 310.

Secondly, as to the demurrer. By the terms of the charter-party, no part of the balance of the freight was payable, unless the vessel could take 1,000 tons. The words "on condition" in the charter-party, import a condition precedent on their fair meaning. The Court will give effect to the plain words of any contract importing a condition precedent—*Stadhard v. Lee* (6), *Tidey v. Mollett* (7), *Behn v. Burness* (8) and *Graves v. Legg* (9). The plaintiff therefore cannot recover on the charter-party at all. He may sue indeed on a *quantum meruit*, for freight, having carried the goods; but in that action he would be met by the fact that the amount that the defendant would have to pay for freight, according to the rate per ton in the charter-party, is less than the sum actually paid by the defendant. The Court below, in their decision on the demurrer, rely on the ruling in *Behn v. Burness* (8), that when a party receives a partial benefit, a condition precedent loses that character and becomes a warranty. That principle does not apply to this case, for no part of the benefit had been derived by the defendant when the goods had been put on board the vessel.

Mellish (*Kemplay* with him), for the plaintiff, was not called upon.

ERLE, C.J.—We are of opinion that the judgment of the Court below ought to be affirmed. The argument has turned upon the portion of the charter-party in which a pre-payment was stipulated to be due from the defendant on condition of the ship taking a cargo of not less than 1,000 tons of weight and measurement. The action is brought for balance of freight due. The defence was that the above-mentioned condition had not been performed. It was argued, for the defendant, that the meaning of that condition was, that as the ship was chartered from Liverpool to Sydney, the

stipulation in the charter-party was for the taking a Sydney cargo. Now a Sydney cargo is an unusual cargo in this respect, that it consists of two-thirds weight and one-third measurement. In ordinary cases, and at the port of loading, the proportion of loading by weight and measurement would be reversed. The question upon which the right to the balance of freight depends is, whether the defendant can maintain that that stipulation was for a Sydney cargo of 1,000 tons. We think that it was not, but that the stipulation relates to what the vessel was capable of taking. The jury have found that the vessel was capable of taking an ordinary cargo of 1,000 tons of weight and measurement, that is, such a cargo as is an ordinary cargo at the port of loading. That being so, we think that there was no breach of the condition, and that there is no defence upon the facts.

Then, with respect to the demurrer. The third plea states that the vessel did not, nor could, take a cargo of not less than 1,000 tons of weight and measurement. Even if we were to construe the words as a condition precedent, the case falls within the principle laid down in *Behn v. Burness* (8), that where a part of the benefit of the contract has been received by the party, he cannot reject it *in toto*. Here the ship has been placed by the shipowner at the disposal of the defendant, and loaded by the latter. Though the breach of a condition precedent might have given the defendant a right originally to repudiate the contract, it cannot now justify him in wholly refusing to pay any part of the freight. But he may have the benefit of the breach of contract, if any, in reduction of the amount claimed.

For these reasons, and also on the grounds stated by the Court below, in which we fully concur, we are of opinion that the judgment of the Court below ought to be affirmed.

The other JUDGES concurred.

Judgment affirmed.

(6) 3 B. & S. 371; a.c. 32 Law J. Rep. (N.S.) Q.B. 75.

(7) 33 Law J. Rep. (N.S.) O.P. 285; a.c. 16 Com. B. Rep. N.S. 398.

(8) 3 B. & S. 751; a.c. 32 Law J. Rep. (N.S.) Q.B. 204.

(9) 9 Exch. Rep. 709; a.c. 23 Law J. Rep. (N.S.) Exch. 228.

1865. } SUMNER AND OTHERS v.
Jan. 17, 20. } BEOMILOW AND ANOTHER.

Landlord and Tenant—Fixtures—Right to remove—When to remove.

By a lease of land intended to be used for salt-works, the lessees covenanted that they would erect certain buildings and works, and that they would at the determination of the term "leave at the disposal of the lessors all the fixed materials of what nature or kind soever that should be in or about the said intended wychhouses or salt-works, or any ways relating thereto, save and except all the salt-pans and other movable articles made use of at all or at any of the said wychhouses or salt-works," which they the lessees were to take away for their own use and benefit. The interest of the lessees became afterwards vested in the defendants, who took upon themselves the performance of the above covenant, and also covenanted that they would yield up possession of the premises, with all erections, buildings and improvements, together with the cisterns, doors, &c., and "also all other fixtures and appurtenances of what kind or nature whatsoever which should be used in or about the buildings," "but as to the salt-pans and other articles made use of at all or any of the said wychhouses, &c., and belonging to the defendants and their assigns, they should be at liberty to take and carry away from off the said premises, upon making good all such injury or damage as the said wychhouses, &c. might sustain in consequence of such removal," with an option to the lessors of purchasing any part of the salt-pans or other movable articles. The defendants sunk a brine-shaft and erected an apparatus for working it. They underlet the premises on the 13th of December 1861. The plaintiffs, on the 23rd of June 1862, wrote a letter demanding possession, as the underletting gave them a right of re-entry on the land; and an action of ejectment was brought on the 7th of July 1862. Between the 18th of January and the 17th of March 1863, the defendants sold and removed a number of fixtures, &c., and on the last-mentioned day they confessed judgment in the action of ejectment:—Held, that under the above covenants, the defendants had a right to take away such fixtures as could properly be called tenant's fixtures; and that they were enti-

tled to a reasonable time after the receipt of the letter of the 23rd of June 1862, within which they might remove them.

The first count of the declaration contained three breaches of covenants in a lease from the plaintiffs to the defendants. The first breach was for not during the term and before the determination thereof, repairing the wychhouses, pan-houses, salt-works, storehouses, reservoirs, counting-house, cottages, and other buildings which were at and after the making of the lease erected upon the demised premises, and a certain pit and shaft sunk by the defendants on the hereditaments and premises thereby demised, and for not at the determination of the term delivering up quiet and peaceable possession of all and singular the hereditaments and premises, with all erections, buildings and improvements made thereon, together with the brine cisterns and other things therein mentioned, being other than the salt-pans and other articles, detached chimney, pan-house, smithy and carpenter's workshop, which the defendants were entitled to remove. The second breach was for not making good the damage caused by the removal of the salt-pans and other articles which the defendants were entitled to remove. The third breach was for underletting without the plaintiffs' consent. In the second count all the allegations in the first count, antecedent to the first breach of covenant therein mentioned, were repeated; and it was further stated, that after the condition was broken as therein mentioned, and before the plaintiffs entered for such breach, the defendants pulled down a part of the premises and dis-annexed fixtures and effects belonging to the plaintiffs, being other and different from the salt-pans and articles which the defendants were empowered to remove, and other than the detached chimney, smithy, and carpenter's shop mentioned in the said second count.

The third count was for waste.

The fourth count was for trespass after the determination of the term; and the fifth count was in trover for a conversion.

The defendants pleaded twenty-one pleas. The first plea was pleaded to the first breach of the first count, and was a plea of payment of 200*l.* into court.

The plaintiffs joined issue on all the defendants' pleas, and demurred to the sixth, seventh, fifteenth and sixteenth pleas, and new assigned to the sixth, seventh, eleventh, twelfth, fifteenth and sixteenth pleas.

The defendants joined in demurrer, and pleaded not guilty to the new assignments.

The plaintiffs joined issue on the plea to the new assignments.

The cause came on to be tried at the Liverpool Winter Assizes, 1863, when a verdict was entered, by consent, for the plaintiffs, subject to a reference, with power to the arbitrator to state a special case.

The arbitrator subsequently stated a special case, which was substantially, and so far as is necessary for the purposes of this report, as follows :

By indenture of lease, bearing date the 6th of October 1798, John Sumner and Philip Sumner demised to George Leigh, John Leigh, James Leigh and Joseph Leigh a piece of land in Wharton, called the "Up Loont," with liberty to the lessees to sink, search for and get brine from under and out of the demised premises for the use of certain wychhouses or salt-works intended to be erected thereon by the lessees, and also to get salt rock to be refined or manufactured at the said wychhouses or salt-works, and for the purposes aforesaid to sink and make brine-pits, reservoirs and other conveniences upon the demised premises, and to dig for clay and sand, to make bricks and build wychhouses or salt-works thereon, together with storehouses, pans, windmills, engines and other erections and buildings, for the purpose of making and storing white salt and rock salt, to hold the same for sixty years from the 10th of October 1798; and the lessees thereby covenanted with the lessors that they would erect all such wychhouses or salt-works as they should erect and build in or upon the said demised premises, or any part thereof, as also all the storehouses, reservoirs, windmills, engines, and other buildings and erections whatsoever necessary and appurtenant thereto, in a good, substantial, workmanlike manner, with brick or stone, and should or would cover the same with slate or tiles, and should and would from time to time, and at all times during the said term, at his and their own proper costs and charges, well and sufficiently repair, amend, maintain and keep

all and singular the said wychhouses or salt-works, together with the storehouses, reservoirs, windmills, engines and other buildings to be erected and built upon the said demised premises, in good, substantial, tenantable working order, repair and condition, and at the end or other sooner determination of the said term, should and would yield and deliver up the quiet and peaceable possession of all and singular the said hereditaments and premises, with their appurtenances, unto the lessors, their heirs and assigns, in such good repair and condition as aforesaid, and also leave at the disposal of the said lessors, their heirs and assigns, all the fixed materials, of what nature or kind soever, that should be used in or about the said intended wychhouses or salt-works, or any ways relating thereto, save and except all the salt-pans and other movable articles made use of at all or any of the said wychhouses and salt-works, which they the said lessees, their executors, administrators or assigns, were to take and carry away for their own use and benefit, they the said lessees, their executors, administrators and assigns, making good all such injury or damage as might be done to such intended wychhouses or salt-works by the removal of such pans.

During the term created by the lease of 1798 the lessees thereunder made, erected and set up in and upon the land thereby demised wychhouses and salt-works, together with storehouses, reservoirs, engines and other buildings, with fixed materials used in or about such wychhouses or salt-works, as well as salt-pans and other movable articles made use of at the said wychhouses or salt-works; but no brine-pits were at any time sunk or made under that lease.

In the year 1849 negotiations took place between the defendants and the parties respectively entitled to the interests of the lessors and lessees in the lease of the 6th of October 1798, for a surrender of the said lease of 1798, and the granting to the defendants of a new lease, which, on the 2nd of January 1850, were carried out by the surrender and new lease hereinafter mentioned.

By indenture of surrender, bearing date the 2nd of January 1850, between the Rev. John Leigh of the first part, and Sir Oswald Mosely of the second part (the said parties thereto of the first and second parts being

the parties then entitled to the interest of the lessees in the said lease of 1798), other parties (also interested in the said lease) of the third, fourth and fifth parts, the defendants of the sixth part, and the plaintiffs and John Sumner (since deceased), Philip Sumner (since deceased) and John Jackson (since deceased), being the parties then entitled to the interest of the lessors in the said lease, of the seventh part, after reciting (amongst other things) the said lease of the 6th of October 1798, and that the said parties thereto of the first and second parts had, with the consent of the parties thereto of the seventh part, lately agreed with the defendants to assign to them the salt-works and premises demised by the said recited indenture of lease for the unexpired residue of the said term therein granted, in consideration of the defendants taking upon themselves the fulfilment and performance of all and singular the covenants in the said lease, so far as the same covenants and agreements were capable of being performed and taking effect, which the defendants had agreed to do, and had since applied to the said parties thereto of the seventh part to accept and take a surrender of the said premises for the unexpired residue of the said term, and to grant to them a new lease of part of the said premises, together with other land specified in the plan on the back thereof, and coloured red, for the full term of thirty years, to be computed from the 2nd of January 1850, which the said parties thereto of the seventh part had agreed to do, the parties of the first and second parts, at the request of the defendants, and the said parties of the third, fourth, fifth and sixth parts, did thereby assign and surrender unto the said parties of the seventh part, their heirs and assigns, all that field, close or parcel of land, and all and singular other the hereditaments and premises described and comprised in the said indenture of lease of the 6th of October 1798, together with all and singular buildings, cisterns, reservoirs, canal and improvements standing and made thereon, or on any part thereof, together also with all ways, paths, passages and rights of passage, lights, liberties, easements, privileges, profits, commodities, advantages and appurtenances whatsoever to the said hereditaments and premises belonging or in anywise appertaining, and all the

estate, right, title, interest, trust, property, possession, term and terms of years, claim and demand whatsoever, both at law and in equity, of them the said John Leigh and Sir Oswald Mosely, parties of the first and second parts, and the said several other parties of the third, fourth and fifth parts respectively.

The case then stated that the plaintiffs and J. Sumner and Philip Sumner and John Jackson had demised to the defendants the "Up Loont" and the "Big Meadow" for thirty years, with liberty to sink pits for brine, and make pits, engines, &c.

And the defendants thereby covenanted with the plaintiffs, amongst other things, that the defendants would during the said term sink and form a brine-pit and shaft in the best and most approved manner, and with the best materials, to the satisfaction of the lessors or their surveyor; and, further, that the defendants should and would from time to time, and at all times during the said term, at their own proper costs and charges, in all things well and sufficiently repair, amend, maintain and keep all and singular the wychhouses, pan-houses or salt-works, together with the storehouses, reservoirs, counting-house and cottages and other buildings then erected and built, and thereafter to be erected and built, upon the said demised premises, and also the said pit and shaft to be sunk, made and found as aforesaid, and all and singular other the hereditaments and premises thereby demised, in good, substantial and tenantable working order, repair and condition, and at the end or other sooner determination of the said term, should and would yield up the quiet and peaceable possession of all and singular the said hereditaments and premises, with all erections, buildings and improvements made thereon, together also with the present brine cisterns, and all doors, shutters, hurdles, roofs and roof-supporters, coal-deposits, salt-stages, weighing-machines, coal quays, and all flues in the refined salt stoves, and also all other fixtures and appurtenances of what nature or kind soever, which should be used in or about the said counting-house, cottages and other buildings, wychhouses or salt-works, or in anywise relating thereto, unto the said parties thereto of the first part, or their assigns, in thorough and good working order, repair and condition in all respects; but as to

the salt-pans and other articles made use of at all or any of the said wychhouses, pan-houses or salt-works, and belonging to the defendants and their assigns, they should be at liberty to take and carry away from off the said premises, upon making good all such injury or damage as the said wychhouses or salt-works and premises might sustain in consequence of such removal; but, nevertheless, it was agreed and declared that the lessors should at the end of the said term have the option of purchasing all or any part of the said salt-pans and other movable articles which should be used in or about the said salt-works and premises, or any of them; and, further, that they, the defendants, should at all times during the continuance of that demise use their best endeavours to preserve and keep all and every the brine pit and pits, reservoir and reservoirs, which should be sunk, made or be upon the said premises during that demise, also the brine to be found therein, or in or upon or under any part or parts of the said demised premises from sustaining any injury or damage by fresh water, leakage or otherwise however. And also that they, the defendants, should not nor would sub-let, assign or dispose of the said demised premises, or any part thereof, without the licence and consent of the parties thereto of the first part. There was a clause of re-entry for a breach of this covenant.

Under the agreement with Mr. Leigh's representatives, recited in the deed of surrender, dated the 2nd of January 1850, the defendants took possession of the salt-pans and other property which had belonged to such representatives, and they had done considerable repairs to the premises.

After the granting of the said new lease of 1850, the defendants sunk a brine-shaft, and erected an apparatus for working it.

In the summer of 1861 the plaintiffs entered into a contract of sale with Messrs. Vardin of all interest in the land, and on the 13th of December 1861 the defendants underlet the land to J. Foster, but afterwards renewed possession. However, the plaintiffs wrote to the defendants on the 23rd of June 1862 a letter demanding possession of the premises in consequence of their right of re-entry upon the defendants underletting without consent; and an action of ejectment was brought on the 7th of July 1862. On the 18th of January

1863 the defendants had a public auction of the salt-pans and other articles and things on the premises, and afterwards, between that day and the 17th of March 1863, they were removed from the premises. On the 17th of March the defendants confessed judgment in the action of ejectment, and judgment was signed on the 25th. The case then contained a very long description of the buildings, works and fixtures which had been upon the premises. Saltpans, wychhouses, pan-houses, &c. were erected during the continuance of each of the above-mentioned leases, and for the purposes of this case it was to be taken that between the 18th of January and the 17th of March 1863 the defendants removed the salt-pans, hatch-frames, bearers, loose fire-bars, iron doors, and steam pan-houses, but none of the brickwork.

The material questions for the opinion of the Court were, first, were the defendants entitled to remove any and which of the articles and things described? Secondly, up to what time did the rights of the defendants to remove such of the said articles and things, if any, as they were entitled to remove, continue?

Kemplay, for the plaintiffs.—First, none of the articles enumerated were removable. This depends on the terms of the lease of 1850; by this the defendants have renounced the right which as tenants they would otherwise have had of removing trade fixtures—*Dumergue v. Rumsey* (1). *Walsley v. Milne* (2) shews that in certain cases, even without such a covenant, trade fixtures enure to the landlord's benefit, and become at once part of the inheritance, as when the mortgagor remains in possession of the premises and erects trade fixtures.—[He then went through the different articles, contending that they were all tenant's or trade fixtures, citing notes to *Elves v. Mawe* (3) and *Whitehead v. Bennett* (4).]

[BLACKBURN, J. referred to *Wystow's case* (5), and COCKBURN, C.J. to *The King v. Otley* (6).]

(1) 33 Law J. Rep. (N.S.) Exch. 88; s. c. 2 H. & C. 777.

(2) 29 Law J. Rep. (N.S.) C.P. 97; s. c. 7 Com. B. Rep. N.S. 115.

(3) 2 Sm. L.C. 149, 4th edit.; 163, 5th edit.

(4) 27 Law J. Rep. (N.S.) Chanc. 474.

(5) 14 Hen. 8. 25 B., cited in 11 Rep. 50 b. and 2 Sm. L.C. p. 146, 4th edit.; p. 159, 5th edit.

(6) 1 B. & Ad. 161.

Secondly, assuming the fixtures to have been removable, they were not removable at the time the removal took place—see the notes to *Elves v. Maws* (7). *Weston v. Woodcock* (8) shews the right of a tenant to remove tenant's fixtures continues so long only after the determination of his term as he remains in possession under a right to consider himself as tenant. In *Leader v. Homewood* (9) it was doubted whether a tenant holding over at sufferance had any right to remove fixtures. At all events, in a case of forfeiture, the removal must take place within a reasonable time after the tenant has notice that the landlord exercises his right of determining the tenancy; here the defendants had this notice in June 1862, and the removal did not take place till March in the following year.

[COCKBURN, C.J. referred to *Stansfeld v. the Mayor of Portsmouth* (10).]

He also contended that the parol evidence was not admissible to explain the meaning of the words used in the lease as to what are meant by "other articles used in salt-works." He also referred to ss. 68. & 69.

Mellish (*Holland* with him), for the defendants.—First, the defendants were entitled to remove all the articles which have been removed. By the lease of 1850, they were to be at liberty to take away the salt-pans and other articles made use of, &c. Secondly, they were entitled to remove and did remove them within a reasonable time, under the circumstances, after the determination of the term. The first lease must be carefully considered, and it appears to be a long lease in the nature of a building lease, with a covenant to erect buildings, to keep them in repair, and at the end or sooner determination of the term to yield up and deliver peaceable possession of the hereditaments with their appurtenances in good repair, to leave the fixed materials, save and except all the salt-pans and other movable articles made use of at all or any of the said wchhouses and salt-works. Therefore the defendants were to deliver up whatever belonged to the lessors, but if they had found

on or brought on to the premises articles or things which could be removed without injuring the buildings, such articles or things would be tenant's or trade fixtures, which they would have a right to remove, although they had been fixed then to the buildings. The second lease amounts to nearly the same, upon the question before the Court. *Lawton v. Salmon* in a note to *Fitzherbert v. Shaw* (11) shews that the salt-pans would go to the heir and not to the executor. In *Foley v. Addenbrooke* (12) it was held that the defendants had a right to remove whatever was in the nature of a machine or part of a machine, but not what was in the nature of building or support of building, although made of iron; and that in such removal the defendants might disturb such brickwork as was necessary, and were not bound to restore it to a perfect state, as if the article it was intended to support or cover were still there, but that the defendants were liable for any unnecessary disturbance of brickwork. But the principle is settled by *Elliott v. Bishop* (13), where there was a covenant to deliver up the demised premises together with all locks, &c., "and other fixtures and articles in the nature of fixtures, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging." The tenant had put up certain fixtures which were necessary for carrying on the business of a licensed victualler, and which were of the description called and known as trade and tenant's fixtures. The Court of Exchequer Chamber held, agreeing with the judgment of Platt, B. in the Court below (14), that the tenant, notwithstanding the covenant, had a right to take away such fixtures. See also *The Duke of Beaufort v. Bates* (15). The second question is, whether they were removed within the time which the defendants were fairly entitled to. In *Fitzherbert v. Shaw* (11), the parties in an action of ejectment entered into an agreement that judgment should be signed for the plaintiff with a stay of execution for a given period. It was held, that

(7) 2 Sm. L.C. 168, 5th edit.

(8) 7 Mee. & W. 14; s.c. 10 Law J. Rep. (N.S.) Exch. 183.

(9) 27 Law J. Rep. (N.S.) C.P. 316; s.c. 5 Com. B. Rep. N.S. 546.

(10) 4 Com. B. Rep. N.S. 120; s.c. 27 Law J. (N.S.) C.P. 124.

(11) 1 H. Black. 260.

(12) 13 Mee. & W. 174; s.c. 14 Law J. Rep. (N.S.) Exch. 169.

(13) 11 Exch. Rep. 113, 229; s.c. 24 Law J. Rep. (N.S.) Exch. 229.

(14) 10 Exch. Rep. 496; s.c. 24 Law J. Rep. (N.S.) Exch. 38.

(15) 31 Law J. Rep. (N.S.) Chanc. 481.

during that period the tenant could not be allowed to do any act by which the premises would be altered, but that he must deliver them up in the same condition as they were when the agreement was made and the judgment was signed. Here there is a clause giving the landlord an option to purchase the fixtures, and if he did not elect to exercise that option and purchase them, the tenant had a right to take them as long as he remained in possession.

[MELLOR, J.—Can that be so? Would a tenant who held over beyond his term be entitled to remove fixtures, as long as he chose to hold over?]

Yes, it is submitted that he would. *Stansfeld v. the Mayor of Portsmouth* (10) shews that after an entry for a forfeiture, the assignees of a lessee are entitled to a reasonable time within which they may enter to remove fixtures. *Penton v. Robart* (16) decides that a tenant may remove trade fixtures so long as he remains in possession, although the term is at an end, and there has been judgment against him in an action of ejectment. In *Weeton v. Woodcock* (8) it was held that a tenant could not remove after his term was over. But that case was afterwards discussed in *Leader v. Homewood* (9), where it was left doubtful whether a tenant holding over at sufferance would be allowed to remove fixtures. *Minshall v. Lloyd* (17), *Heap v. Barton* (18), *Dumergue v. Rumsey* (1) were also referred to.

Kemplay, in reply.—The proposition that the tenant may remove fixtures at any time during his continuance in possession is directly contrary to *Weeton v. Woodcock* (8). Here, as soon as the writ of ejectment was served the tenant became a trespasser. The real principle is, that as soon as the fixtures are attached to the freehold they belong to the landlord, not that they belonged to the tenant, as was thought to be the case when *Penton v. Robart* (16) was decided, and that they were given by him to the landlord. They, *ipso facto*, belong to the landlord at the expiration of the term, unless the tenant has done some act. But if a reasonable time is to be allowed, when is it to begin to run; from the time at which the action is com-

menced or from the time at which the tenant receives the notice?

[*Per Curiam*.—The time must be calculated from the earlier date, from the moment at which the tenant receives the notice. BLACKBURN, J.—The arbitrator will take all the circumstances into account in determining what is a reasonable time.]

COCKBURN, C.J.—I think that the true construction of this lease is that contended for by the defendants. Is there anything in the covenant to restrain them from removing trade fixtures? There is a provision in the first lease that they were to deliver up to the landlords peaceable possession of the hereditaments with their appurtenances, and leave at their disposal all the fixed materials, save and except all the salt-pans and other movable articles, &c.; and by the second lease they were to be at liberty to take away the salt-pans and other articles made use of, &c. Now, the case of *Elliott v. Bishop* (13) is an express authority that by such a covenant a tenant is only bound to leave upon the premises such fixtures as belong to the landlord, and I am the more confirmed in my opinion, that this is the proper construction, by finding the words in the first lease "movable articles," as to which there is an express exception. This must mean articles movable by the tenant though they had been affixed to the buildings, for there would have been no occasion to reserve a right to take away mere chattels. I am satisfied that *Elliott v. Bishop* (13) is directly in point; but even in the absence of such an authority I should be prepared to hold the same opinion. The arbitrator must determine what number of the articles removed come within the denomination of trade fixtures, for such the defendants had liberty to remove. The other point has been determined during the argument.

BLACKBURN, J.—I am now satisfied that the effect of the covenant is to prevent the tenants taking away such of the fixtures as can be called landlord's fixtures attached to the soil, and that the other fixtures, which can be called tenant's fixtures, the defendants had a right to remove. I at first thought otherwise, but I had not the case of *Elliott v. Bishop* (13) in my mind at that time, and I now think that the defendants must be taken to have a right to take away all such fixtures as the arbitrator

(16) 2 East, 88.

(17) 2 Moo. & W. 450; s.c. 6 Law J. Rep. (N.S.) Exch. 115.

(18) 12 Com. B. Rep. 274; s.c. 21 Law J. Rep. (N.S.) C.P. 153.

shall determine to have properly been trade fixtures.

MELLOR, J.—I agree with what my Lord has said.

Case to go back to the arbitrator, with an intimation of the opinion of the Court.

1865. }
Jan. 14. } *Ex parte* KEDDLE.

Attorney and Solicitor—Articled Clerk—Service under Fresh Articles—Application to Court—Practice—6 & 7 Vict. c. 73. ss. 14–17.

An articled clerk, having served part only of the five years under his articles, after the expiration of the five years applied to the Court that he might be allowed to enter into fresh articles, and that the time actually served might be counted as part of the necessary time of service. The Court refused to make any order; overruling Ex parte Smith (1) on this point.

John Shering Keddle entered into articles of clerkship, dated the 20th of May 1852, made between him and Francis George Coleridge and Francis James Coleridge, attornies, of Ottery St. Mary, Devon, by which Keddle was bound to serve F. G. Coleridge for five years, and if he died or gave up practice before the expiration of the articles, then to serve as clerk to F. J. Coleridge for the residue of the term. Keddle served F. G. Coleridge from the date of the articles till his death on the 26th of August 1854, and from that time served F. J. Coleridge till the 1st of March 1855, making altogether a service of rather more than two years and nine months. On that day, with his master's consent, he discontinued service, and obtained a commission in the 83rd Regiment, and served in it until the 31st of December 1857; when being then in the West Indies, he was obliged to sell out, owing to ill health. He then went to reside with his father at Bedminster for four years, and afterwards, up to the date of this application, at Uxbridge, living on an allowance from his father. F. J. Coleridge died on the 5th of June 1862, and the articles had not been cancelled.

Philbrick moved, on behalf of Keddle,

(1) 1 E. & E. 928; s. c. 28 Law J. Rep. (N.S.) Q. B. 263.

that the articles might be assigned to another attorney for the residue of the term of five years, or that he might be allowed to serve for that residue under fresh articles without payment of a new stamp duty, and that in either case the term for which he had actually served might be reckoned as part of the necessary term of five years. He referred to section 13. of the 6 & 7 Vict. c. 73, and cited *Ex parte Smith* (1) and *Ex parte De Fivas* (2).

[CROMPTON, J.—The contract under the old articles has expired; the applicant does not want the leave of the Court to enter into fresh articles.]

It is necessary to obtain the leave of the Court, in order that the time already actually served may be allowed to count.

[COCKBURN, C.J.—That is asking us to anticipate, by a decision now, what will be properly in the jurisdiction of the Court at a future time. *Ex parte Smith* (1) must be taken to be overruled on this point: we refused to act upon it on a similar application this Term (3). The applicant must take what course he is advised; we cannot interfere at present. CROMPTON, J.—If we granted this *ex parte* application, we should be setting aside the functions of the examiners appointed under the 6 & 7 Vict. c. 73. ss. 15–17.]

Per Curiam (4)—

Application refused (5).

1865. }
Jan. 26. } *Ex parte* ROGERS.

Attorney and Solicitor—Articled Clerk—Service—Application to Court to remit part of Service—Practice—6 & 7 Vict. c. 73. ss. 14–17.

A clerk, under articles for five years, having served for two years and a half, was incapacitated by ill health from serving for more than a year; he then resumed service. Before the expiration of the five years, he applied to the Court that the interval during which he had been unable to serve might be

(2) *Ante*, p. 7.

(3) *Ex parte* Williamson, Jan. 11.—The affidavits on which the motion was made having been lost, the reporter is unable to give the exact circumstances of that case.

(4) Cockburn, C.J., Crompton, J., Blackburn, J. and Mellor, J.

(5) See the next case.

allowed to count as actual service. The Court refused the application as premature.

Joseph Rogers was bound by articles on the 10th of July 1860, to serve J. G. Winter, an attorney of Norwich, for five years. He served till the 28th of February 1863, when he was obliged to leave, owing to ill health. On his recovery, a transfer of the articles was executed on the 20th of May 1864 to W. P. Isaacson, of Newmarket, the clerk's native place; and he had served Isaacson ever since up to the time of the application. The articles would expire on the 10th of July next.

Hawkins applied to the Court to allow the time, during which the applicant had been incapacitated from service, to be counted as actual service.

But the Court (1) refused the application as premature.

Application refused.

1865.

Feb. 25. }

BIDDLE v. BOND.

Bailment—Action by Bailor—Jus Tertii.

A bailee is not estopped from disputing the title of his bailor, and setting up the jus tertii, where the bailment has been determined by what is equivalent to an eviction by title paramount.

The plaintiff seized goods belonging to R. under a distress for rent of a house alleged to have been demised by the plaintiff to R, and having seized them he delivered them to the defendant, an auctioneer, for the purpose of selling them. When the sale was about to begin R. gave notice to the defendant that he must not sell the goods, or if he did sell them that he must retain the proceeds for him, R., as the distress was void, and as the relation of landlord and tenant did not exist between himself and the plaintiff. This was true, and the distress was void altogether. The defendant did sell the goods, but kept the proceeds for R.:—Held, that he was entitled to set up the jus tertii, and had a good defence to an action by the plaintiff.

The declaration alleged that in consideration that the plaintiff would employ the defendant as his agent to sell and dispose of certain goods for the plaintiff for reward to the defendant, the defendant promised to

sell the same, and on request to render an account of the sale of the said goods, and to pay over the monies to the plaintiff. That the plaintiff did employ the defendant, and that all things were performed, &c. Breach, that the defendant did not render an account or pay over the monies arising from the sale to the plaintiff. There were also counts for money had and received, and on an account stated.

Pleas to the first count, first, that the defendant did not promise as alleged; secondly, that the plaintiff did not employ the defendant as his agent, nor did the defendant receive the goods for the purpose and on the terms alleged; thirdly, to the residue of the declaration, never indebted.

At the trial, before Willes, J., at the Surrey Summer Assizes, 1864, it appeared that the plaintiff had seized the goods of one Robbins under a distress for rent of a house alleged to have been demised by the plaintiff to Robbins, and had delivered them to the defendant, an auctioneer, to sell by auction. When the sale was about to begin Robbins served a notice on the defendant that the distress was void, as the relation of landlord and tenant did not exist between the plaintiff and himself, and there was no rent in arrear. By the notice he required Robbins not to sell the goods, or if he had sold them, to retain the proceeds for him. The defendant sold the goods, but refused to pay the proceeds over to the plaintiff, and relied on the right of Robbins. The relation of the plaintiff and Robbins was that of vendor and vendee only.

It was contended, for the plaintiff, that the defendant being a bailee could not be allowed to set up the *jus tertii* against his bailor, from whom he received the goods, and a verdict was entered for the plaintiff for 44*l.* 12*s.* 6*d.*, with leave to the defendant to move to enter the verdict for him.

A rule having been obtained,

Thrupp (Jan. 23) shewed cause.—This action is maintainable, and the verdict is right. An agent can only set up the *jus tertii* in a case of fraud, and there was no fraud in the present case. The defendant was employed by the plaintiff to sell the goods, and having done so, he has no right to say now that they were the goods of Robbins, and therefore that he refused to pay over the proceeds of the sale.

[BLACKBURN, J.—I cannot see why

(1) Crompton, J., Blackburn, J. and Mellor, J.

Robbins could not proceed against the defendant for taking and converting his goods, if he had refused to let Robbins have them or the proceeds of the sale.]

It is not clear that such an action would be maintainable by Robbins.

[BLACKBURN, J.—The defendant would have sold the goods without any right to do so, and it would be no answer to say that he had been authorized by the plaintiff to sell them.]

But he cannot set up the *jus tertii* unless there has been some kind of fraud. In *Hardman v. Willcock*, reported in a note to *White v. Bartlett* (1), Alderson, J., in delivering the judgment of the Court, said, "There are many authorities which were cited for the plaintiff, which establish, no doubt, that an agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him. The case of *Nickolson v. Knowles* (2) is a distinct authority, shewing that an agent to receive for the use of another, cannot by notice from a third person be converted into an implied trustee; and that his possession is the possession of his principal. The same principle, which depends on the relation of the parties as agent and principal, was laid down by the Court of King's Bench in *Dixon v. Hamond* (3); by the Court of Common Pleas in *Gosling v. Birnie* (4); and by the Court of Exchequer in *Roberts v. Ogilby* (5). But we think that all these cases are distinguishable from the present, upon the ground that here the jury have found that the plaintiff's possession of the goods arose out of a fraud concerted between him and the insolvent." The doctrine thus laid down has never been contravened. There is a recent case of *Sheridan v. the New Quay Company* (6), in which the defendants were allowed to set up the *jus tertii*, but it was expressly upon the ground that they were common carriers, and as such bound to receive the goods. So also in *Cheesman v. Exall* (7), the defendant was held to be

entitled to set up the *jus tertii*, but Pollock, C.B. distinguished the case from the ordinary class of cases upon the subject, in this respect, that the plaintiff had pledged the property to the defendant fraudulently and to avoid an execution.

[BLACKBURN, J. referred to *Load v. Green* (8) and *White v. Garden* (9) as shewing that a contract for the sale of goods obtained by fraud on the part of the purchaser is voidable only at the election of the vendor, and not void.]

There is also a class of cases in which it is laid down that an agent cannot dispute the title of his principal, following the rule that a tenant cannot dispute the title of his landlord. In *Wilton v. Dunn* (10), which was an action for use and occupation, the defendant pleaded that the occupation was by leave of the plaintiff, who was mortgagor in possession; that the mortgagee who was entitled to the possession during the whole period of occupation, gave notice to the defendant claiming mesne profits; that the defendant until such notice was ready and willing to pay the plaintiff, and that from the time of such notice he was liable to pay the mortgagee. It was decided that the plea was bad, Lord Campbell, C.J. saying, "The plea is new, and I am of opinion that this ingenious experiment should not be sanctioned. It calls on us as a Court of law to do that which we have no power to do. We cannot protect this defendant from the threat of the mortgagee. Had the tenant under compulsion of that threat actually paid the mortgagee what was due, it might have been a defence." He also referred to *Hickman v. Machin* (11).

Parry, Serj. and Howard, in support of the rule.—The defendant is not liable in this action; the goods belong to Robbins, who has a right to proceed against the defendant if he does not pay over the proceeds of the sale to him. He could maintain an action of trover, or he might waive the tort and bring an action for money had and received. In truth, the money is in the

(1) 9 Bing. 382.

(2) 5 Madd. 47.

(3) 2 B. & Ald. 310.

(4) 7 Bing. 339.

(5) 9 Price, 269.

(6) 4 Com. B. Rep. N.S. 618; s. c. 28 Law J. Rep. (N.S.) C.P. 58.

(7) 6 Exch. Rep. 341; s. c. 20 Law J. Rep. (N.S.) Exch. 209.

(8) 15 Mee. & W. 216; s. c. 15 Law J. Rep. (N.S.) Exch. 113.

(9) 10 Com. B. Rep. 919; s. c. 20 Law J. Rep. (N.S.) C.P. 166.

(10) 17 Q.B. Rep. 294; s. c. 21 Law J. Rep. (N.S.) Q.B. 60.

(11) 28 Law J. Rep. (N.S.) Exch. 310; s. c. 4 Hurl. & N. 716.

hands of the defendant for Robbins, and is held for him—see *Adamson v. Jarvis* (12), *Farebrother v. Ansley* (13), *Rodgers v. Maw* (14) and *Neate v. Harding* (15). In *Story on Agency*, s. 217, the author, when speaking of the rule that an agent is not in general allowed to set up the adverse title of a third person against that of his principal, says, "An exception, however, is allowed where the principal has obtained the goods fraudulently or tortiously from such third person," and he cites *Hardman v. Willcock* (1), which is on all-fours with the present case. The fraud which was set up only shewed that the plaintiff had no title. They also referred to *Betteley v. Reed* (16).

Cur. adv. vult.

BLACKBURN, J. delivered the judgment of the Court.—In this case, which was tried before my Brother Willes, the verdict was directed to be entered for the plaintiff for 44l. 12s. 6d., with leave to move to enter the verdict for the defendant, this Court to have power to amend the pleadings in any manner, and to draw inferences of fact. My Brother Parry obtained a rule *nisi* accordingly, which was argued before my Lord, my Brother Mellor and myself in last term, when the Court took time to consider their judgment. From the Judge's notes it appears that goods which belonged to one Robbins were seized by the plaintiff under a distress for rent of a house alleged to have been demised by the plaintiff to Robbins; these goods had been removed by the plaintiff, and delivered by him to the defendant to sell as his (the plaintiff's) auctioneer, and the defendant proceeded to sell them in the ordinary way. When the sale was about to begin, Robbins served a notice on the defendant that the distress was void, as the relation of landlord and tenant did not exist between him and the plaintiff, and there was no rent in arrear; and by the notice Robbins required the defendant not to sell the goods, or if he had sold them, to retain the proceeds for him, Robbins. The defendant proceeded to sell the goods, but we think that the inference from the evidence is that he did this only

because the notice was served so late that he had not time to make any inquiries before the sale came on. He received the proceeds of the sale, but refused to pay them over to the plaintiff. He did not pay the proceeds to Robbins, but from the evidence of Robbins, who was called as a witness at the trial, we draw the inference of fact that the defendant withheld the proceeds from the plaintiff and defended this action, relying on the right and by the authority of Robbins, and not hostilely to him. It appeared on the trial that the relation between the plaintiff and Robbins was not that of landlord and tenant, but of vendor and vendee, and consequently that the distress was altogether void and tortious. The question, therefore, comes to be whether under such circumstances the defendant can set up the *jus tertii* or not. And we are of opinion that he can do so; and, consequently, that the rule to enter the verdict for the defendant must be made absolute. We do not question the general rule, that one who has received property from another as his bailee or agent or servant, must restore or account for that property to him from whom he received it; and we agree with what is said by my Brother Martin in *Cheesman v. Exall* (7), that "there are numerous cases in connexion with wharfs and docks, in which, if the party intrusted with the possession of property were not estopped from denying the title of the person from whom he received it, it would be difficult to transact commercial business." But the bailee has no better title than the bailor; and, consequently, if a person entitled as against the bailor to the property claims it, the bailee has no defence against him—*Wilson v. Anderton* (17). Such was the position of the defendant in the present case. If Robbins had chosen to sue him in trover, or, waiving the tort, had sued for money had and received, the defendant would have had no defence. He was therefore compelled to yield to Robbins's claim; and it would certainly be a hardship on him if, without any fault of his own, the law left him without any defence against the plaintiff for so yielding. We do not, however, think that such is the law. Several cases were cited on the argument at the bar, and more might have been cited, such as *Stonard v. Dunkin* (18), *Gosling v. Birnie* (4)

(12) 4 Bing. 66.

(13) 1 Campb. 343.

(14) 15 Mee. & W. 444.

(15) 6 Exch. Rep. 349; s. c. 20 Law J. Rep. (N.S.) Exch. 250.

(16) 4 Q.B. Rep. 511; s. c. 12 Law J. Rep. (N.S.) Q.B. 172.

(17) 1 B. & Ad. 450.

(18) 2 Campb. 344.

and *Hawes v. Watson* (19), in which a bailee, who, by attorning to a purchaser of the goods, has, in effect, represented to him that the property has passed to him (though such was not the fact), and has thereby induced him to alter his position and pay the price to his vendor, has been held estopped from denying the property of the person, to whom he has thus attorned, by setting up a title in a third person inconsistent with the representation on which he had induced the plaintiff to act. We in no way question that those cases were rightly decided. But in all these cases the estoppel proceeded on the representation, which was analogous to a warranty of title for good consideration to the purchaser. Now, in the ordinary class of bailments, such as the present, the representation is by the bailor to the bailee that he may safely accept the bailment; and so far as any weight is to be given to the representation, it makes against the estoppel. This is pointed out by Parke, B., in *Cheesman v. Exall* (7), in the case of a pledge; and is indicated as one of the grounds on which the judgment of the Court of Common Pleas proceeded in *Sheridan v. the New Quay Company* (6), which was the case of a carrier. The position of an ordinary bailee, where there has been no special contract or misrepresentation on his part, is very analogous to that of a tenant who, having accepted the possession of land from another, is estopped from denying his landlord's title, but whose estoppel ceases when he is evicted by title paramount. This was decided as early as the 44 Eliz., in *Shelbury v. Scotsford* (20). There the plaintiff sued in assumpsit against the bailee of a horse for the breach of his contract to re-deliver it. The defendant pleaded that J. S., the true owner of the horse, took it from the defendant. After verdict for the defendant, the plaintiff moved in arrest of judgment; but "by Fenner and Yelverton contra; for the matter alleged by the defendant does in law discharge the promise, by reason of the former property of the horse in J. S.; and then it is, as it were, an eviction of the horse out of the defendant's possession, which discharges the promise, as well as an eviction of the lessee for years discharges all rents, bonds and

covenants in any sort depending upon the interest." In *Wilson v. Anderton* (17) Littledale, J. (without referring to *Shelbury v. Scotsford* (20), but evidently having it in his mind) states the law to the same effect. And accordingly in *Hardman v. Willcock* (1), in *Cheesman v. Exall* (7), and in *Sheridan v. the New Quay Company* (6) a bailee was permitted, under circumstances similar to the present, to set up the *jus tertii*. It is true that in the first two of these cases the plaintiffs had obtained the goods by a fraud upon the person whose title was set up, whilst in the present case there is nothing in the evidence to shew that the plaintiff, though a wrong-doer, did not honestly believe that he had the right to distrain. But we do not think that this circumstance alters the law on the subject. The position of the bailee is precisely the same, whether his bailor was honestly mistaken as to the rights of the third person, or fraudulently acting in derogation of them. We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in *Shelbury v. Scotsford* (20), viz., that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in *Betteley v. Reed* (16), that "to allow a depository of goods or money, who has acknowledged the title of one person, to set up the title of another who makes no claim or has abandoned all claim, would enable the depository to keep for himself that to which he does not pretend to have any title in himself whatsoever." Nor is it enough that an adverse claim is made upon him, so that he may be entitled to relief under an interpleader. We assent to what is said by Pollock, C.B., in *Thorne v. Tylbury* (21), that a bailee can set up the title of another only "if he defends upon the right and title and by the authority of that person." Thus restricted, we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences.

Rule absolute.

(19) 2 B. & C. 540.

(20) 1 Yelv. 22.

(21) 3 Hurl. & N. at p. 537; a. c. 27 Law J. Rep. (N.S.) Exch. 407.

CASES ARGUED AND DETERMINED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL FROM THE QUEEN'S BENCH.

EASTER TERM, 28 VICTORIÆ.

1865. } BACKHOUSE AND OTHERS
May 2. } v. HALL.

Guarantie, when not continuing after Change in Partners — Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97. s. 4.

The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97.) s. 4,—which enacts that no promise for the debt or default of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, or for the debt or default of such a firm, shall be binding in respect of anything done after a change in any one or more of the persons constituting the firm, or the person trading under the name of the firm, unless the intention of the parties that such promise shall continue notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise,—is only an affirmance of the law of England previous to the statute.

Three persons carried on the business of ship-builders under the name of "G. W. & W. J. Hall." No person of that name had been in the partnership for some time, and the plaintiff and defendant being both aware of the constitution of the partnership, the defendant gave the plaintiff the following guarantee:—"In consideration that you have at my instance and request consented

to open an account with the firm of G. W. & W. J. Hall, ship-builders, I hereby guarantee the payment to you of the monies that at any time may become due not exceeding 5,000l."—Held, that the guarantee ceased on the death of one of the partners, as a contrary intention did not appear by express stipulation, or by necessary implication from the nature of the firm or otherwise.

This was an action brought by the plaintiffs to recover from the defendant 5,000l., alleged to be payable under a guarantee; and the following CASE was stated without pleadings.

1. For some years before 1840 George Wilkin Hall and William Joseph Hall, brothers of the defendant, carried on business, in co-partnership, as ship-builders, at Sunderland, under the style and form of "G. W. & W. J. Hall."

2. and 3. On the 25th of October 1840, W. J. Hall died. After his death the business continued to be carried on by the surviving partner together with the widow, Sarah Hall, and the defendant, as executors of the deceased partner, under the name and style of "G. W. & W. J. Hall."

4. On the 18th of December 1856, G. W. Hall died.

5. For some years after the death of W. J. Hall, the surviving partner in the original firm, G. W. Hall, acted as manager

of the firm of "G. W. & W. J. Hall," receiving a yearly salary of 400*l.* for his services; and for a few years prior to the death of G. W. Hall he and the defendant had the joint management of the business of the firm. After the death of G. W. Hall, the defendant, together with Sarah Hall, the widow of W. J. Hall, and Elizabeth, widow of G. W. Hall, continued to carry on the business under the same style, and the defendant continued, as manager, to receive a salary.

6. On the 31st of December 1857, the partnership then subsisting between James Hall, the son and sole executor of G. W. Hall, and the defendant and Sarah Hall, the executors of W. J. Hall, was dissolved, and an arrangement made by which the business was to be, for the future, carried on under the style or firm of "G. W. & W. J. Hall," by Sarah Hall and Elizabeth Hall, and their nephew, George S. Moore. The defendant, at the same time, ceased to act as manager of the business. Notice of this newly-arranged partnership and its position was given by circular.

7. In February 1858, G. S. Moore applied to the plaintiffs, who had then opened a branch bank at Sunderland, to give the firm accommodation by allowing them to open an account to be overdrawn to the extent of 5,000*l.*

8. This the plaintiffs consented to do upon receiving the joint and several guarantie of the defendant and G. S. Moore; and accordingly, on the 25th of February 1858, the defendant and G. S. Moore gave to the plaintiffs the following guarantie:

"Sunderland, Feb. 25, 1858.

To Messrs. Backhouse & Co., Bankers.

Gentlemen,—In consideration that you have at our instance and request consented to open an account with the firm of G. W. & W. J. Hall, ship-builders, Monkwearmouth, we and each of us do hereby guarantee the payment to you of the monies that at any time may become due, not exceeding 5,000*l.*, such payment by us not to be made at a shorter date than twelve months from this date.

(Signed)

G. S. Moore,
J. C. Hall.

We request you to become guarantie for us in manner set out.

Elizabeth Hall,
Sarah Hall."

9. In pursuance of this guarantie the plaintiffs from time to time gave accommodation to the firm of G. W. & W. J. Hall, and the firm thereby became indebted to the plaintiffs on a balance of account in a sum which on the 17th of September 1858 exceeded 5,000*l.*

10. On the 5th of July 1858, Elizabeth Hall died. This was known to the defendant at the time, but was not known to the plaintiffs until the year 1862. At the date of the death of E. Hall, the balance of account due from the firm of G. W. & W. J. Hall was 3,236*l.* 6*s.* 9*d.*

11. After the death of E. Hall, the business of the firm of G. W. & W. J. Hall was carried on under that style as before by the surviving partners, S. Hall & G. S. Moore, and the plaintiffs as before kept the accounts of them as continued accounts.

12. On the 2nd of July 1861, the plaintiffs received from the defendant's attorney a letter, giving them notice that the defendant "would not hold himself liable to them after the receipt of this notice, for any monies to be hereafter advanced by them to the firm of G. W. & W. J. Hall."

14. On the 2nd of July 1861, the balance of account due to the plaintiffs exceeded the sum of 5,000*l.* The whole of the advances upon which this balance accrued were made subsequently to the death of Elizabeth Hall.

15. The defendant in no other way, if at all, made himself responsible for that or any other balance unless by virtue of his guarantie of the 25th of February 1858.

16. The firm of G. W. & W. J. Hall stopped payment on the 17th of February 1862.

17. The Court is to be at liberty to draw all inferences of fact which a jury might draw.

18. The question for the consideration of the Court is, whether under the circumstances hereinbefore stated the defendant is liable under his guarantie to pay to the plaintiffs any and what portion of the balance due to the plaintiffs from the firm of G. W. & W. J. Hall on the 2nd of July 1861.

Bovill (*Karslake* and *Hannen* with him), for the plaintiffs.—The question turns on the construction of the 19 & 20 Vict. c. 97. s. 4, which enacts that "No promise to answer for the debt &c. of a firm consisting of two or more persons shall be binding on

the person making the promise in respect of anything done after a change shall have taken place in the persons constituting the firm, unless the intention of the parties, that the promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise." Here the guarantie was given, not for money to be advanced to the individuals trading under the firm, but to the firm of G. W. & W. J. Hall, all parties knowing that this was merely the name of the firm, and that none of the individuals composing it were of that name, and that the firm had been constantly changing. It therefore appears from the nature of the firm and otherwise that the guarantie was intended to be continuing.

[BLACKBURN, J.—It would appear that the statute, as far as the law of England is concerned, has made no difference.]

Lusk (*Watkin Williams* with him), contra.—Before the statute a guarantie was at an end in case of any change in the firm to whom or on whose behalf it was given—*Weston v. Barton* (1), *Simson v. Cooke* (2). *Barclay v. Lucas* (3), which is a contrary decision, must be taken as overruled, as pointed out by Mansfield, C.J. in *Weston v. Barton* (1).

[BLACKBURN, J.—In *Chitty on Contracts*, 473, 7th edit., it is said, "Before the statute 19 & 20 Vict. c. 97. it appears to have been held that when the security is given to a house, e. g. to a banking-house, and not to the members of a firm by name, the surety would still continue liable, notwithstanding a change of partners": for which is cited in the note "*Barclay v. Lucas* (3); and see *Metcalf v. Bruin* (4), and, per Curiam, *Chapman v. Beckington*" (5). And it is added, "*Barclay v. Lucas* (3) has been doubted; see 1 *New Rep.* 42; 4 *Taunt.* 681. But it gives the true principle, viz., that if the words shew an intention that the security should continue, notwithstanding the accession of a new partner, the surety shall be liable."]

The editor of *Chitty* is mistaken as to

Barclay v. Lucas (4), for the bond was there to the plaintiffs as individuals, and not to the firm.

[BLACKBURN, J.—In the notes to *Arlington v. Merrick* (6) Serjeant Williams cites *Barclay v. Lucas* (3) as good law; and there is no expression to the contrary in the notes to Mr. Justice Patteson's edition.]

Barclay v. Lucas (3) must be considered to be virtually overruled, as a misapplication of the true principle on which such cases are to be decided, viz., that the intention that the guarantie shall continue must distinctly appear from express stipulation or other expressions in the instrument itself, or from the nature of the firm; see the notes 3 *Dougl.* 326, citing amongst other cases *Strange v. Lee* (7).

Bovill, in reply.—In *Weston v. Barton* (1) and *Simson v. Cooke* (2) the individual members of the partnership, and not the firm, were named.

[BLACKBURN, J.—In *Metcalf v. Bruin* (4) it was decided that the guarantie continued, because the intention appeared on the face of the document that the guarantie was to be for faithful service to the company, which was a fluctuating body; and Lord Ellenborough and Grose, J. put it expressly on the intention appearing, which the Lord Chief Justice says was the principle on which *Barclay v. Lucas* (3) proceeded. Is there anything in the nature of this firm different from that of any other firm, where persons carry on business in the name of a "firm" instead of the names of the actual partners?]

1 *Bell's Commentaries*, pp. 374–5, (p. 285, 6th edit.) on the law of Scotland as to guaranties, was also cited; and *Smith's Mercantile Law*, 5th edit. p. 54, n., as to the law of England before the statute.

BLACKBURN, J.—I am of opinion that our judgment ought to be for the defendant. The action is brought on a guarantie made in February 1858, and signed by the defendant and another in the following terms.—[The learned Judge read the guarantie.]—At the time it was made the firm of G. W. & W. J. Hall had long ceased to be carried on by the persons of that name, but the business had for very many years

(1) 4 *Taunt.* 678.

(2) 8 B. Moore, 588; s. c. 1 *Bing.* 452.

(3) 3 *Dougl.* 321; s. c. 1 *Term Rep.* 291, n.

(4) 12 *East.* 400.

(5) 3 Q.B. *Rep.* 703, 722.

(6) 2 *Wms. Saund.* 414 a, n. (5).

(7) 3 *East.* 484; see p. 490.

been carried on in that name by different persons, and several changes in the actual partners had occurred, and at the time the guarantie was given the firm consisted of two widows and a third person; and all parties knew that. Afterwards one of the three partners died. The defendant was aware of that, but the plaintiffs were not, and the business was still carried on as before; it was not shewn that there was any duty on the defendant to disclose the death to the plaintiffs, nor that the defendant concealed the death; but the plaintiffs not knowing of it had no opportunity of exercising their option of whether they would continue their advances; but this can have no effect on the construction of the guarantie. The amount due at the time of the death has been paid off, but further advances have been made by the plaintiffs, and there is due a sum exceeding the amount guaranteed; and the question is, whether since the Mercantile Law Amendment Act, 1856, the guarantie was continuing after the death of Elizabeth Hall, so as to be binding on the defendant to make good these further advances. Before the act passed it had been well established that a guarantie was not a continuing guarantie, so as to remain in force after the death of a member of a firm to or for whom it was given, unless it appeared by the terms of the instrument that it was the intention of the parties that it should so continue. Now, when this intention appeared by express stipulation in the instrument itself from the terms used, as when the firm was named, with the addition "and their successors," there was no difficulty. But when there was no such addition, as in *Barclay v. Lucas* (3) it has been doubted whether the intention was sufficiently expressed; and on the present occasion it is unnecessary for us to give any decisive opinion on that case, as the two cases are very different. In *Metcalf v. Bruin* (4) the guarantie was given to trustees for the Globe Insurance Company, a non-corporate body; and the guarantie was for the faithful service to that body, and that the servant would faithfully account and pay over any balance in his hands to the company, or the directors for the time being; and the Court of King's Bench held that it sufficiently appeared to be the intention that the guarantie should be for faithful service to the fluctuating

body who should from time to time constitute the company; and on the ground that the intention appeared from necessary implication on the face of the bond and the nature of the business, the plaintiff recovered as on a continuing guarantie. Then comes the Mercantile Law Amendment Act, not apparently altering the English law as settled by decided cases, but intended to make the law of Great Britain uniform: the Scotch law, if it differed, being assimilated to the English by c. 60. of the same session, s. 7. The 4th section of the English Act is as follows.—[The learned Judge read the material parts of the section.]—That does not alter the law, but fixes it at what the decisions had previously said was the law. The enacting part says that the change in a firm shall put an end to a guarantie: that was what decided cases had always said; and the saving clause is simply, that where there is an express stipulation, or as in *Metcalf v. Bruin* (4) a manifest intention appears, the guarantie shall continue notwithstanding the change, as it is obviously right and just that it should. The question, therefore, is simply, does the intention that the guarantie should continue appear by express stipulation, or by necessary implication from the nature of the firm, or otherwise? Now, there is certainly no express stipulation, and there is nothing in the nature of the firm beyond those incidents common to every partnership—that the partners had changed and might again change. If it was really intended that the guarantie should be a continuing one for the firm, a very few additional words would have shewn that intention. If the defendant was at one time under the impression that he was bound by the guarantie as a continuing guarantie, that can have no effect upon the construction that is to be put upon the contract from its terms, or by necessary implication from the nature of the firm. Although it is, therefore, hard upon the plaintiffs, there must be judgment for the defendant.

SHER, J. concurred (8).

Judgment for the defendant.

(8) No other Judges were in court.

1865. } SMITH AND ANOTHER, assignees of JOHN WILLDEN, a
 April 28; } bankrupt, v. HUDSON.
 May 5. }

Sale of Goods—Statute of Frauds—Acceptance—Vendor and Vendee—Bankruptcy—Title of Assignees to accept—Possession, Order or Disposition—12 & 13 Vict. c. 106. s. 125.—Stoppage in Transitu.

To make a valid verbal contract for the sale of goods above the value of 10l. where nothing has been given to bind the bargain or by way of part payment binding upon the vendee, there must be an acceptance and actual receipt, and such acceptance must be made with the consent of the vendor; and until such acceptance, the property in the goods is not changed and the vendor may exercise his right to rescind the contract. And if under such circumstances the contract has been rescinded, no act on the part of the vendee, or of his assignees in case of his subsequent bankruptcy, can effect an acceptance so as to change the property in the goods.

Goods purchased under such a contract and sent by the vendor to a railway station, consigned to the order of the vendee, are not, whilst lying at the station, waiting the order of the vendee, and before any order given or other act done by him constituting an acceptance of the goods, in his "possession, order or disposition," with the consent of the true owner, so as, upon his bankruptcy, to give his assignees any right to them under the 12 & 13 Vict. c. 106. s. 125, notwithstanding the goods were no longer in transitu, and the right of stoppage therefore did not exist.

The following CASE was stated by consent without pleadings.

In this action the plaintiffs seek to recover the sum of 80*l.*, being the value of 48½ quarters of barley.

1. The bankrupt, John Willden the younger, for some time prior to November 1863, carried on business as a corn-merchant at East Dereham, county Norfolk. The defendant is a farmer residing at Castle Acre in the same county.

2. The defendant on the 3rd of November 1863, at the market at King's Lynn, entered into a verbal contract with the bankrupt to sell him 48½ quarters of barley, at 35*s.* per quarter,—as stated in the an-

nexed examination of the defendant before the Court of Bankruptcy, the whole of which is to be taken as part of this case,—the price amounting to 84*l.* 17*s.* 6*d.*; there was no written contract and no payment on account. The sale was by sample, and the bulk was taken on the 7th of November by the defendant in his own waggons to the goods-shed of the Swaffham Railway Station, and left on the platform there with a delivery-note in his own handwriting in the words following: "Great Eastern Railway. To the Station Master, Swaffham Station. November 7th, 1863. Receive 97 coombs of barley, consigned to the order of Mr. Willden, of Dereham, from Thomas Moore Hudson, Castle Acre, charges."

3. No receipt was given by the railway company for the corn.

4. It is the custom of the trade for the buyer to compare the sample with the bulk as delivered, and if the examination is not satisfactory to strike it, *i. e.* either refuse to accept it or allow it to remain as the property of the vendor; and notwithstanding the delivery of the bulk by the defendant at the Swaffham station, it was in the power of the bankrupt to strike the corn if it had not proved according to sample on examination by him or on his behalf.

5. On the 9th of November the bankrupt was adjudicated a bankrupt on his own petition filed on that day.

6. No portion of the corn was paid for. On the 11th of November the defendant gave a verbal notice to the station-master at Swaffham not to deliver the corn into the possession of the bankrupt or his assignees, or any other person without his (Hudson's) written consent, but to deliver the same to him or his order, and subsequently on the same day gave a written notice to the station-master to the same effect. The station-master promised the defendant that no one should remove the corn without his instructions.

7. At the time these notices were given the corn was still on the platform of the goods-shed at the station; the bankrupt had given no orders or directions respecting it, nor had he examined it to see whether the bulk corresponded with the sample, nor had he given any notice to the defendant that he accepted or declined the corn.

8. No demurrage was charged by the railway company in respect of the corn. It was the custom of the company to charge demurrage on corn or other goods left at the station for upwards of five days, but not for any shorter period.

9. On the 1st of December the plaintiffs were duly appointed assignees of the bankrupt, and on the same day they gave notice to the railway company that they claimed all the corn which had been left by various persons to the order of the bankrupt at the different stations of the railway.

10. The railway company, on being indemnified by the defendant, delivered the 48½ quarters of barley to him on the 5th of December 1863.

11. The plaintiffs, as such assignees, contend that there was a perfect delivery of the barley to the bankrupt; that the *transitus* was at an end, and that the property in the corn passed to them as such assignees.

12. They also claim to be entitled to the corn, as being, under the circumstances above stated, in the order and disposition of the bankrupt at the time of his bankruptcy.

13. The defendant contests the above claim altogether.

14. The question for the opinion of the Court is, whether the plaintiffs, under the circumstances above stated, were entitled to the barley.

15. If the Court shall be of that opinion, then the sum of 80*l.*, the value of the barley, is to be paid by the defendant, together with the costs of this action.

16. If the Court shall be of opinion that the plaintiffs were not entitled to the barley, then the plaintiffs are to pay the defendant the costs of this action.

The examination of the defendant was as follows: "I sold to the bankrupt 48½ quarters of barley on the 3rd of November 1863. The sale was at Lynn; the price was 35*s.* per quarter. I undertook to deliver the barley at the Swaffham station at my own expense; when I say I undertook, I mean that it was usual for me to do so. I had several prior dealings with the bankrupt, in which I delivered the corn to the order of the bankrupt to Swaffham station. The delivery-note was in writing. I have not

the delivery-note. I sent this corn in my own waggon to the Swaffham station on the 7th of November 1863, with the delivery-note in my own handwriting. Having heard that Mr. Willden had become bankrupt, I verbally and also by writing gave notice to the station-master at Swaffham not to deliver the corn, and claimed to have it returned to me, and it was given up to me on the 5th of December 1863, on my undertaking to indemnify the railway company. I believe it was the bankrupt's practice to have corn which he purchased sent to his order at the railway station, and to forward such corn from the station to the person for whom he purchased. The bankrupt had no warehouse in which he could store it. The value of the corn which I received back from the railway company was about 2*s.* a quarter less when I received it back than when I sold it."

Mellish, for the plaintiffs (April 25).—First, there clearly could be no stoppage *in transitu*. The goods were delivered by the vendor to the railway company, not as carriers, but as warehousemen for the vendee; and therefore, as far as the vendor and vendee were concerned, the *transitus* was at an end. Secondly, there was an acceptance within the Statute of Frauds, either by the bankrupt or his assignees. Four days elapsed between the delivery at the station and the demand by the defendant; mere lapse of time is evidence of acceptance. When there has been an acceptance, the evidence required by the statute is complete; and the contract having been good from the first, the case is as if the statute had never passed. This is shewn by *Bailey v. Sweeting* (1). There is no case in which there had been an actual delivery by the vendor to the vendee, and it has been held that before acceptance the vendor could disaffirm the contract and demand the goods back. *Taylor v. Wakefield* (2) will be relied upon by the other side; but in that case there had been no delivery; the goods at the time of the bargain were in the hands of the purchaser as bailees. In *Morton v. Tibbett* (3) the goods had never been seen by the

(1) 30 Law J. Rep. (N.S.) C.P. 150; s. c. 9 Com. B. Rep. N.S. 843.

(2) 6 E. & B. 765.

(3) 15 Q.B. Rep. 428; s. c. 19 Law J. Rep. (N.S.) Q.B. 382.

vendee, and the mere subsale was there held evidence of acceptance without more.

[BLACKBURN, J.—*Meredith v. Meigh* (4) is very like this case, and it was there held that a delivery such as would support a count for goods sold and delivered, the vendee doing nothing, was not evidence of acceptance. In *Cusack v. Robinson* (5) it was held that the acceptance might be before delivery; but there the vendee had seen and agreed to take the specific goods; in the present case the vendee had only seen the sample.]

In *Bushell v. Wheeler* (6), after a delivery at the warehouse of the vendee's agent, the mere lapse of time was held evidence of acceptance. Thirdly, if the property in the barley remained in the vendor, then it was in the order and disposition of the bankrupt with the consent of the true owner.

Gray (J. Brown with him), for the defendant.—No doubt the *transitus* was at an end; the first point, therefore, is not available to the defendant. Secondly, there was no evidence of acceptance; the contract therefore was "not good"; and the property therefore remained in the vendor, and he had a right to demand possession from the railway company.

[COCKBURN, C.J.—Is there any case where the buyer claims performance of the contract, and the seller has been held able to repudiate the contract and say Give me back my goods?]

Taylor v. Wakefield (2) is precisely that case. It is a direct authority that until there is a binding agreement signed, or the other requisites of the statute complied with, either party may recede. Unless the sale be of a specific chattel, no property passes by the mere delivery to the agent of the vendee—*Godts v. Rose* (7). In *Norman v. Phillips* (8) timber was sent by railway and arrived at the vendee's station, and the invoice was sent to the vendee, who kept it more than a month, and yet it was held there was no evidence on which the jury

ought to find an acceptance. *Hunt v. Hecht* (9) is a distinct authority that there can be no acceptance unless the vendee has had an opportunity of examining the goods and seeing whether they correspond with the sample or order.

[COCKBURN, C.J.—In the considered judgment of the Court of Queen's Bench all the cases are examined, and the conclusion come to is directly contrary to *Hunt v. Hecht* (9).]

In *Nicholson v. Bower* (10) the vendee had actually examined a bulk sample, and found it to correspond, and yet it was held that this did not amount to an acceptance *per se*.

Gray continued his argument (May 5).—First, there was no valid contract by the Statute of Frauds to pass the property in these goods to the bankrupt. The possession of the carriers at the time of the bankruptcy was the possession of the vendor, the defendant, because there never had been any acceptance at that time to give validity to the contract of sale. The carriers had no power to accept the goods so as to bind the vendee. The case of *Bailey v. Sweeting* (1) is distinguishable from the present case. There the vendee was the person to make the acknowledgment in writing, and he did so; but here the carriers (the railway company) had no authority to bind the vendee by acceptance at the time of the bankruptcy. They were the agents of the vendor and not of the vendee. Then, further, to constitute a binding acceptance within the statute, there must be a consent of both vendor and vendee at the time of acceptance; but here the consent of the vendor was withdrawn before anything was done which could constitute acceptance by the vendee or the carriers as his agents—*Taylor v. Wakefield* (2); the reason of which decision is given by Willes, J., at page 152 of 30 *Law J. Rep.* (N.S.) C.P., to have been on that ground. Next the corn did not pass to the assignees under the bankruptcy as being in the order and disposition of the bankrupt. By the 12 & 13 Vict. c. 106. s. 125, "if any bankrupt at the time he becomes bankrupt

(4) 2 E. & B. 364; s.c. 22 *Law J. Rep.* (N.S.) Q.B. 401.

(5) 1 B. & S. 299; s.c. 30 *Law J. Rep.* (N.S.) Q.B. 261.

(6) 15 Q.B. Rep. 442, n.

(7) 17 Com. B. Rep. N.S. 229; s.c. 25 *Law J. Rep.* (N.S.) C.P. 61.

(8) 14 Mee. & W. 277.

(9) 8 Exch. Rep. 814; s.c. 22 *Law J. Rep.* (N.S.) Exch. 293.

(10) 1 El. & E. 172; s.c. 28 *Law J. Rep.* (N.S.) Q.B. 97.

shall by consent and permission of the true owner thereof have in his possession, order or disposition any goods or chattels whereof he was reputed owner, or," &c., "the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy." First, the corn was not in the possession, order or disposition of the bankrupt at the time of his bankruptcy; secondly, if there was any possession of any sort in the bankrupt, it was not such a possession, &c. as is contemplated by the statute; thirdly, there was no such reputation of ownership as to make the bankrupt reputed owner; fourthly, there was no consent of the true owner to the bankrupt's possession, order or disposition of the corn as owner thereof. The bankrupt had no possession, order or disposition at the time of bankruptcy.

[COCKBURN, C.J.—An order was given to the railway company telling them to give possession to the bankrupt.]

But there was no contract upon which the order to give possession was founded.

[BLACKBURN, J.—I am inclined to think there might be a contract in fact.]

But whether there was a contract in fact or not makes no difference in this respect, if it is not rendered valid in law. When the defendant rescinded the contract, it was as if the owner had sent the goods by mistake to be delivered to the bankrupt; there would then be no possession, order or disposition in the bankrupt.

[BLACKBURN, J.—I agree a mistaken consent is no consent. COCKBURN, C.J.—There was no extinction of the contract at the time of the bankruptcy.]

It is as if the goods had been consumed by fire.

[COCKBURN, C.J.—But at the time of the bankruptcy the bankrupt might have gone to the station, and by an order have disposed of the goods. No consent of the owner would have been necessary.]

Such a test is not sufficient to try whether the possession, &c. is a possession under the statute. For if there was any possession, there was no such possession as to satisfy the statute. Mere possession is not enough. Possession of goods sent to the bankrupt "on sale or return" is not an acceptance so as to change the property or make them in the order and disposition of

the bankrupt within the old statute of 21 Jac. 1. c. 19.—*Gibson v. Bray* (11). The observations of Gibbs, C.J. in that case as to what possession would be within that statute are worthy of attention, though he was overruled as to the particular point of his ruling in that case. The same case is reported in *Banc*, 8 *Taunt.* 76, and *Dallas*, J. points out in his judgment that it is a fallacy to say that mere possession of goods by a bankrupt by means whereof a false credit may arise is a sufficient possession, by declaring that the possession of factors, trustees and others is not sufficient; and he says, "The true question is, whether the bankrupt, having the goods in his power, has taken upon himself the order and disposition thereof."

[BLACKBURN, J.—It is properly admitted that the *transitus* by the railway company was terminated, because they held them at the order or disposition of the bankrupt. Is not such an order or disposition within the statute? SHEE, J.—The order or disposition must be as reputed owner with the consent of the true owner.]

There was no reputation of ownership. The bankrupt never came near and never accepted the corn, and no one but the railway company knew that it was for him. The character of the possession of the railway company may depend upon what may take place subsequently; thus, if the vendee authorizes the vendor to send goods by a railway company, and there is a valid contract, the possession of the railway company is the possession of the vendee; but here, to constitute a valid contract acceptance was wanting, and there was no acceptance by the vendee. Thus in *Meredith v. Meigh* (4), where goods above 10*l.* in value were verbally ordered to be shipped on board a vessel selected by the vendor, for which a bill of lading was signed and sent to vendees, but the vendees did and said nothing, and the goods perished at sea, the goods were held to be at the loss of the vendor, as there was no acceptance within the statute, and from the judgment of Erle, J., that what would constitute good evidence of a delivery of goods to satisfy a count for goods sold and delivered would not be sufficient to make an acceptance and receipt

within the Statute of Frauds. In *Hart v. Bush* (12), the vendee, under a verbal order, named the wharf to which the goods were to be sent for transmission to him by sea, yet a delivery at that wharf did not constitute an acceptance and receipt within the Statute of Frauds. So here, there was no acceptance and receipt, and therefore no possession by the bankrupt or any one as his agent.

[BLACKBURN, J.—The cases of *Hart v. Bush* (12) and *Meredith v. Meigh* (4) mean there may be a receipt or delivery, but yet no acceptance and receipt within the statute.]

But then to make a delivery to a carrier a good delivery, the delivery must have been under a contract, by which the carrier is to receive; but here, there being no contract, there was no delivery or receipt by the carrier for the bankrupt, but a delivery to some one or other who became thereby bailee for the vendor. Next, there must be a consent on the part of the vendor to the vendee holding the goods as the goods of the vendor; but here, as far as there ever was any consent, it was a consent to the vendee holding the goods under the contract as his, the vendee's, goods.

[COCKBURN, C.J.—The intention was, that the goods should be held by the vendee as under the contract, that is, if the contract was carried out, and with a right to have them again if it was not performed.]

In *Load v. Green* (13), the decision turned on the question whether the true owners of the goods consented to the apparent ownership as such of the bankrupts. The consent there was, the bankrupt should hold them as his own under a contract of sale, which the vendors after the bankruptcy were enabled to annul on the ground of fraud.

[SHERR, J.—A party to be bound must be a party to consent to the property being held so as to give a false appearance.]

In *Wilkins v. Bromhead* (14), there was a consent to the possession by the bankrupt but not to ownership, and shews that there

must be a consent to possession as reputed owners.

[BLACKBURN, J.—There the bankrupt had declared as well as he could do that he was not the owner.]

The meaning of this provision is well explained by Lord Redesdale in *Joy v. Campbell* (15).

Mellish, in reply.—First, with respect to the Statute of Frauds. Upon a verbal contract and delivery to purchaser or his agent the seller cannot by simple notice require the re-delivery, so as to prevent the purchaser receiving them so as to amount to an acceptance. The cases cited only shew a delivery without any acceptance—*Taylor v. Wakefield* (2). The carriers were the agents here for the vendee, and held the goods in that character, therefore no notice could prevent an acceptance in fact. The effect of a receipt and acceptance of goods under a contract within the statute is to refer back to the original making of the contract, in fact, and put the rights of the parties on the same footing as if there had been a valid contract from the beginning and the act had never passed, for these facts are only required as corroborative evidence of the contract, therefore it is that the vendor under a parol contract within the statute sues if the carrier loses the goods on their conveyance to their destination and before acceptance by the vendee, but if the goods are merely injured in the carriage before delivery and the vendee accepts them, the vendee sues for the injury. The only question is, whether there has been an acceptance *de facto* or not, at any time would do—*Bailey v. Sweeting* (1) which supports the retrospective operation of this contract.

[COCKBURN, C.J.—I should be sorry to extend *Bailey v. Sweeting* (1) one jot further. BLACKBURN, J.—Suppose the vendor to have an action of trover against the company for non-delivery of goods, can that vested right of action be taken away by a subsequent acceptance by the vendee? COCKBURN, C.J.—We need not go so far; the question is, whether up to the time of acceptance the contract may not be repudiated by either party.]

It cannot. There always is a contract, and the corroborative facts are only required as evidence of its existence.

(15) 1 Sch. & Lef. 336.

(12) E. B. & E. 494; s. c. 27 Law J. Rep. (N.S.) Q.B. 271.

(13) 15 Moo. & W. 216; s. c. 15 Law J. Rep. (N.S.) Exch. 113.

(14) 7 Scott, N.R. 921; s. c. 6 Man. & G. 963; 13 Law J. Rep. (N.S.) C.P. 74.

[COCKBURN, C.J.—The terms of the company's answer and the seller's notice amount to a rescission on the part of the vendor, with consent of the warehouseman. There is no contract till subsequent acceptance.]

Yes, there always was a contract. The rules of pleading are in favour of the plaintiffs. Upon acceptance, there may be an action with reference to a breach of contract committed before acceptance. Take the case of a purchaser not bound, but a vendor bound by a note in writing, when the purchaser does the corroborating act, then the vendor is bound from the first. But the vendee here accepted the goods through the railway company, for by doing nothing for a sufficiently long time he may shew acceptance. The amount of time is a question of degree.

[COCKBURN, C.J.—But here the goods were bought three days before the bankruptcy; surely not long enough to make an acceptance by merely doing nothing.]

In *Norman v. Phillips* (8) there was no acceptance, because the purchaser refused to take the goods on the day of the arrival of the goods; and the reasons of Alderson, B., that an acceptance within the statute must be such as to preclude the purchaser from objecting to the quality of the goods, was dissented from in *Morton v. Tibbett* (3). In *Hunt v. Hecht* (9), which conflicts to a great extent with *Morton v. Tibbett* (3), something remained to be done before acceptance could take place. *Nicholson v. Bower* (10) turns on refusal. Then, the assignees might adopt the contract—*Scott v. Pettit* (16). Lord Alvanley there goes into the question how far the assignees may take possession of goods, though consignors could not come in under the commission; and refers to *Ellis v. Hunt* (17) to shew that bankruptcy was no countermand of the order, and says that “for the purpose of receiving goods the assignees stand in the place of the bankrupt.”

[BLACKBURN, J. referred to *Van Casteel v. Booker* (18) and *Gibson v. Carruthers* (19).]

(16) 3 Bos. & P. 469.

(17) 3 Term Rep. 464.

(18) 18 Law J. Rep. (N.S.) Exch. 9; s. c. 2 Exch. Rep. 691.

(19) 8 Mee. & W. 321; s. c. 11 Law J. Rep. (N.S.) Exch. 188.

The possession of the railway company, under the circumstances of this case, is the possession of the bankrupt, and he is therefore apparent owner.

[BLACKBURN, J.—I cannot help feeling a doubt whether the credit of a bankrupt depends upon possession as apparent owner, but still the law is so. MELLOR, J.—The intention was, that he should be true owner, and not that his possession should be as reputed owner. COCKBURN, C.J.—They must be in his order and disposition, with the consent of the true owner, otherwise, the goods being sent, the vendor would lose them, though the bankrupt refused to accept and pay for them. BLACKBURN, J., referring to the fourth paragraph of the case, said, the practice being known, would they be reputed to be his when it was known that the goods were only sent on the 7th or 8th of November?]

But though it was a sale by sample, a person ought not therefore to suppose that the bulk would not agree with the sample. In *Gibson v. Bray* (11) a distinction was alluded to between the possession of factors and of trustees. He then referred to *Meredith v. Meigh* (4) and *Hart v. Bush* (12). If the purchaser orders goods verbally to be sent by the carrier, and afterwards the vendor comes to the carrier and orders him to give them back, the carrier might refuse to do so.

(Gray referred to the case of *Scott v. Pettit* (16), and said that in that case there was a contract; but that assignees, where there is no contract, cannot take upon themselves to accept.)

COCKBURN, C.J.—This case has been argued with great ability and learning on both sides. Our judgment ought to be for the defendant. The first question raised was, whether the defendant was entitled to stop the goods, as being *in transitu*. This point was properly given up by the defendant, for clearly the *transitus* had ceased. The goods had arrived at the place which as between buyer and seller was the place of their destination; therefore the *transitus* was at an end. Then, at the time the defendant demanded possession of the goods, was the property in him so as to give him the right to get possession? That depends upon whether the Statute of Frauds

had been satisfied. But did the delivery by the defendant to the railway company under the arrangement between them in itself make a receipt and acceptance under that statute? I think not. The cases of *Hart v. Bush* (12) and *Hunt v. Hecht* (9) are conclusive authorities to shew that a delivery to the railway company was not a receipt and acceptance by the buyer. In the former case brandy had been delivered at a vault to be put on board ship to be conveyed to the place where the buyer carried on business, and it was held, that there was no acceptance of the brandy. Here goods were given to the railway company to be carried to another place to the order of the buyer. The case of *Hunt v. Hecht* (9) goes a step further, and is binding on us. There the buyer had a right to inspect the articles sold, to see if they were in accordance with the contract, and it was held that there was no acceptance until he had had time to see whether they were so or not. The other point then presents itself, namely, as to whether the assignees of the buyer were entitled to be put in the bankrupt buyer's place for the purpose of accepting the goods, and so to take the case out of the Statute of Frauds. I assume that they would have a right as assignees to perfect a right or interest of the bankrupt inchoate at the time of bankruptcy. If so, was the bankrupt in such a condition as to be able to accept these goods at the time of bankruptcy? and that depends upon the Statute of Frauds. Assuming that there had been no acceptance and receipt by the buyer, I think without acceptance there is no valid contract, that is to say, no contract binding upon either party. It is clear that until acceptance, no property can pass; the property therefore remains in the seller until acceptance, and he had a right to exercise that right of property and did so, and the railway admitted his right. I think this put an end to the contract. Now comes the question whether these goods were left in the order and disposition, and I think the case of *Load v. Green* (13) quite disposes of that question. I approve of that case. There must be a consent of the seller that the buyer should be considered merely ostensible owner; but here, I think, the consent was to his being vendee.

BLACKBURN, J.—I am of the same opinion. This case does not depend upon stoppage *in transitu*; and if the Statute of Frauds had been satisfied, the goods would have belonged to the purchaser. But there must have been both acceptance and receipt to bind both purchaser and vendor under that statute. The delivery to the railway was on the 7th of November; the goods lie at the station till the 9th, on which day the bankruptcy occurred. The bankrupt never meddled with the goods, but I think there would have been *some* evidence of acceptance, as in *Morton v. Tibbett* (3), which establishes that lapse of time is some evidence. But here shortness of time and position of vendee negative such an assumption. Assuming that the contract was not made good by acceptance, according to *Meredith v. Meigh* (4), if the goods had perished by accident, it would have been the loss of the vendor, because the property had not passed and still remained in him. From the 9th of November to the 1st of December the goods remained the vendor's, and he then demanded them from the company. They did not refuse them, but said they would not part with them without giving him notice. After that, could there be any subsequent acceptance without the consent of the vendor? *Bailey v. Sweeting* (1) does not affect the present case unless there was an acceptance. If the vendor had permitted the vendee to take them, it might have been an acceptance; but after what happened there could not be an acceptance, because I think it would require the consent of the vendor to the acceptance. Next, was there order or disposition as reputed owner? *Load v. Green* (13) decides that the true owner as such must consent that the other side should be reputed owner, not being true owner; but here, I think, the vendor only consented that the bankrupt should have them until he should be true owner. On that ground also I think the defendant is entitled to our judgment in his favour.

MELLOR, J.—This case was a sale of goods by sample over the value of 10*l*. The Statute of Frauds says—[The learned Judge read the section]. Now here the goods so sold were sent to the railway station by order of the buyer, and there

must be an acceptance of goods so sold. The purchaser, however, did nothing under the contract, and the vendor countermands his prior directions, and the station-master promises that he will not part with them. All this occurs before any act by the vendee to bind the contract; therefore the property did not pass. As to the other point, I agree to what has been said, that possession under the Bankrupt Act applies to different acts from those in the present case.

SHEE, J. concurred.

Judgment for the defendant.

1865.
May 6.

THE QUEEN, on the prosecution of THE COMMITTEE OF VISITORS OF THE CAMBRIDGESHIRE, ISLE OF ELY, AND BOROUGH OF CAMBRIDGE LUNATIC ASYLUM, appellants, v. THE OVERSEERS OF THE PARISH OF FULBOURN, respondents.

Poor-Rate — County Lunatic Asylum, Rating of—"Purposes of an Asylum"—16 & 17 Vict. c. 97. s. 35.

A county lunatic asylum, though many pauper lunatics not belonging to the county are confined in it, and some patients not paupers, from both of which classes considerable profits are made, is "used for the purposes of an asylum" within the meaning of the 35th section of the 16 & 17 Vict. c. 97, and therefore rateable only at the value at which the land on which it is built was assessed at the time it was purchased.

Land cultivated as farm and garden by the lunatics assisted by skilled labourers, the produce beyond that consumed by the inmates of the asylum being sold and a profit realized, is land used for the purposes of an asylum within the meaning of the above section, if the primary object is not the profit but the healthful employment of the lunatics.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 106.]

1865. } ALEXANDER v. THE NORTH-
April 25. } EASTERN RAILWAY COMPANY.

Libel—Justification—Inaccurate Statement.

The plaintiff charged, as a libel upon him, a notice published by the defendants, a railway company, which stated that the plaintiff had been convicted by Justices of an offence against the defendants' by-laws and fined with an alternative of three weeks' imprisonment; the alternative in the conviction was really fourteen days:—Held, that it was a question for the jury whether the statement charged as libellous was or was not substantially true, and that the inaccuracy of the statement did not necessarily make it libellous.

*Declaration—That the defendants falsely and maliciously wrote and printed and published of the plaintiff the words following—"North-Eastern Railway. Caution. J. Alexander," (meaning the plaintiff) "manufacturer and general merchant, Trafalgar Street, Leeds, was charged before the magistrates of Darlington, on the 28th of September, for riding in a train from Leeds for which his ticket was not available and refusing to pay the proper fare. He was convicted in the penalty of 9*l.* 1*s.* 10*d.*, including costs, or three weeks' imprisonment."*

*Plea—That the plaintiff was convicted before two Justices, for that the plaintiff on the 24th of August, having procured a ticket, did therewith travel on the defendants' railway in a carriage attached to a train other than the train for which it was issued, contrary to the defendants' by-law, made under the authority of their act of parliament, and the Justices adjudged the plaintiff for his said offence to forfeit and pay 1*l.*, to be applied according to law, and 8*l.* 1*s.* 10*d.* costs, and if the said sums should not immediately be paid, the Justices ordered that the same should be levied by distress, and in default of distress they adjudged the plaintiff to be imprisoned for the space of a certain time, to wit, three weeks (1), unless the said sum and all costs*

(1) The plea originally stated, that the Justices adjudged the plaintiff to be imprisoned for the space of fourteen days, and the plaintiff demurred to it; on the argument the Court, after hearing Mellish for the defendants, without calling on Holkar for the plaintiff, allowed the defendants to amend the plea as it now stands.

and charges should be sooner paid, which conviction at the time of the doing by the defendants of what is complained of was in full force.

Replication—Setting out the conviction *verbatim*, which was as stated in the plea, with the exception that the amount of imprisonment adjudged in default of payment or levy by distress was fourteen days, and not three weeks.

Rejoinder—That the conviction is described with substantial and sufficient accuracy and truth, as well in the words of the publishing of which the plaintiff has complained as in the plea, and that the words so far as they differ in their literal meaning from the words of the conviction are not libellous; and that the words so far as they are libellous appear from the allegations in the plea and from the conviction to be and the same in fact are true in substance.

Demurrer and joinder.

Holker, in support of the demurrer.—The replication shews that in point of fact the plea contained no justification, and the rejoinder does no more than reiterate the plea. The notice charged as libellous is not justified by the plea, the amount of penalty and costs being lumped together, and the length of the alternative imprisonment being larger than that really imposed; both these inaccuracies were likely to create a prejudice against the plaintiff, and would lead the public to believe he had been guilty of a graver offence than that with which he had in fact been charged.

[COCKBURN, C.J.—It is a question for the jury whether the libel was in substance true; but we cannot say as a matter of law that the substitution of three weeks for a fortnight makes the statement libellous; the jury will have to say whether the inaccurate statement would have a different effect on the public than the literal truth. BLACKBURN, J.—When the case was before the Court on the former occasion (1), the defendant, by pleading a conviction and a penalty with the alternative of fourteen days' imprisonment, as a justification to the libel stating the alternative as three weeks' imprisonment, asked the Court to say as a matter of law that the difference *could not* be libellous. The plaintiff now asks us to say that the difference *must*

be libellous. It is not necessarily libellous, therefore the rejoinder is good.]

Secondly, the plea ought to allege that the conviction is still unreversed—*Cuddington v. Wilkins* (2).

[BLACKBURN, J.—It is perfectly immaterial whether the conviction is still subsisting or not, for if the plaintiff was convicted, the libel is true. MELLOR, J.—The case in *Hobart* was that a pardon had been granted, which put the plaintiff in the same position as if he had never committed the offence charged. COCKBURN, C.J.—If the conviction has been quashed and the quashing has the effect contended for, it should have been pleaded.]

Mellish, for the defendants, was not heard.

Per Curiam.—COCKBURN, C.J., BLACKBURN, J., MELLOR, J. and SHEE, J.

Judgment for the defendants.

1865. } KENYON, appellant, v. HART,
Feb. 3. } respondent.

Game—Trespass in Search of—Dead Game—1 & 2 Will. 4. c. 32. s. 30.

The 30th section of 1 & 2 Will. 4. c. 32, which makes it an offence to "commit a trespass by entering or being in the daytime upon any land in search of game," does not apply to a case where the game alleged to be searched for was dead at the time.

The respondent was shooting upon his own land, when a pheasant rose and flew across the fence which divided it from the land of T. After it had crossed the boundary, the respondent fired at and killed it. It fell upon the land of T, and the respondent went over while it lay dead upon the ground and brought it away. Upon an information laid against him for committing a trespass by being upon the land of T. "in search of game," the Justices dismissed the charge, on the ground that the mere act of entering the land for the purpose of picking up the pheasant, which was then dead, was not such a trespass as was contemplated by the act:—*Held, distinguishing Osbond v. Meadows, that the Justices were right in refusing to convict.*

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 87.]

(2) Hob. 61.

X

1865. } O'HANLAN v. THE GREAT
May 13.* } WESTERN RAILWAY COMPANY.

Carrier—Loss of Parcel—Measure of Damages.

In an action against a carrier for the loss of a parcel of goods, the measure of damages is, in general, the market value of the goods at the place and time at which they ought to have been delivered. If there is no market for the sale of such goods at the place, then the jury must ascertain their value by taking the price at the place of manufacture, together with the cost of carriage, and allowing a reasonable sum for importer's profit.

Rice v. Baxendale (1) commented upon.

Declaration against the defendants as carriers for hire from Leeds to Neath, that the plaintiff delivered to the defendants a package of cloth, at Leeds, to be carried to and delivered at Neath within a reasonable time; that the defendants had not delivered within a reasonable time, nor at all, but the package was wholly lost, through the defendants' negligence; claim, 50*l*.

Plea (March 4, 1865)—Payment of 22*l*. into court.

Replication—Damages ultra. Issue thereon.

The plaintiff's particulars were, cost of cloth, giving the items, amounting to 20*l*. 10*s*. 9*d*. Loss by non-delivery, &c., 12*l*. 12*s*.

At the trial, before Blackburn, J., at the Glamorganshire Spring Assizes, it appeared that the plaintiff was a hawker or dealer in cloth, travelling about the counties of Glamorgan and Carmarthen, and that he bought at Leeds and paid 20*l*. for three lots, chiefly of pilot cloth, the invoice price being 20*l*. 10*s*. 9*d*., the 10*s*. 9*d*. being taken off as discount for ready money.

This bale of goods was delivered to the defendants, at Leeds, about the 6th of November 1864, to be carried to Neath, the carriage not being paid (which it was agreed would be about 5*s*.), but on the plaintiff's arrival there a few days after the bale was not to be found. After some

delay for inquiries at the defendants' request, the plaintiff's attorney wrote demanding 25*l*.; but receiving no satisfactory answer, after further delay, caused by the defendants, the action was commenced on the 21st of January, and further correspondence then ensued, and ultimately (on March 4) the defendants pleaded payment into court of 22*l*.

After the above facts had been given in evidence, the plaintiff's counsel was about to go into evidence of special damage, but refrained on the learned Judge intimating that, under the circumstances, he thought it likely to imperil the verdict. The only further evidence given was, that the plaintiff said he could not have bought similar goods at Neath for 25*l*.; but it did not appear that there was any wholesale market for cloth at Neath.

The plaintiff's counsel cited among other cases *Rice v. Baxendale* (1).

The learned Judge left it to the jury to say what was the value of these goods at Neath, where they ought to have been delivered, which would be something more than the cost at Leeds (and the carriage not, however, paid in this case); but he left it to the jury, as men of sense, to say how much more, including interest, which might be given up to the 4th of March, when the plea was pleaded.

The jury found a verdict for 3*l*. beyond the 22*l*. paid into court; and leave was reserved to enter the verdict for the defendants, if the Court should be of opinion there was no evidence on which the jury could reasonably find more than 22*l*. No appeal without leave of the Court.

A rule having been obtained accordingly, *J. W. Bowen* shewed cause.—There was ample evidence to justify the jury in finding the damages to be 25*l*.

[BLACKBURN, J.—That is further than the plaintiff need go; it is sufficient for the present rule if they might have found anything beyond 22*l*.]

In the first place the plaintiff is entitled to very liberal interest; the goods ought to have been delivered early in November, and owing to the delay caused by the defendants' acts he did not receive the 22*l*. until the 4th of March. A man in the plaintiff's position would have been able to turn his money half a dozen times in the four months.

* At the Sittings after Term.

(1) 30 Law J. Rep. (N.S.) Exch. 371; a.c. 7 Hurl. & N. 96.

[BLACKBURN, J.—No doubt the jury were justified in giving interest, but in the most liberal way the interest on 20*l.* could not amount to 5*l.* for between three and four months.]

At 20*l.* per cent. interest would amount to about 1*l.* 7*s.*; the defendants paid into court 1*l.* 9*s.* 3*d.* beyond the cost price. But the question is, in addition to the interest, what was the value of the goods at Neath?

[BLACKBURN, J.—That is the real question.]

The defendants called no witnesses, and the only evidence on the point was that of the plaintiff himself, who said he could not buy the goods at Neath for 25*l.*

[BLACKBURN, J.—That was his evidence, but I think it may be taken that there was no market at all for such goods at Neath.]

There was no direct evidence as to this. But assuming there was no market, the plaintiff was not bound, as the defendants contended, to send to Leeds for the cloth; he was entitled to buy at the nearest place to the place of consignment, and was clearly entitled as damages to the value of the cloth at Neath, as was decided in *Rice v. Bazendale* (1). The defendants are liable to all damages which are the natural consequence of their default—*Hadley v. Bazendale* (2), and as they were bound to deliver the cloth at Neath within a reasonable time, they must pay the expense of replacing it there, that is, the value of the cloth there. This value must be arrived at by leaving the matter generally to the jury; it is impossible to lay down any general rule,—see per Wilde, B. in *Gee v. the Lancashire and Yorkshire Railway Company* (3). So again, in *Black v. Bazendale* (4), Parke, B. says, the jury may give any damages which are incurred as the reasonable consequences of the defendants' breach of contract. Again, in *Wilson v. the Lancashire and Yorkshire Railway Company* (5), it was held that the

plaintiff could not recover for the loss of profits he might have made by making the cloth (the article that miscarried) into caps, but that he might recover the loss of the season caused by the delay.

[MELLOR, J.—Was there any loss of season or market here?]

Not exactly, but there was the delay, and the course of dealing shews that the plaintiff could have sold several lots of goods during the interval in which the defendants kept him making inquiries. Now, the cost of the cloth was 20*l.* 10*s.* 9*d.*; 20*l.* per cent. on that for four months would be 1*l.* 7*s.* 4*d.*, and that, with 5*s.* only for carriage, amounts to more than 22*l.* Therefore, on the lowest estimate, the defendants have not paid enough into court, which entitles the plaintiff on this rule to keep his verdict.

Grove, Hardinge Giffard, and Ollivant, in support of the rule.—In the first place, all damage for delay is out of the question, as no evidence as to special damage was admitted, and all that really was left to the jury was the question of the value of the goods at Neath. With regard to the interest, even at the rate of 20*l.* per cent., there would not be sufficient to turn the scale in the plaintiff's favour; for as he only paid 20*l.*, he can only have that sum *plus* the interest on that sum, and the 10*s.* 9*d.* must go as part of the interest.

[BLACKBURN, J.—On no reasonable computation of interest could the amount be possibly made to exceed 22*l.*]

What, then, was the value of the goods? *Ex concessis* they were worth 20*l.* 10*s.* 9*d.* at Leeds, and the carriage to Neath would be about 5*s.*, therefore the plaintiff could have been put in the same position as if the goods had been delivered by the payment of 20*l.* 10*s.* 9*d.* *plus* the carriage; but inasmuch as the carriage in the present case was not paid, that element could not be taken into consideration. Now, what rule have the Courts laid down as the measure of damages? In *Hadley v. Bazendale* (2) it is stated to be that which may be reasonably in the contemplation of the parties at the time of entering into the contract. That rule is applied in several subsequent cases, and the element of profit cannot be taken into consideration—*Wilson v. the Lancashire and Yorkshire Railway Company* (5)

(2) 9 Exch. Rep. 341; s.c. 23 Law J. Rep. (N.S.) Exch. 179.

(3) 30 Law J. Rep. (N.S.) Exch. 11; s.c. 6 Hurl. & N. 211.

(4) 1 Exch. Rep. 410; s.c. 17 Law J. Rep. (N.S.) Exch. 50.

(5) 30 Law J. Rep. (N.S.) C.P. 232; s.c. 9 Com. B. Rep. N.S. 632.

and *Gee v. the Lancashire and Yorkshire Railway Company* (3). In both those cases the goods were ultimately delivered, and the only question was the damage for delay, and it was held that loss of profit could not be taken into consideration, but loss by deterioration might. But in both those cases the question was the amount of *special* damage. Here no special damage was shewn, or claimed, or left to the jury. Here all that the parties contemplated at the time of entering into the contract was the value of the goods. The plaintiff, if he had chosen, might have bought fresh goods at Leeds at once, and the measure of damages is simply the value of the goods. It may be admitted, as decided by the Court of Exchequer in *Rice v. Baxendale* (1), that the goods would be worth more at the place of consignment than at Leeds; but all that case decides is that the value was something more, and that the plaintiff was entitled to that, but it is impossible to say from the case how much more; and it certainly was not the value at which similar goods could have been purchased at Maidstone, the place of consignment, for the Court directed the verdict for 3*l.*, whereas it was expressly found in the case that the plaintiff could not have procured goods of a like quality at Maidstone at less than 4*l.* 14*s.* 6*d.* beyond the sum paid into court, which was 10*l.* 13*s.* 6*d.*, the price the plaintiffs had paid at Leeds, the place at which the goods were purchased, and from which they were sent.

[BLACKBURN, J.—The judgments of both Pollock, C.B. and Bramwell, B. put the value at Maidstone as the measure of damages; for the latter says, if the Judge had had his attention called to it, he would in all probability have found that it was something more.]

It seems difficult to say how the Court arrived at the 3*l.* The amount of damage which would have been caused by delay in sending for fresh goods from Leeds was given as 3*l.*; but the counsel for the defendants shews that this could not be recovered, because that would in effect be giving damages for loss of profits on re-sale, which was the only loss the delay could have caused. Then, all that the Chief Baron says is, "The only rule we can lay down is, that where goods are sent from A. to B. and are lost, the party entitled to them is

entitled to the value at B. It is clear the goods are worth more at Maidstone than at Leeds. Let the verdict be entered for 3*l.*" But it does not appear how this 3*l.* was arrived at. Bramwell, B., not differing from the rest of the Court, shews how this value is to be calculated, viz., not by ascertaining the accidental value at Maidstone, but by finding for what the goods could be got to Maidstone; and that, as in the present case, would be the cost at Leeds *plus* the carriage.

[BLACKBURN, J.—I confess I do not understand that statement of the learned Judge.]

What the learned Judge seems to mean is, that the measure of damages is not the value at which the goods may be purchased in a shop at Maidstone, for that would include the shopman's profit, but the value at which any one else going to that shopman's market could get the goods to Maidstone, and that would be simply the price at the place of manufacture *plus* the carriage.

[MELLOR, J.—Supposing the goods manufactured at Leeds were in stock at Neath and you proceeded to buy them there, what you would have to pay to replace the lost goods at Neath would include all these elements; the price at Leeds, the cost of transit to Neath, and the importer's profit at Neath; because no one would import them for the purpose of sale unless he could see his way, not only to repay himself the cost price and cost of transit, but to a reasonable profit to himself. Now, as the goods cannot be replaced at Neath, has not the plaintiff a right to say, the jury must give the price at Leeds, the cost of carriage, and something in respect of the importer's profit?]

The cost at Leeds and the carriage, no doubt; but importer's profit introduces an element of uncertainty, with regard to which carriers cannot be supposed to contract; and at this point the authority of *Rice v. Baxendale* (1) stops; the value at Maidstone, says the whole Court, is *something* more than at Leeds; and Bramwell, B., that value is the value at which the goods can be got to Maidstone; and the rest of the Court suggest no other mode of ascertaining the value.

[BLACKBURN, J.—The element of un-

certainty arises in ordinary cases. If there is a bale of cotton to be sent to Liverpool and it is lost, the value is at once regulated by the market price. But if the bale is lost on its way to a place where there is no market then you cannot say what is the actual market value at the time, and you are obliged to ascertain it as best you can, by taking into account all the things that are settled by what Sir Robert Peel called the "higgling" of the market. But in Liverpool the importer's profit from America would be taken into account, because no man would import from New Orleans to Liverpool merely to be repaid his costs out of pocket.]

Then the carrier is to be liable for all the fluctuations of the market, which the use of the telegraph now makes daily.

[BLACKBURN, J.—If cotton goods are lost at Manchester, and a telegram came which doubled the price, the carriers should pay that price.]

That would get rid of the rule laid down in *Hadley v. Baxendale* (2), and the other cases, and the carrier would be liable to all the uncertainties of the market, which are matters of speculation with the tradesman, but about which the carrier can know nothing. The rule must be that the consignee can only recover the actual value of the goods. Any element of profit at once leaves the carrier at the mercy of a jury. The importer's profit may be nothing. He may be at a dead loss.

[BLACKBURN, J.—That would be in favour of the carrier. If at the time the carrier lost, the goods owing to a falling market were of less value, he pays less; but if, owing to the rise of the market, the goods were of greater value, then he must pay more.]

No doubt, if the "market value" at the place, in the widest sense is to be the measure of damage; but in *Rice v. Baxendale* (6), Bramwell, B. says "What is the loss? It is the value of the goods at Maidstone," and Martin, B. adds, "The loss is the sum at which the goods could be replaced at Maidstone, and the proper mode of replacing them is to purchase them, not of a tradesman, but of the *manufacturer*."

[BLACKBURN, J.—The judgment of the Court goes further than that, because in the result they do give the plaintiff something more than the cost price at Leeds.]

If importer's profits are to be taken into consideration some evidence ought to have been given, on which the jury could arrive at a reasonable conclusion. Not an atom of evidence was given in the present case.

[MELLOR, J.—The very nature of the case shews that no evidence could be given.—BLACKBURN, J.—In such case the jury must exercise their common sense, as tradesmen and men of business.]

BLACKBURN, J.—In this case we are all of opinion that the rule should be discharged. The leave reserved, there being 22*l.* paid into court, was to enter the verdict for the defendants, if there was no evidence on which the jury could reasonably find more than 22*l.* It appears that the goods originally cost at Leeds, cash down, 20*l.*, the price in the invoice being 20*l.* 10*s.* 9*d.* They were then sent to Neath, where they ought to have arrived early in November, but they were lost, and I think it has been pretty well agreed in the course of this discussion, that the rule laid down in *Rice v. Baxendale* (1), and as it seems to me, by all the Court there, applies in the present case, that the measure of damages, setting all special damage aside—and no question of special damage was left to the jury—the natural and fair measure of damages would be the value of the goods at the place and time at which they ought to have been delivered. Now, as we have been stating in the course of the argument, the value of the goods at the place of importation consists of that which would be the market value, if there is a market price at that place which regulates what the value would be, and shews what it is. If there is no market at that place,—if from the smallness of the place or the scarcity of the particular goods and other things there is no market price,—the parties have not the means of settling what it would be; but the real value at the time and place would have to be ascertained as a matter of fact by the jury, taking into consideration those circumstances which would otherwise, in the higgling of the market, have shewn the market

value. Neath was a place where there was no market, and the jury were therefore to take into consideration those elements. I think it is very clear where there is an actual market, and the goods are actually sold at the market-price, that price is regulated by the importer, not simply by his own costs and charges, but by the average costs and charges, together with the average importer's profit. I cannot doubt that the value of cotton in Liverpool, upon an average, exceeds the value of cotton in the Southern States of America together with the freight and costs and charges; otherwise no one would import it. Importer's profit, therefore, does become an element in the market-price, and, where there is no market, reasonable importer's profit must be taken into account. Then, what is the reasonable importer's profit? No evidence, from the nature of the thing, can well be given, and the jury are to say what they think is fair and reasonable under ordinary circumstances. Here they were an intelligent Swansea jury, and they were all of a class who would know pretty well what were the importer's profits of persons who brought goods from a manufacturing district to a town in Wales. The railway company had paid into court a sum calculated at something less than 10% per cent. on the cost price, to cover interest and everything else. The question reserved is, could the jury find more than 10% per cent. on the cost price? The jury have found 25% damages. I think they were very liberal in doing so, but I cannot take upon myself to say they were wrong.

MELLOR, J.—I am of the same opinion. After considerable hesitation it appears to me that it is impossible to lay down the rule that the value at Neath, in the absence of any market-price at Neath, must mean the price paid at Leeds *plus* the freight. There is another element, as I think, which must be taken into consideration, and it is the importer's profit; that is to say, no man brings goods to Neath for the purpose of selling them, without adding to the actual cost something in respect that they are goods which he is dealing in, or about to deal in at Neath, and are not goods being sold at Leeds. This is what I understand, even from my Brother Bramwell's view in the case of *Rice v. Baxendale* (1),

which has been so much relied upon; and I do not think that his opinion is inconsistent with what I am now saying. I think there must be some error in the report of what is attributed to my Brother Bramwell, because there is an apparent inconsistency. He says, "If the Judge's attention had been called to the point, he would have said that the value to the plaintiff at Maidstone would be something more than the value at the place of delivery in law, at Leeds." It is not very clearly expressed in the report, but I think my Brother Bramwell must have acceded to the view that there was something that must be added beyond the mere cost of freight. I am unable to say what it ought to be. The defendants' counsel have contended that there ought to be some evidence on which any estimate we are to form is to be based. I do not see what evidence can be given, and I am afraid, although it leads to some uncertainty, we cannot escape from it, and cannot confine the value at Neath to the mere price at Leeds *plus* the freight. If so, then the additional *quantum* must be assessed by the jury. I am bound to say I agree, they seem to have dealt here, as juries generally do with railway companies, with a liberal hand, and have given more than I think was right; but we are not inquiring whether the verdict was right on that ground. The difference between the sum paid into court and the sum the jury have given, would not have induced the Court to grant a rule on the ground of excess of damages; but the question is, to see whether the verdict ought to be entered for the defendants or stand for the plaintiff; and I cannot see that, on the finding of the jury, we can say that the verdict ought to be entered for the defendants by rejecting every other element of computation than the mere cost at Leeds *plus* the freight.

SHEE, J.—I am of the same opinion. I think when a carrier fails to deliver the goods, which have been intrusted to him to carry for reward, at the time at which they ought to have been delivered, then the person to whom they belong is entitled, within a reasonable time after the failure, to go and purchase similar goods at the place where the railway company or carrier contracted

to deliver. If there had been a regular market-price for such goods at that place, then it is clear the plaintiff has sustained no damage beyond the cost which he necessarily incurred in supplying himself with other goods of the same kind. If the place at which the goods ought to have been delivered is a place where there is plenty of such commodities, but none except charged with a profit beyond their prime cost and the cost of their carriage, then the damage he sustains is this higher profit cost to him, though this price be more than the price at which the goods would have stood to him if they had been received at the proper time and place. On the other hand, if there be no market of any kind, no place where the goods can be bought, or no dealer to say what they can be bought for at the place, then we are driven to give a reasonable construction to the words in which the rule is laid down in *Hadley v. Bazendale* (2), and to judge what damages naturally arise from the breach of such a contract according to the usual course of things, and must ascertain what would be the probable cost, calculating reasonable profits, at which the plaintiff would have been enabled to buy the things he has lost at the place where they ought to have been delivered, that not being a place of manufacture, but a place at which there were dealers who sold goods of that kind at a fair, proper profit on the prime cost at the place of manufacture, and the cost of the carriage. It seems to me it was quite right, on the question of damages, to give the jury direction that they ought to consider what would be the damage arising naturally, that is, according to the usual course of things, upon such a breach of contract; and they might, therefore, very fairly give such damages as they thought the person with whom the contract had been broken would have sustained if there had been the means of purchasing the things at the place of destination, but saddled with something for the profit price.

Rule discharged.

1865. } *FREWEN v. THE LOCAL BOARD*
May 8. } *OF HEALTH OF HASTINGS.*

Local Board of Health—Purchase of Land—Provisional Order of Secretary of State—11 & 12 Vict. c. 63. and 21 & 22 Vict. c. 98.

A provisional order of a Secretary of State empowering a local board to put in force the Lands Clauses Consolidation Act, with respect to the purchase of land, has no validity until it has been confirmed by act of parliament, and cannot be brought up by certiorari in order that it may be quashed.

Rule calling upon the Hastings Local Board of Health to shew cause why a writ of *certiorari* should not issue to remove into this Court the provisional order of the Secretary of State, and all proceedings connected therewith, empowering the Hastings Local Board of Health to put in force the powers of the Lands Clauses Consolidation Act, 1845, with respect to the purchase of land otherwise than by agreement, as to certain lands of Charles Hay Frewen, as having been made without jurisdiction, first, because for purposes not authorized by the act; secondly, because made as to lands which were not sufficiently or properly defined, and the description and quantities of which in the said order mentioned agreed neither with those mentioned in the advertisements nor with those mentioned in the notice to Mr. Frewen, and because the said order was bad, for it was impossible to say how much or what land was intended to be taken.

Lush (J. Brown and Hance with him) shewed cause against the rule.—It will not be necessary to discuss the grounds of the rule, for this Court has no power to interfere, as the order which it is sought to have quashed has no validity at present. By the 11 & 12 Vict. c. 63. s. 73, local boards of health may by agreement purchase premises for the purpose of widening, &c. any street. The statute is amended by the 21 & 22 Vict. c. 98, and section 75. provides for the purchase of land by the local board. Notices are to be published and served; the local board is to have power to petition the Secretary of State, who is to take the petition into consideration, and may either dismiss it or direct an inquiry,

and may afterwards by provisional order empower the local board to put in force the powers of the Lands Clauses Consolidation Act, with respect to the taking of land otherwise than by agreement. But by the 6th clause of the same section, "no provisional order so made shall be of any validity, unless the same has been confirmed by act of parliament; and it shall be lawful for the Secretary of State as soon as conveniently may be to obtain such confirmation, and the act confirming such order shall be deemed to be a public act of parliament." The order may be made good if an act is passed, but at present there is no validity in it whatever. Section 77, by the 6th clause, shews that either of the Houses of Parliament may be petitioned against the bill, and that if there be such a petition, the bill may be referred to a Select Committee, and the petitioner shall be allowed to appear and oppose as in the case of private bills.—(He was then stopped.)

Field and A. Wills, in support of the rule.—It can never have been intended that where the provisional order is clearly bad, it should be necessary to go before a Select Committee. Parliament would start with the notion that the order was good, and this Court ought to interfere to prevent what is really an abuse by the local board of the powers given by their act.

[BLACKBURN, J.—Any one who wishes to petition against it would be heard.]

COCKBURN, C.J.—The Secretary of State is not exercising any judicial function; his order is only like a report, and decides nothing. The bill would be referred to a Select Committee if there is any opposition to it. It was evidently the intention of the legislature to apply the powers of parliament to cases which would not justify the extravagant outlay which takes place in regard to private bills, and to substitute this proceeding by the Secretary of State with the object of guiding and assisting the legislature. The order has no validity whatever till the act is passed, and we should be usurping functions which do not belong to us if we stepped in for the purpose of quashing this order. Such an interference would be beyond our proper sphere of action.

BLACKBURN, J.—I am of the same opinion; the 75th section, by clause 6, and the 77th section, by clause 6, shew clearly that the order has no validity whatever until it has been confirmed by act of parliament.

MELLOR, J.—I am also of opinion that we ought not to interfere. The legislature has instituted these proceedings with a view to economy, and we must take care that we do not interfere with the duties of the Secretary of State, by quashing an order which at present has no validity at all.

Rule discharged.

1865. } PEW v. THE METROPOLITAN
Jan. 25. } BOARD OF WORKS.

Metropolis Local Management Act, 1855
(18 & 19 Vict. c. 120.) sections 170, 181.
—*Sewerage Districts—Sewerage Expenses*
—*How raised—Rateable Value.*

By section 181. of 18 & 19 Vict. c. 120. all liabilities which, under 11 & 12 Vict. c. 112, are chargeable upon the rates authorized to be levied under such latter act, are to be raised by the Metropolitan Board of Works in like manner as the expenses of such Board in the execution of that act.

*Before the passing of the 18 & 19 Vict. c. 120. the Commissioners of Sewers, acting under 11 & 12 Vict. c. 112, had borrowed money, of which 67,000*l.* had been expended on drainage works for the benefit of the Surrey and Kent Sewerage District formed under the powers given to the Commissioners. The district comprised parts of nineteen parishes, and in one of them (C.) 519*l.* had been expended on works locally situate there, and the whole benefit derived amounted to 1,074*l.* 6*s.* 10*d.*—Held, nevertheless, that the proper mode of raising the money to defray the liabilities of the Commissioners of Sewers was to apportion the amount of such liabilities among the different parishes in the sewerage district, according to the rateable value of the property in each, and then to make a rate for such proportion upon C. and the other parishes respectively.*

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 97.]

1865. } COWELL v. AMMAN (ABERDARE)
May 8. } COLLIERY COMPANY (LIMITED).

Costs—County Court Act, 13 & 14 Vict. c. 61. s. 11.—Recovery under Voluntary Reference after Issue joined but before Trial.

*Where a cause is referred to arbitration, by consent of the parties, after issue joined, the costs of the cause to abide the event of the award, and the arbitrator finds all the issues for the plaintiff, and awards that a sum not exceeding 20*l.* is due from the defendant to the plaintiff in respect of the breaches of contract alleged in the declaration, the plaintiff "recovers" that sum within the meaning of the 13 & 14 Vict. c. 61. s. 11, and is deprived of costs by that section.—So held by the Court of Queen's Bench after conference with the Judges of the Courts of Common Pleas and Exchequer.*

By a Judge's order, made by consent of the parties, after issue joined, this cause was referred to an arbitrator, who was to have all the powers as to certifying and amending pleadings of a Judge at Nisi Prius; the costs of the cause to abide the result of the award, the costs of the reference and award to be in the discretion of the arbitrator.

The arbitrator awarded as follows: "I find each of the several issues joined for the plaintiff, and I find and award that the plaintiff has sustained damages by reason of the breaches of contract alleged in the declaration, to the amount of 20*s.*, which sum I order and award the defendants to pay to the plaintiff. And I further award and order that the plaintiff and defendants do each bear their own costs of the reference, and that the defendants pay the costs of this award."

On this award, the order of reference having been made a rule of court, the Master proceeded to tax the plaintiff his costs of the cause.

Quain thereupon obtained a rule, calling on the plaintiff to shew cause why the Master should not review his taxation, on the ground that the plaintiff "had recovered a sum not exceeding 20*l.*," and was therefore deprived of costs by the County Court Act, 13 & 14 Vict. c. 61. s. 11, which enacts that if in any action of debt, &c. the plain-

tiff shall recover a sum not exceeding 20*l.*, the plaintiff shall have judgment to recover such sum only, and no costs.

J. Brown (Hilary Term, Jan. 31) shewed cause.

Quain was heard in support of his rule.

The course of argument sufficiently appears from the judgment of the Court. The case of *Parr v. Lillicrap* (1) was cited in addition to the cases noticed in the judgment.

Cur. adv. vult.

The judgment of the Court (2) was (May 8) delivered by—

MELLOR, J.—In this case a rule had been obtained by Mr. Quain, calling upon the plaintiff to shew cause why the Master should not be at liberty to review his taxation of costs. An action having been commenced, and issue joined therein, by order of a Judge, and by consent of the parties, the cause was referred, and it was ordered "that the costs of the cause should abide the event of the award, and that the costs of the reference should be in the discretion of the arbitrator." By the award the arbitrator found that the plaintiff had sustained damages by reason of the breaches of contract alleged in the declaration to the amount of 20*s.*; this amount he ordered the defendants to pay to the plaintiff, and directed that each party should bear their own costs of the reference.

Upon this award, the Master taxed the plaintiff's costs of suit, the event of the award being in his favour. The defendants objected that the plaintiff, having recovered a sum not exceeding 20*l.*, was not entitled to costs by virtue of the 13 & 14 Vict. c. 61. s. 11.

On shewing cause against the rule, it was contended that that section did not apply to an arbitration by consent of parties before trial, wherein the costs were ordered to abide the event of the award, and he argued that the word "recover" in the County Court Act meant recover by the verdict of a jury. Several cases were cited, in which Judges have in general terms suggested, that there does exist a distinc-

(1) 1 H. & C. 615; s.c. 32 Law J. Rep. (N.S.) Exch. 150.

(2) Cockburn, C.J., Mellor, J. and Shae, J.

tion in this respect between cases in which there has been a verdict subject to a reference and cases in which the reference was by consent before verdict. It is important in considering this question to distinguish between the cases which have been decided upon the construction of the 3 & 4 Vict. c. 24. s. 2, which in terms applies only to cases in which there has been "the verdict of a jury," and cases decided upon the County Court Act, and similar acts, in which there are no such words.

The case mainly relied upon by Mr. Brown was that of *Frean v. Sargent* (3), in which an action of slander had been referred after issue and before trial, by agreement of the parties, in which it was stipulated "that the costs of the cause should abide the event of the award"; and the arbitrator having found in favour of the plaintiff with 20*s.* damages, the Master had taxed the plaintiff's costs of suit, upon which the Court of Exchequer refused a rule to review the Master's taxation, saying, "that in actions referred by agreement of parties before trial, the agreement regulates the right to costs." In that case Bramwell, B., although he concurred in refusing the rule, did so expressly on the ground that "it did not appear that that case came within any of the statutes taking away the plaintiff's general right to costs given by the Statute of Gloucester."

The case of *Robertson v. Sterne* (4) was relied upon by each of the learned gentlemen who appeared on the rule, Mr. Brown contending that it established a clear distinction between cases of compulsory reference, and cases of reference by agreement or consent of parties; and there is no doubt that the Court, in giving judgment in that case, appears to have considered that the statutes, which deprive the plaintiff of costs in certain events, did not apply to references by consent before trial. Mr. Quain, on the other hand, contended that that case was in reality in favour of his rule, inasmuch as it established that in a reference under the compulsory clauses of the Common Law Procedure Act, 1854, where there was no verdict of a jury, nor any

power to enter a verdict, the plaintiff, having recovered less than 20*l.*, although the costs were ordered to abide the event of the award, was held to be deprived of them by the operation of the London Small Debts Act, 15 & 16 Vict. c. lxxvii. s. 120, in which the words are "shall recover a sum not exceeding 20*l.*"

In the case of *Smith v. Edge* (5), in which a verdict had been entered, subject to a reference, and in which some members of the Court of Exchequer are reported to have used expressions countenancing the distinction between actions referred before trial and actions in which a verdict has been taken subject to a reference, the case of *Robertson v. Sterne* (4) was cited, and Bramwell, B., in adopting the reasoning of the Court of Common Pleas, so far as it related to the main question there decided, viz., that the London Small Debts Act did deprive the plaintiff in that case of costs, expressly dissented from the opinion of the Court of Common Pleas, so far as "it intimated a difference between submission by consent and submission by compulsion," and after reviewing the cases of *Frean v. Sargent* (3) and *Jones v. Jones* (6) is reported to have said, "I think that the general rule that ought to govern all these cases applies here, and that rule is, that wherever the plaintiff is entitled to judgment in the action and gets his damages in the action, and the case is such that if there had been no reference, the plaintiff would, by virtue of the County Court Act, have lost his costs in the cause, so does he equally lose them when there is a reference which fixes the amount, unless he has succeeded in getting the necessary certificate."

We are of opinion that the above statement of Bramwell, B. truly expresses the rule which ought to be applied to the case before us. We think that it is impolitic to make a distinction which would greatly discourage references by consent, and we cannot perceive any substantial difference between an order made compulsorily and one made by consent. The meaning of the words "costs of the action to abide the event of the award" must receive the same

(3) 32 Law J. Rep. (N.S.) Exch. 281; s. c. 2 H. & C. 293.

(4) 13 Com. B. Rep. N.S. 248; s. c. 31 Law J. Rep. (N.S.) C.P. 362.

(5) 33 Law J. Rep. (N.S.) Exch. 9; s. c. 2 H. & C. 659.

(6) 7 Com. B. Rep. N.S. 832; s. c. 29 Law J. Rep. (N.S.) C.P. 151.

construction in each case; and when it is once established that the word "recover" in the County Court Act, as in the London Small Debts Act, is satisfied by a recovery in the action, without the verdict of a jury—*Boulding v. Tyler* (7), the result seems naturally to follow that in each case, the plaintiff not having recovered in the action 20*l.*, is deprived of his costs by virtue of the provisions of the County Court Act and other similar statutes.

Our impression during the argument was strong in favour of making the rule absolute; but we abstained from delivering judgment with the intention of consulting the Judges of the other Courts upon the subject. We have since had the opportunity of conferring with the Judges of the Courts of Common Pleas and Exchequer, who concur with us that this rule should be made absolute.

Rule absolute.

1865. } *BARKER, appellant, v. DAVIS,*
May 3. } *respondent.*

Game—Right of Shooting—1 & 2 Will. 4. c. 32. ss. 12. and 30.—Proof of Right—Variance—Amendment, 11 & 12 Vict. c. 43. ss. 1. and 9.

The tenant of P. shot game upon land which was occupied by him as tenant. Before the commencement of the tenancy P. had granted the right of shooting over the land to G. by deed. The tenant having been summoned before Justices was convicted of killing game upon the evidence of G. that he had the exclusive right of shooting over the land; that he preserved the game there; that he had given no permission to the tenant to shoot; and that the tenant had killed game at the time in question:—Held, that upon this evidence the Justices ought not to have convicted the tenant, inasmuch as there was not sufficient evidence that the right of shooting was in G. without the production of the deed.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 140.]

(7) 3 B. & S. 472; s. c. 32 Law J. Rep. (N.S.) Q.B. 85.

1865. } *BROWN, appellant, v. EVANS,*
April 29. } *respondent.*

Highway—Turnpike-Road—Repairs out of Parish Highway Rate—4 & 5 Vict. c. 59.—Retrospective Order.

The 4 & 5 Vict. c. 59. (which makes it lawful for Justices in petty sessions, upon information that the trust funds are insufficient for the repairs of a turnpike-road within a parish, to examine the state of the funds of the trust, and to inquire into the state of the repairs of the road, and if they think necessary and expedient to order payment to be made out of the highway rate to the trustees of the road, the money to be wholly laid out on the actual repairs of the turnpike-road) —does not enable Justices to make an order towards the payment of repairs already done.

Where by the private turnpike act the funds are to be applied, in the first instance, to the payment of interest and reduction of the principal sum borrowed, and after that to the repairs of the road, and the funds have not been applied to the repair at all, such case is within the 4 & 5 Vict. c. 59.

The Justices making an order under the above act, in the absence of any proof to the contrary, need not inquire whether the trust funds have been properly applied.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 101.]

1865. } *GUAGLIENI, appellant, v. MAT-*
April 29. } *THEWS, respondent.*

Disorderly House—Licence—Public Entertainment—25 Geo. 2. c. 36. s. 2.

A local act, in similar terms to the 25 Geo. 2. c. 36. s. 2, enacted, that no house, room, or other place, within the borough should be kept or used for public dancing, music, or other public entertainment of the like kind, without a licence:—Held, that the dancing need not be by the public; but that in order to bring an entertainment within the act the music and dancing must not be merely subsidiary, but must form a substantial part of the entertainment.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 116.]

1865.
May 11.

{ THE QUEEN, on the prosecution of THE MAYOR, ALDERMEN AND BURGESSES OF SOUTHAMPTON, v. THE SOUTHAMPTON HARBOUR COMMISSIONERS.

Costs, Security for—Increase of Security, when allowed.

A rule of court having been made, directing that legal proceedings might be taken in the name of a corporation against certain Commissioners by certain ratepayers interested in the matter, on their giving security to indemnify the corporation against costs, two of the ratepayers entered into a bond in the usual amount of 200*l.*; a mandamus having accordingly issued against the Commissioners, and the case having been taken by writ of error to the House of Lords, and the bond of indemnity being therefore of insufficient amount to cover the expenses incurred, the Court made absolute a rule to increase the amount to such sum as the coroner and attorney of the court should think reasonable.

This was a rule, calling on three ratepayers of the borough of Southampton to shew cause why the indemnity given by two of them should not be increased to an amount reasonably sufficient to cover the expenses as to which this indemnity was given, and that the matter be referred to the coroner and attorney of the Court for that purpose.

It appeared that by a rule of court, of the 26th of July 1859, the three ratepayers being interested in the matter, were to be at liberty to use the name of the corporation in taking such legal proceedings against the Commissioners of Southampton Harbour as they might be advised, on giving to the corporation an indemnity to the satisfaction of the coroner and attorney of the Court.

The then coroner accordingly directed a bond to be entered into in the penal sum of 200*l.* by two of the three ratepayers, conditioned to indemnify the corporation against all costs to be incurred by them relating to any proceedings taken in the name of the corporation against the Commissioners, the coroner saying that 200*l.*

was the sum usually fixed, and refusing to increase the amount.

A mandamus accordingly issued, with the corporation as prosecutors against the Commissioners, and judgment was obtained in this court in favour of the Crown, but was reversed in the Exchequer Chamber, and a writ of error is now pending in the House of Lords; the expenses of the prosecutors already incurred exceeded 200*l.*

Mellish and Archibald shewed cause, and contended that it was contrary to practice to increase the security.

Bullar was not heard in support of the rule.

The COURT (1) were of opinion that it was but reasonable that either the litigation should be stopped, or that the parties interested should enter into fresh security; and that the rule should be made absolute that the security be increased to such sum as the coroner and attorney of the Court shall think reasonable.

Rule absolute accordingly.

1865. } WARD, appellant, v. GRAY,
April 26. } respondent.

Tolls—Floating Bridge—Steam Ferry Boat—Soldiers—Mutiny Act, 1864.

By section 72. of 27 Vict. c. 3. (the Mutiny Act, 1864,) Her Majesty's officers and soldiers on duty are exempted from payment of any duties and tolls in passing along or over any turnpike or other roads or bridges otherwise demandable:—Held, that this exemption does not apply to the case of a floating bridge propelled from one side of a river to the other by steam power, and kept in its course by parallel chains laid across the bed of the river.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 146.]

(1) Blackburn, J., Mellor, J. and Shae, J.

1865. } THE QUEEN v. JOHNSON AND
Jan. 26. } ANOTHER.

Highway, Non-repair of—Jurisdiction of Justices under 5 & 6 Will. 4. c. 50. s. 95. on Summons against Parish.

Where, on the hearing of a summons against the surveyors of a parish for the non-repair of a highway, the surveyors deny the duty of the parish to repair, on the ground that the alleged highway is not a highway, the Justices cannot proceed to make an order under the 5 & 6 Will. 4. c. 50. s. 95, that an indictment be preferred, without making any inquiry as to whether the road be a highway.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 85.]

1865. { VYSEY, appellant, v. HOSKINS,
April 26. { respondent.
HARRIS, appellant, v. HOSKINS,
respondent.

Game—9 Geo. 4. c. 69. s. 1.—Entering Land Open or Inclosed—Road—7 & 8 Vict. c. 29. s. 1.

The appellant was found with a net, and for the purpose of taking game, upon certain land, which had a hedge on either side, and a metalled road running through it. Between the road, on both sides of it, and the hedges the land was waste land varying in extent:—Held, that this land was not either open or inclosed within the meaning of the 9 Geo. 4. c. 69. s. 1, which makes it an offence to enter by night any land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 97.]

1865. } THE QUEEN v. COLVILL.
May 3. }

Prisons—Gaols—Classification of Prisoners—Order of Quarter Sessions—Warrant—4 Geo. 4. c. 64. s. 4.

By 4 Geo. 4. c. 64. s. 4. it is provided that the Justices of the Peace assembled at the

Michaelmas Quarter Sessions, by orders to be made for that purpose, may ascertain and declare to what class or classes of prisoners every gaol, house or houses of correction, or any part or parts of any of them respectively shall be applicable, &c. By an order made under this section, the house of correction at C, in the county of M, was directed to be applicable to certain specified classes of prisoners. Under a local act, 20 & 21 Vict. c. cxxix., Justices were empowered to issue warrants for the apprehension and commitment of persons making default in the payment of rates and for their committal to the common gaol or house of correction. Under that act R. S, a defaulter in payment of rates, was ordered to be taken to the common gaol or house of correction for the county at C, and the keeper of the said house of correction was ordered to receive and imprison the said R. S, who had not committed any offence within the classes specified in the order of Quarter Sessions:—Held, that the keeper of the house of correction was justified in refusing to receive R. S into his custody, as the order that the house of correction should be applicable only to classes of prisoners in which R. S. was not included was binding.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 137.]

1865. { THE QUEEN v. THE JUSTICES OF
May 9. { THE WEST RIDING.
(THE SHEFFIELD UNITED GAS-
LIGHT COMPANY v. THE OVER-
SEERS OF SHEFFIELD.)

Appeal to Quarter Sessions—Reference to Arbitration—Costs—12 & 13 Vict. c. 45. s. 13.

Where the matter of an appeal at Quarter Sessions is referred to an arbitrator, under the 12 & 13 Vict. c. 45. s. 13, and the order of reference is silent as to the costs of the arbitration, the subsequent Sessions at which the award is entered as the judgment of the Court have no power to order either party to pay the costs of the reference.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 142.]

1865. }
May 15. } MOODY v. CORBETT AND OTHERS.

SPECIAL CASE.

Railway—Superfluous Lands—Owners of Land adjoining thereto—8 Vict. c. 18. s. 127. (Lands Clauses Consolidation Act.)

By the 216th and 217th sections of a local act for making a railway (containing similar provisions with those in the 127th section of the Lands Clauses Consolidation Act), lands acquired by the company under the provisions of the act, but which would not be required for the purposes thereof, were to be sold within ten years after the passing of the act, and if they were not so sold, they were to vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same:—Held, that this applied to all land acquired under the provisions of the act, for the purpose of making the railway, and not used for that purpose, whether the land were actually in the possession of the company or in the occupation of their tenants.

In the year 1861, the plaintiff brought an action to recover the possession of lands which, under the act, would become vested in him as the owner of adjoining land. In 1863, the company, in promoting another private act, got a clause inserted, to the effect that the respective periods limited for the sale of superfluous lands were to be extended for five years from the passing of the act. The vested interest of the plaintiff, if he had any at all, had vested in him in the year 1854:—Held, that the clause so inserted in the year 1863 had no operation upon the claim of the plaintiff.

Held, also, that the proper way to apportion the superfluous lands among the owners of the land adjoining thereto, was by drawing a line from the point where the boundaries of two adjoining owners meet, to the nearest point of the land actually used by the company.

This was a SPECIAL CASE stated by consent of the parties in an action of ejectment, tried at the Surrey Summer Assizes, 1861, and in which a verdict was ordered to be entered for the plaintiff, subject to the opinion of this Court.

1. The plaintiff was at the commencement of this action and still is the surviving trustee of a marriage settlement, made on the 5th of June 1844, in contemplation of the marriage of Mrs. Susannah Hawkins with the Rev. Thomas Ainsworth, which subsequently took place; and by the said settlement the legal estate in the lands which are coloured green in the accompanying plan marked No. 1. (1), (which is made to scale, and is to form part of this case), and of which the said Mrs. Hawkins was then and had for many years previously been the owner in fee simple, was duly conveyed in fee to the plaintiff and two other trustees (since deceased) upon the trusts therein mentioned.

2. The defendants, the London, Brighton and South Coast Railway Company, appeared and defended for the whole, as did also the other defendants, Charles Joseph Corbett, Charles Walker, John Haworth and William Nathaniel Wright, who were severally at the time of the bringing of this action occupiers of the lands and the buildings sought to be recovered in the present action, the lands being coloured pink on the said plan (1), and the buildings thereon being shaded, and they severally derive their title through the railway company.

3. The plaintiff, as owner of the adjoining lands marked green on the said plan (1), under the provisions contained in the 216th and 217th sections of the 7 & 8 Vict. c. 92. (passed on the 29th of July 1844), entitled 'An Act for making a Railway from the London and Croydon Railway at Croydon to Epsom,' sought to recover possession of the lands and buildings mentioned in the writ of ejectment, as being superfluous lands adjoining the plaintiff's, unsold within the prescribed period of ten years after the passing of the said act, and therefore forfeited to the plaintiff as such adjoining owner.

4. By the 5 Will. 4. c. 10, the London and Croydon Railway Company was incorporated for the purpose of making a railway from Croydon to join the London and Greenwich Railway near London.

(1) See this plan at the end of the judgment.

5. By the above-mentioned act of the 7 & 8 Vict. c. 92, the Croydon and Epsom Railway Company was incorporated for the purpose of making a railway from the London and Croydon Railway at Croydon to Epsom.

6. By the 131st section of the last-mentioned act, it is enacted that, subject to the provisions of the act, it should be lawful for the company to agree with the owners of the lands which they were thereby authorized to enter into and take for the purposes of the railway, for the absolute purchase for a consideration in money of any such lands, or such parts thereof as they should think proper, and of all subsisting leases therein, and of all rents, charges, annuities, mortgages or incumbrances affecting any such lands, and all commonable or other rights to which such lands might be subject, and all other estates or interests in such lands of what kind soever.

7. By the 216th section it is enacted, for the purpose of making provision respecting the sale of lands acquired by the company under the provisions of this act, but which shall not be required for the purposes thereof, that the company shall sell all such superfluous lands in such manner as they may deem most advantageous, and convey the same to the purchasers thereof by deed under the common seal of the company, and a receipt under such common seal shall be a sufficient discharge to the purchaser of any such lands for the purchase-money in such receipt expressed to be received, and such sales and conveyances shall take place within ten years after the passing of this act.

8. And by the 217th section of the same act it is further enacted, that if the company do not sell such superfluous lands within the period aforesaid, then such lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same.

9. By the 227th section it is enacted that, subject to the provisions and restrictions in the said act contained, it should be lawful for the company to make, and maintain the said railway and works on the line and upon the lands delineated and

described on the plan and in the books of reference thereafter mentioned, and in the schedule thereto, and for that purpose to enter upon, take and use such of the lands so delineated and described as should be necessary for making and constructing the said railway and works.

10. By the 228th section it is recited that plans and sections of the railway shewing the line and levels thereof, and also a book of reference containing the names of the owners, lessees and occupiers or reputed owners, lessees and occupiers of the lands through which the same was intended to pass, had been deposited with the clerk of the peace of the said county of Surrey.

11. By the 230th section it is enacted that true copies of such plans and book of reference, or of any correction thereof, or extracts therefrom, certified by such clerk of the peace, should be received in all courts of justice or elsewhere as evidence of the contents thereof.

12. By the 231st section it is enacted that the company, in making the railway, should have power to deviate from the line delineated on the plan so deposited, provided that no such deviation should extend to a greater distance than the limits of deviation delineated on the said plans, nor to a greater extent in passing through a town than 10 yards, or elsewhere to a greater extent than 100 yards from the said line, nor should such deviation extend into the lands or property of any person whose name is not mentioned in the said book of reference, without the previous consent in writing of such person, unless the name of such person should have been omitted by mistake; and the fact that such omission proceeded from mistake should have been certified in manner thereinbefore provided for in cases of unintentional errors in the said book of reference.

13. By the 234th section it is enacted that the company should not take or injure any property of the following kinds, except such as should be specified in the schedule to this act, without the consent in writing of the owners and occupiers thereof, unless the omission in such schedule be certified according to the provisions thereinbefore contained to have proceeded from mistake (that is to say), any house or building

erected on or before the 30th of November 1843, or any ground on or before that day inclosed or set apart and used as a garden, orchard, nursery-ground, yard, paddock, plantation, planted walk or avenue to a house.

14. In addition to the said plan (1), another plan, marked No. 2, which accompanies this case, was also put in evidence.

15. The said plan No. 2. is a tracing of a portion of the plan deposited with the clerk of the peace under the 227th and 228th sections, and which was also put in evidence at the trial of this cause, and the numbers mentioned therein refer to the numbers and description of the property mentioned in the said book of reference.

16. The Nos. 51, 52, 53, 54, 60, 61, 62. and 63. on the said plan No. 2, comprise the portion coloured pink on the plan No. 1. (1), as well as the portion of the line of railway adjoining.

17. The Nos. 55. and 59. on the said plan No. 2, comprise the parts coloured green on the plan No. 1. (1).

19. The Schedule 1. referred to in the 227th and 234th sections of the said act, 7 & 8 Vict. c. xcii., contains a description of the property numbered 51, 52, 53, 54, 55, 61. and 62, similar in all respects to that contained in the said book of reference, with the exception of their not being numbered; such schedule does not contain No. 63, the same being pasture land. And the schedule only contains lands of the particular description enumerated in the said 234th section of the said act.

20. The red lines on the said plan No. 2. denote the limits of deviation mentioned in the said 231st section of the said act, and the whole of the property claimed, as well as part of the plaintiff's, is within them.

21. By the 7 & 8 Vict. c. xcvi. (6th of August 1844) the powers of the London and Croydon Railway Company were extended. By section 26. of the last-mentioned act, power was given to them to purchase the Croydon and Epsom Railway.

22. By the 9 & 10 Vict. c. cclxxxiii. (27th July 1846) reciting these acts amongst others, and that in pursuance of the 7 & 8 Vict. c. xcvi. the London and Croydon Railway

Company had purchased the Croydon and Epsom line the London, Brighton and South Coast Railway was incorporated.

23. By sections 1. and 5. of the last-mentioned act, the London and Epsom companies were dissolved, and the powers, privileges, rights, lands, &c. granted to them were vested in the London, Brighton and South Coast Railway Company.

24. By section 21. the regulations and restrictions in the acts of the dissolved companies were made binding on the said London, Brighton and South Coast Railway Company.

25. In support of the plaintiff's case at the trial, the following witnesses amongst others being sworn on behalf of the plaintiff deposed as follows:

26. Thomas Fowler Wood was called on the part of the plaintiff, and proved that before and at the time of the passing of the Croydon and Epsom Railway Act he was the owner of Nos. 51, 52, 53, 54. and 60, the last number being a public footpath, shewn on the said other plan.

27. That the triangular piece at the east end of the plan No. 1. (1), coloured pink and marked A, was no part of his property, and that he whilst such owner received the following notice:

"In pursuance of the provisions contained in a certain act of parliament passed in the session holden in the 7th and 8th years of the reign of Her Majesty Queen Victoria, intituled 'An Act for making a Railway from the London and Croydon Railway at Croydon to Epsom,' I do hereby, on behalf of the Croydon and Epsom Railway Company, give you notice that a certain piece of orchard land, containing by estimation 3 roods and 15 perches or thereabouts, and being parcel of a larger piece of orchard land situate in the parish of Croydon, in the county of Surrey, now or late in the occupation of Samuel Harris, distinguished in the map or plan and book of reference deposited in the office of the clerk of the peace for the county of Surrey, and referred to by the said act with the No. 51, and delineated in the plan hereunto annexed, and therein coloured red, will be wanted and required by the said company for the purposes of the said act, and that it is the intention of the said company to contract for, and they are now willing to treat and agree for the pur-

(1) See this plan at the end of the judgment.

chase thereof, and of all subsisting leases, terms, estates and interests therein. And further, that you are hereby required on or before the expiration of one calendar month next after this notice, to deliver or cause to be delivered at the office of the said company, being the London and Croydon Railway office, London Bridge Terminus, Southwark, a statement in writing of the particulars of the estate, share, interest or charge which you claim to be entitled to, or to be authorized to receive satisfaction and compensation for, and of the injury or damage sustained by you, and of the amount of the sum of money which you may demand or be willing to receive in satisfaction and compensation for the value of such lands and premises, and such estate, share, interest or charge, and for such injury or damage respectively. Dated the 16th day of January 1845.

R. J. Young,

Secretary to the said company.

To Messrs. Thomas F. Wood and Samuel Harris, and to all and every person and persons whom it may concern."

And of part of which land, viz. Nos. 51, 52, 53, and 54, Samuel Harris was the tenant or occupier. The adjoining property occupied by Morley, viz. Nos. 61, 62, and 63, belonged to Mr. Wright, since dead.

28. He stated further, that there was a transfer and conveyance executed by him to the Croydon and Epsom Railway Company of the whole of the said land, Nos. 51, 52, 53, 54, and 60; that he in 1846 received the purchase-money and left the conveyance with his solicitor, Mr. Drummond, of Croydon, and had not since seen it or had possession of the land.

29. This deed was called for by the plaintiff pursuant to usual notice to produce given to the defendants in that behalf, but was not produced by them, and the receipt of such notice to produce was admitted by the defendants.

30. He further stated that the railway was made upon part of the property taken from him by the railway; that he had recently been over the property, when he found the hedges and other boundaries the same as when the lands were his, except so far as the same had been altered by the severance and alteration that was caused by making the said railway over a portion of the property.

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31. Giles Long proved that he knew the land adjoining and close to Pitlake Bridge, on the Croydon and Epsom line of railway, and, on the plan No. 1. (1) being produced to him, stated that the land marked green represented the part he then held as yearly tenant under Mrs. Ainsworth, and had done so for rather more than twenty-one years; that Mrs. Ainsworth was formerly Mrs. Hawkins, the widow of the Rev. John Richard Hawkins; that she was Mrs. Susannah Hawkins, and subsequently married Mr. Ainsworth; that he knew the adjoining property coloured pink, and that it was in the occupation of Mr. Samuel Harris, for many years before the making of the railway, and after him it was occupied by Mr. Wright; and after Mr. Wright the defendant Mr. Corbett occupied one of two cottages (originally forming one house) thereon, and another person occupied the other cottage; there was a kitchen-garden, flower-garden, and fish-pond belonging to the house occupied by the defendant Corbett, and about three acres and a half of meadow land, of a part of which Corbett has been in occupation about four years and up to the present time; that he saw the railway men, when the railway was being made upon that land, conveying ballast from the pond and its vicinity (being the part occupied by Samuel Harris, and part of the said land coloured pink,) to the railway, and making the railway; that the triangular piece was not held by Harris; that there is at the west end a piece of land between the ground in question and the road bank, which is used as a road from the Croydon parish road to his house and the property occupied by Corbett and others; that after passing Corbett's premises, there is a vacant piece of ground, formerly part of the said old parish road, and running down to and stopped many years ago by the railway; it has become grassed over, and the part near the railway used as a wood-yard by Morley, and afterwards by West.

32. Thomas West was called, and proved that he rented a portion of the land coloured pink, consisting of a house with a cottage attached, with meadow and garden, and had done so for thirteen years next prior to Christmas 1860, but not the cottage and lands Nos. 61, 62, and 63, which were occupied by Morley under an

agreement, which was not produced, and that he underlet the house, meadow and garden land to William Morton Wright, who underlet to the defendant Corbett, and that he underlet the cottage attached to another person ; that when he first went there the railway was being made, but was not finished. He proved further, that during all that time he paid his rent to the London, Brighton and South Coast Railway Company.

33. John Morley proved that he occupied one of the cottages and the rest of Wright's property on the said plan No. 1. (1), and which adjoins Wood's property, and being Nos. 61, 62. and 63. in the said plan No. 2, and a book of reference under leases from Wright, which were then produced by him, for twenty-one years from 1836 to 1857; that he paid rent to Wright during such period until the making of the railway, and after that to Henry Anscombe, on behalf of the London, Brighton and South Coast Railway Company, and continued to do so to the end of his term.

34. Henry Anscombe, superintendent at the London, Brighton and South Coast Railway terminus, and formerly travelling inspector of such company, proved the receipt of rent from the two last witnesses, West and Morley, for their holdings during the last four or five years, and the payment of it to the London, Brighton and South Coast Railway Company.

35. George Robinson proved that he had been a servant for ten years of the London, Brighton and South Coast Railway Company, and that he occupied the cottage formerly let to the witness Morley, and had done so for two years; he took the cottage from one Brown, who was in the said company's employ, and that his rent for such cottage was deducted by the London, Brighton and South Coast Railway Company from his wages every fortnight. He added, that the nature of his employment did not render it convenient that he should occupy that cottage more than any other.

36. It was proved at the said trial that after the determination of Morley's lease the said London, Brighton and South Coast Company was duly rated for the house so occupied by Robinson, and that they paid the rates.

(1) See this plan at the end of the judgment.

37. The catalogue or particulars, with plans and conditions marked W, which accompany and form part of this case, were put in evidence by the plaintiff; those particulars are headed "London, Brighton and South Coast Railway Company, surplus estates, freehold and copyhold. Francis Fuller & Co. have received instructions from the London, Brighton and South Coast Railway Company to sell by auction at the Mart, opposite the Bank of England, on Wednesday, the 22nd of June 1859, in lots, several portions of their surplus properties, comprising exceedingly valuable and highly important estates adjoining or near to the following stations on their line of railway."

38. The following description will be found therein of lot 2.

"Lot 2, near the West Croydon Station." This lot comprises 4 a. 0 r. 34 p. of very valuable freehold building land, with a considerable frontage to a road near the Derby Arms, and adjoining the high road from Croydon to Mitcham.

"On this property is a small brick-built dwelling-house, with slated roof, containing six living rooms, standing in a good garden, with a wood-yard adjoining; and also an old-fashioned family residence, brick built, containing six sleeping-rooms, two bow parlours, kitchen, washhouse, cellars, and other offices; there are also a two-stall stable, coachhouse and yards, and adjoining the house is a superior kitchen-garden with excellent fruit-trees, a flower garden, fish-pond, and about three acres and a half of superior meadow land.

"This property is within five minutes walk of the West Croydon Station.

"The fixtures belonging to the tenant will have to be paid for by valuation.

"The title to this lot will commence as to part with a conveyance, dated the 11th of February 1846, and as to the other part with a conveyance, dated the 26th of February 1846."

The catalogue or particulars contain conditions of the sale, the 4th of which is as follows :

IV. The vendors will within twenty-one days after the sale deliver to each purchaser an abstract of the title to the lot or lots purchased, such abstract commencing with the deed, surrender, admission, or other

document stated in the particulars of each lot, and no earlier title or evidence of any earlier title shall upon any ground or pretence whatever be required, and it shall be assumed that every such deed, surrender, admission and other document well and effectually conveyed or passed the property, estate and interest purporting to be thereby conveyed or passed, free from all incumbrances, claims and demands, and it shall be assumed without proof, question or inquiry that the vendors and the persons in whom the legal estate or the property is now vested have done and performed all acts and things necessary or proper to be done and performed to enable or authorize them to sell, convey, surrender and assure the lot or lots to the purchaser or purchasers thereof respectively, and the purchaser or purchasers shall not make any objection or requisition on account of the vendors being accountable to the Crown under any bond for payment of duties on passengers or otherwise, or on the ground of any judgment, rule, decree or order registered against the vendors and appearing to be unsatisfied (if any such there be), or on account of any claim for compensation or other claim against the vendors with respect to any part of the property or otherwise (if any such there be), or on account of any liability of the vendors on any account whatsoever, and it shall not be necessary for the vendors to furnish any evidence of the identity of any of the lots with the property described in the abstracted documents, and if the respective purchasers or their solicitors shall not within ten days after the delivery of the abstract, state in writing to Messrs. G. Faithfull & Son, of Ship Street, Brighton, the vendor's solicitors, some valid objection to the title not precluded by these conditions, the purchaser shall be considered as accepting the title, and all objections not delivered within that time shall be considered as waived, time being in this respect the essence of the contract."

39. Among the said plans above referred to in the said particulars, there is one marked X. appertaining to and descriptive of lot 2, and headed as follows:

"London, Brighton and South Coast Railway.

"Plan of land in the parish of Croydon,
"To be sold by auction June 1859."

40. The part coloured pink thereon represents the 4 a. 0 r. 34 p. to be put up to auction, and is bounded on the one side by the London, Croydon and Epsom Railway, and on the opposite side by land belonging to Mrs. Ainsworth, on another side by the high road from Croydon to Mitcham, being land not belonging to the plaintiff or the defendants, and on the remaining side by land belonging to Messrs. Thomas and James Turner; Pitlake Bridge is also marked thereon.

41. James Scott, for three years deputy-chairman of the London, Brighton and South Coast Railway Company, and for one year director, proved that the said Francis Fuller was usually their auctioneer, to sell when they had property to sell, and that he had done so since he (witness) had been at the board, and that he knew as a director that there was a sale of surplus lands in 1859, and that he knew of the catalogue marked W. being published in 1859; that it was the province of their solicitor, Mr. Faithfull, to settle the conditions, and that he was employed by the company for that purpose in the preparation of the sale; that the sale was on the 22nd day of June 1859; that the said catalogue or particulars marked W. were used at the sale; that he called at Mr. Fuller's on the subject of the sale and saw a catalogue there, and that some of the lots were withdrawn before the sale.

42. George Faithfull, solicitor of the London, Brighton and South Coast Railway Company, proved that the said conditions of sale mentioned in the said particulars were prepared at his office; that he had been solicitor to the company for more than ten years; that he received the draft of the said conditions of sale from Mr. Fuller, and Mr. Fuller sent him the said particulars of the sale marked W; that he settled the conditions of sale and sent them to Mr. Fuller; that he attended the sale as solicitor for the company on the 22nd of June 1859; that the property was put up for sale; that there were bidders; that the purchasers prepared the drafts of the purchase-deeds, which were sent to him for perusal on behalf of the London, Brighton and South Coast Railway Company; that he charged the company for settling them, and received money on behalf of the London, Brighton and South Coast Railway Company for lands then put up for

sale at the auction mart, and paid it over to the company; that the said particulars marked W. were used at the sale.

43. Copies of the said several acts, plans, particulars and books of reference accompanying and are to be taken as part of this case.

The question for the opinion of the Court was—

Whether upon the facts above stated the plaintiff was entitled to recover all or any, and if any, what portion of the lands coloured pink on plan No. 1.

If the Court should be of opinion in the affirmative, then the verdict was to stand in respect of the whole, or of such portion, and judgment was to be entered up for the same with costs, including costs of and incident to this case, to be borne and paid by the defendants.

If the Court should be of a contrary opinion, then the said verdict was to be set aside and a nonsuit entered in lieu thereof, with the costs of and incidental to this case to be borne and paid by the plaintiff.

The Court was to have power to draw all inferences of fact which a jury might draw.

The case was argued by—

Lush (*Baylis* and *Murphy* with him), for the plaintiff, and by

Bovill, for the defendants.

The arguments were based upon the facts set out in the case, and the different sections referred to therein, and are sufficiently disclosed by the judgment.

BLACKBURN, J.—I think, in this case, as the matter has been considered a good deal while the argument has proceeded, we need not take further time to consider; but that we ought to say that we think the plaintiff is entitled to judgment; I will presently point out the manner in which he is entitled to recover, and what quantity of land he is entitled to recover.

The first point is this: by the Croydon and Epsom Act, passed in the year 1844, it was enacted (and provisions have since been adopted in the Lands Clauses Act which are precisely similar, and which are, indeed, almost identical in words, but I take them from the local act), by the 216th section, that, "for the purpose of making provision respecting the sale of lands acquired by the company under the provisions of this act,

but which shall not be required for the purposes thereof, the company shall sell all such superfluous lands," and that "such sales and conveyances shall take place within ten years after the passing of this act." Now, that act was passed on the 29th of July 1844, so that the ten years there mentioned, so far as that act is concerned, ended in July 1854, because it says that such sales shall take place within ten years after the passing of the act. Then by section 217. it further enacts "that if the company do not sell such lands within the period aforesaid," that is, before July 1854, "then such lands remaining unsold at the expiration of such period, shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same." Now the plaintiff is the owner of some lands adjoining the quantity of land marked pink (1). The first question is, whether, on the case, he has shewn that the pink land does come within that which is pointed out in these two sections, the 216th and the 217th,—whether it was land "acquired by the company under the provisions of this act," and "not required for the purposes thereof." Now, as to this, we have to take ourselves back to the time of the trial and the verdict in the year 1861, and we have this proved at that time: In the first place, by an act of parliament which has been referred to, the Croydon and Epsom Railway had become vested in the London, Brighton and South Coast Railway Company, and by that act it was enacted, that the clauses of the Croydon and Epsom Act should be read and construed as if the London, Brighton and South Coast Company had been substituted for the Croydon and Epsom. Therefore we have to look at it, in the year 1861, exactly as if the London, Brighton and South Coast Company had been the company who had obtained the act, instead of the Croydon and Epsom. Then we find that evidence was given that as to a portion of the pink land the former owner had received notice to treat from the company, and that after he had executed the conveyance (which was not produced) he had been paid the price for it. The por-

(1) See this plan at the end of the judgment.

tion of land which he had thus divested himself of, had, from that time, been adopted by the company, or by the company's servants, and was up to the time of the trial in the occupation of the company's tenants.

Then we come to other lands, that is, to the parcels 61, 62 and 63, which had belonged to different proprietors, but which, being contiguous, form part of the same thing; and as to those it appears that at the time the company had them they were in the tenancy of a person called "Morley," who held them for a term of years, which would expire in the year 1857. Now Morley was not turned out; it does not appear affirmatively whether the company had given him notice or not; Morley was not turned out, but continued in the occupation; but it also appears that the company had acquired the reversion in some way, because Morley paid them rent, and they received rent up to 1857, when Morley's interest in the land ceased under the lease, and from that time to the time of the trial the company had received rent from Morley, he continuing on as tenant from year to year of the company. That was strong evidence as against the company that, somehow or other, they had acquired the reversion of the land over Morley, although it does not appear that they had acquired the interest that Morley had, because he seems to have enjoyed it up to the year 1837. In the year 1854, therefore, they had acquired the reversion of the land, but they had not yet turned out the tenant.

Now, I think, Mr. Bovill's argument was this. He said that under the 216th section, where provision is made for the sale of lands acquired by the company, "under the provisions of this act, but which shall not be required for the purposes thereof," the construction of that was to be limited to lands which had been acquired, not in the way of reversion, but it must be such immediate possession as that the company might enter into possession and use them; and, consequently the effect of the existing outstanding tenancy in Morley prevented those being lands acquired by the company, and he was unwilling to admit, what I thought was the case (and I think so still), that the same reasoning would apply if there had been a tenant from year to year, and the company

had not given any notice to quit. Mr. Bovill said that that was not the same position. I think it is.

Now, I think, the point turns on what is the meaning of "lands acquired by the company under the provisions of this act." I think, when you look at what it was intended by the act of parliament that the company should acquire, it is this: The company, upon giving compensation, applied to take lands and to force people to sell. And whenever they acquired those lands under the provisions of the act for the purposes of making the railway, or for executing their undertaking, which may be by the general Lands Clauses Act, whatever they acquire in that way should be subject to this condition, that, if they do not use it for the purposes of the line within the prescribed period (in this case ten years), there is a condition by which the land is to go to the proprietors of the adjoining lands "in proportion to the extent of their lands respectively adjoining thereto." That is the scheme of the act, the object being that where lands are taken from proprietors by compulsion of law, for the purpose of having particular works executed, if they are not executed, then they shall, first, be offered to the persons from whom they were taken, and if they will not have them, then to the owners of the adjoining lands. All that applies as much to the reversion, or other partial interest in land which the company had acquired by force, as to the actual fee simple in actual possession. I cannot see, in the reason of the thing, where the distinction is between the reversion that may be acquired, where a company hold on, and the absolute fee simple of the lands required by the company under the provisions of the act; and I see nothing in Mr. Bovill's argument to affect it. Then, it appearing that the company were in possession, and actually enjoying it by receiving the rents from agricultural tenants, who were not using it for the purposes of the railway, but as ordinary inhabitants of cottages—agricultural tenants—and paying rent, it is clear that, *de facto*, it had never been applied to the purposes of the company—the company having overstayed their time, possibly thinking that the provisions of the Lands Clauses Act, giving them ten years from the time when

the execution of the works expired, which would be fifteen years—possibly thinking that that applied here,—instead of this ten years only, they waited too long before they began to sell.

But then they advertised them as “surplus lands,” and that, certainly, is strong evidence that they were in fact surplus lands.

Now the whole of the facts, and everything connected with the case, being completely within the knowledge of the company, if these lands had been appropriated to any of the purposes of the act, so that they ought not to be called “superfluous lands,” that was a fact within the knowledge of the company, the defendants; the defendants were required to prove that if it had been so, when there had been made a *prima facie* case to the contrary, if they had evidence to displace it, but they did not do that.

The same applies to all the lands which shall be acquired for the purposes of the railway, and which shall be superfluous. Now Mr. Bovill says, and says truly, that the green (the plaintiff's land) does not abut on and adjoin to plot 61. and plot 62. (1) That is true. If we were looking at whether it was adjoining the other land at the time that land was originally acquired, it would be true; on that ground it would not be adjoining; but what the act says is, “the owners of the lands adjoining thereto,” that is, at that period when the land is to be vested in those owners, and at that time, in 1861 (being the same as if we had determined it in 1854), the whole piece of the pink was taken as one piece of ground acquired by the railway, no matter who was the owner, because by the provisions of the act it had become, as absolutely as if it had been sold, vested in the owners of the adjoining lands respectively.

Then we come to the next question. We have hitherto been speaking of this upon the state of the law as it was in the year 1861, when this verdict was found, but in the year 1863 the railway company, promoting a private act, got a clause inserted, the effect of which was this: “The respective periods by the several acts relating to the company limited for the sale of their superfluous lands, are hereby respectively

extended for five years from the passing of this act, and those several acts shall be read and construed as if that period had been fixed by each of those acts for that purpose.” Now that section, it is contended on the part of the defendants, has this effect: that we are to suppose that the legislature intended to say that these acts of parliament shall be all read now as if they had been framed in this way, and with these words interpolated into them, “the vested interest which the plaintiff had, if he had acquired any interest at all.” Now the vested interest, if the plaintiff has acquired any at all, was in consequence of the period having elapsed some years before, and more than that, namely, the vested interest that he so acquired in the verdict, he having been only prevented from being put in possession of it in consequence of the law's delay, and which is to be defeated and set aside by this *ex parte* legislation in a private act of parliament, without his being a party before them, and by construing the words in this way. I hope, for the sake of the London and Brighton Railway, that they never intended when they brought in that clause that it should have that effect. If they had intended that it should have such an effect, and had admitted it, the legislature certainly never would have passed it, and it would have been an ineffectual attempt; but they have not used words to express that meaning at all. It is always a rule in legislation of all sorts, and particularly in private legislation, that the words in an enactment shall not be construed retrospectively as affecting vested interests unless you clearly shew that such was the intention of the legislature. Now, here the words are, “the respective periods by the several acts relating to the said company limited for the sale of their surplus lands are hereby respectively extended.” I think the meaning of those words, even if they were open to that principle, but even without the aid of that principle that I have been referring to, plainly is, that where there is an existing time—a still existing time limited at the moment—existing, so that if the period is not yet exhausted so as to give the other party a vested right, but is running and current, is a period still limited and incapable of being extended. I do not think

(1) See this plan at the end of the judgment.

those words are words which we ought to strain in order to make them retrospective, and so defeat vested interests, when they can be construed to mean that where the party has got his vested interest, and has even actually recovered that vested interest, the effect of that should be undone and give the company a right to recover back lands which have been recovered from them, and which, but for the law's delay, would have vested in the plaintiff. I cannot think that the legislature ever intended that.

Therefore, it comes round to the question which we began with, and which is most difficult, for certainly there is very great difficulty about it, and that is as to construing the provisions of the act of parliament so as to see what is meant by "owners of the lands adjoining,"—the land is to become the property of the "owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same."

Now comes the question, what does that mean? We have the question raised, looking at the east end of this plan (1) in this way: It appears that the plaintiff's land, shaded on this plan "green," continues by a line that is not quite parallel with the London, Croydon and Epsom Railway, but which is not far from parallel to it, and runs along until it meets the land of Mr. Turner. There the land of Mr. Turner is the boundary of the plot of land occupied by the company and acquired by the company under the provisions of the act, but not used; they are "superfluous lands." The boundary at Mr. Turner's land goes off; it is not perpendicular, but slants off. Now Mr. Turner's land adjoins to the pink plot, and, in one sense, as much so as the green land adjoins it. Now, how is the act to be construed? One view, which was suggested by Mr. Lush, was that these different owners were to be made tenants in common, and to have the piece apportioned among them. I do not think that is the true construction, and for this reason: we know with regard to railways, that their limits of deviation run parallel to the proposed line for a great many miles, and very likely all along, from one terminus to another, where there are those limits of deviation; and where lands are acquired for

the purposes of the railway, it will be found that they contain a strip outside of the railway which would be superfluous, which was acquired by the company.

Now, to say that the whole of the owners of all the contiguous lands from Croydon to Brighton—as was suggested when it was first put,—to hold that they should all take as tenants in common, would be extremely inconvenient, and it is certainly very unlikely that the legislature ever intended it to be so. Then we find that the legislature have not used words pointing to that, but they say the property is to vest in the proprietors of the lands adjoining, "in proportion to the extent of their lands respectively adjoining the same," it being perfectly plain that the true intent of the legislature was, that the owner of each parcel of land adjoining should have a proportion of the adjoining lands: that is, "adjoining" for that purpose.

Then we come to the question: how are we to say in what proportion and extent the lands are to be said to be "adjoining the same"?

I think it must be in proportion to the extent of the adjoining lands, that is, in proportion to the extent of the land adjoining the railway. And then comes this, further, that if it is to be taken merely as the limit of the frontage, then it would follow that you are to make a rule-of-three sum, and, if so, it is clear. Take the length of the fence along the green line, and then the length of the fence along Turner's land, down there; but then that would not be carrying it to the fence of Mr. Turner, which is in a sloping direction. That would give Mr. Turner, whose estate is in a slanting direction, a larger proportion than it would give to the plaintiff, whose fence is straight along the railway. That cannot be the intention of the legislature. I think the true meaning must be this: I admit the words are not by any means artificially used, but they rather lead to the conclusion that when the thing was originally proposed the framers of the act were not very clear as to what would be the working of the matter—I think the true meaning is this: that when you take the line of the railway as being made the boundary of the deviation from it—which would be, generally

speaking, pretty nearly parallel to the railway—when you find the words “owners of the lands adjoining,” the meaning must be this, that you must go to the point where the two adjoining owners’ boundaries meet. In that case it would be that point where the green and pink and white meet—where the “19” has been marked; and taking it from that point you draw a straight line to the nearest point of the works of the company — of the land actually used by the company for their works — and then the land that on Mr. Turner’s side would be Mr. Turner’s, and that on the plaintiff’s side would be the plaintiff’s. The plaintiff is not entitled to recover anything that belongs to Mr. Turner. He must recover, in ejectment, on the strength of his own title; and therefore what the plaintiff is entitled to recover on the eastern boundary would be up to the straight line drawn from the point where his land and Mr. Turner’s meet, to the nearest point of the land used by the company for the purposes of the railway. That is pretty nearly the same as a line drawn perpendicular on the railway, but not quite the same,—it would not come very far from what I see is the actually existing fence. The effect of that is, that there would be a little corner at the top given to Mr. Turner, and a little corner at the bottom which would be cut off and given to the plaintiff. Probably if the parties fight, they had better draw a straight line down; but if they are wise, they will follow the fence and leave a few yards, on either side, as a set-off. If the parties cannot agree but will fight, then I think the sheriff must determine the position, and put a line on the eastern side to a line drawn to the nearest point of the railway company’s works to the nearest point of the land used by the railway for the purposes of the act, which will be very nearly the same as the fence, not quite.

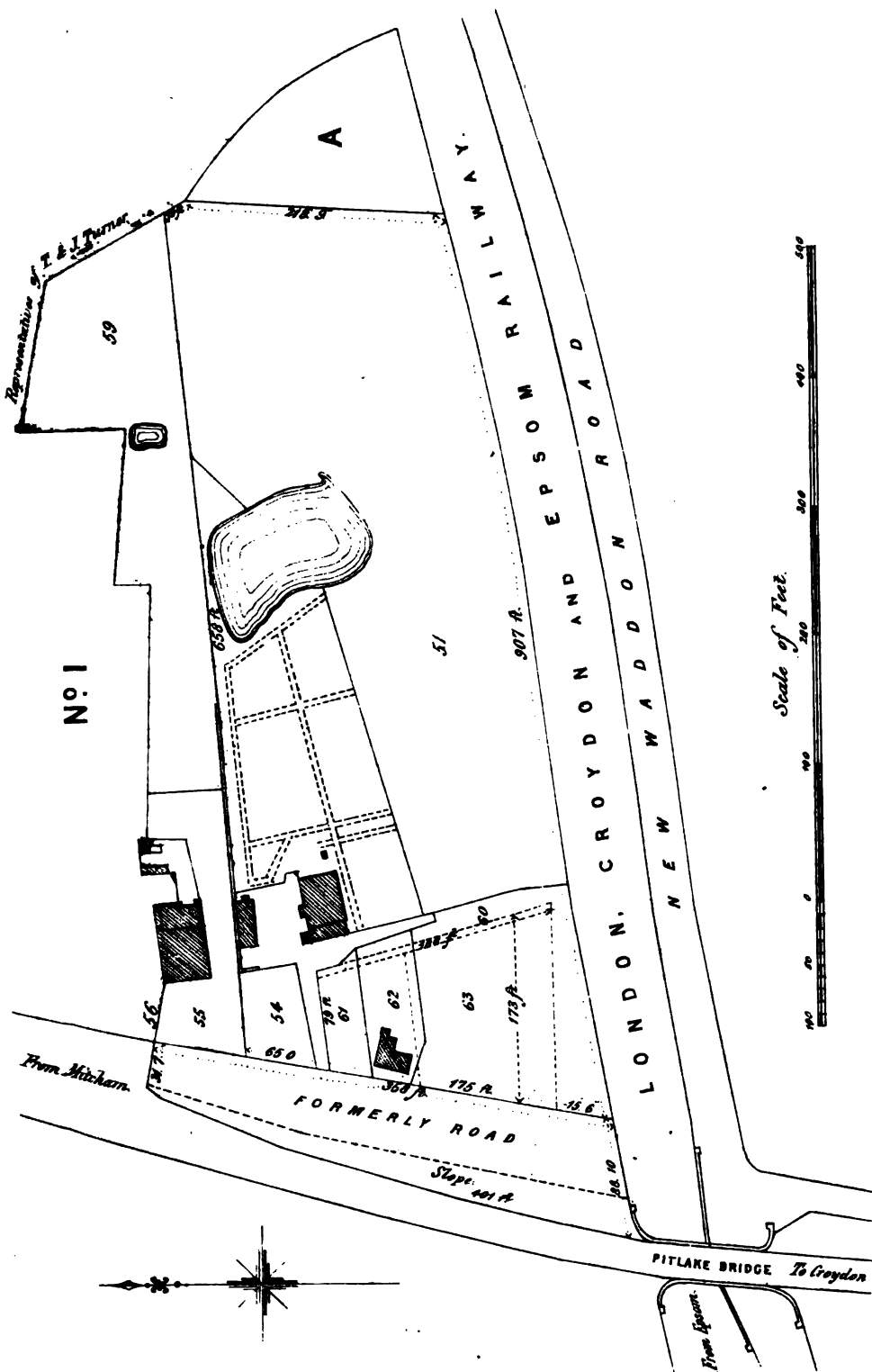
There is one thing, further, on the western boundary, which we have still to continue. There there was, at first, no doubt, an extremely puzzling question, arising from the term “adjoining,” which we had to determine, whether the high road there was “adjoining land” within the meaning of the act, so as to give it to the proprietor of the soil of the road. No

doubt it is the property of some one in fee, though of very little use unless there happen to be minerals there. But when we come to look at it, it does appear that the adjoining part is marked “formerly road,” that portion of the land being occupied, as appears by the case, by the tenants of the pink, and that has, in fact, become part of what was the land which the company was enjoying; probably it would not become theirs by prescription, as the twenty years has not expired, but whilst it remained in their possession, they, as tenants, had encroached upon it for the benefit of the landlord, that is, the railway, it being really part of what the railway had acquired with the rest, according to the same principle, I suppose, although we give no opinion upon that. Supposing the road to be considered as being actually adjoining, the owner’s land, drawing down the line from the corner of it to the nearest point of the railway, no doubt would include part of that which was formerly road, but it also includes the whole of the pink, and the plaintiff not having claimed more than the whole of the pink by his writ of ejectment, it is not necessary now for us to decide how much of the yellow he might claim.

Consequently, for these reasons, we think the plaintiff is entitled to our judgment in this case; and the ground upon which the sheriff will have to give possession will be this: he will have to give the plaintiff possession of the whole of the pink on the west side, and on the east side down to a straight line drawn from the corner where Mr. Turner’s land and the plaintiff’s intersect, and to the corner — the nearest point of the land acquired by the company and used by them for the purposes of their act. That is not very far from where the letter “I” appears on the railway. As to that matter, of course a surveyor had better apply it on the spot.

SHEE, J.—I am of the same opinion (2).
Judgment for the plaintiff.

(2) Mellor, J. left the court in the course of the argument.



1865. }
May 11, } **FISHER v. MARSH.**

Use and Occupation—Parties—Occupation under Contract with Agent—Principal and Agent—Auctioneer.

The corporation of Oxford, to whom certain open land belonged, were in the habit of allowing annual races to be held upon part of it, under the management of a committee. Before the races, the plaintiff, an auctioneer, issued an advertisement—"Oxford Races. The ground for booths, &c. will be let by auction by Mr. J. F. (the plaintiff), on Monday next. Conditions for letting standings for booths, &c. The highest bidder to be the taker, and he shall, immediately the lot is knocked down, give the number of feet required, and pay for the same immediately after the letting." The defendant was the highest bidder for a lot of the land, and took possession of and occupied it during the races, without having previously paid for it. The plaintiff having brought an action in his own name for the hire of the land,—Held, (Shee, J. dubitante) that there was evidence on which the jury might find that the contract was with the plaintiff himself.

Declaration for money payable by the defendant to the plaintiff for the hire of land let by him to the defendant.

Plea, never indebted.

At the trial, before Shee, J., at the Sitings in London after Michaelmas Term, 1864, it appeared that the action was brought to recover 27l. as the price at which a plot of ground on Port Meadow, at Oxford, was taken by the defendant, on a letting by auction by the plaintiff as auctioneer.

Port Meadow is a large open common, the property of the corporation of the city of Oxford; and for some years a race committee, formed partly of members of the corporation, have been permitted the use of part of the land for the annual races. No formal proof whatever of title in the corporation, or of any binding legal permission to the race committee, was given in evidence; but the plaintiff proved that he acted in the matter, as in former years, by direction of the race committee.

Handbills were circulated as follows;—

"Oxford Races. Thursday and Friday, August 18 and 19, 1864. The ground for booths, stalls, &c. will be let by auction, by Mr. J. Fisher (the plaintiff), on Monday next, August 15th, on Port Meadow, at eleven o'clock."

The auction accordingly took place on the Monday, and before the sale the following conditions, among others, were read;—

"Conditions for letting standings for booths, &c. on Port Meadow during the races, 1864. By Mr. John Fisher, August 15th, 1864.

"1. The highest bidder to be the taker.

"5. The ground will be let at per foot frontage, commencing near the grand stand, and the taker shall, immediately the lot is knocked down, give the number of feet required, and pay for the same immediately after the letting.

"6. The takers of the respective lots to fill in all the holes and make good any damage done to the ground, and to get cleared away by Saturday next."

The defendant was the highest bidder for lot 4, which was knocked down to him at 30s. per foot, and he took eighteen feet, making 27l. The defendant, who was a freeman of the city, was well known to the plaintiff, and had taken and paid for land in the same way on former occasions; and the plaintiff did not insist on immediate payment. The defendant occupied part of the land himself, and sublet the rest, during the whole of the races, and on being applied to by the plaintiff, on more than one occasion during the races, promised to pay him the 27l.

On this evidence, the learned Judge directed a nonsuit, on the ground that the plaintiff had shewn no title to the land, and could not maintain an action for use and occupation.

A rule having been afterwards obtained for a new trial, on the ground that there was evidence to support the plaintiff's right to sue,—

*The defendant shewed cause in person.—*The only point he urged was that as a freeman he had a right to occupy the ground without paying for it.

H. James, in support of the rule.—The defence now set up is of course untenable. The action is for the hire of land let by the

plaintiff to the defendant; possibly what the defendant had was a mere licence, and ought to have been by deed; but after enjoyment that objection cannot be set up—*The King v. All Saints, Derby* (1). The point, however, on which the learned Judge was understood to proceed at the trial was, that use and occupation would not lie at the suit of the plaintiff, who let as auctioneer; and from what passed on moving the rule, *Evans v. Evans* (2) seems to have been the authority on which he acted. But *Evans v. Evans* (2) is no authority that an auctioneer or other agent cannot maintain an action for use and occupation if the contract were with him. Gurney, B., who tried the cause, held that he could, as there was an express contract between him and the defendant; and it was only on the latter point that the Court held the direction wrong, as the real principal's name appeared on the conditions of sale.

[The Court intimated that the case was no authority against the plaintiff.]

In some cases the auctioneer's right to sue has been put upon his possession and lien for the price—*Robinson v. Rutter* (3) and *Holmes v. Tutton* (4). But the rights and liabilities arise from the contract. An auctioneer is personally liable on the contract like any other agent, if he do not disclose his principal at the time of the contract—*Franklyn v. Lamond* (5).

[BLACKBURN, J. — That case certainly seems to be an authority that the auctioneer is personally liable on the contract, and therefore, *e converso*, has a right to sue.]

It may be said, that a contract for letting land is not like a mere sale of a chattel; but the case of *Churchward v. Ford* (6) shews that the action for use and occupation depends on the contract between the parties and not on the title; *Sloper v. Saunders* (7) is to the same effect. In *Sykes v. Giles* (8),

Lord Abinger, C.B., speaking of an auctioneer, says, "The rule of law is, that the agent who makes the contract may bring an action on the contract in respect of his privity, and the principal in respect of his interest." In the present case, no doubt the plaintiff was known, like any other auctioneer, to be acting for some one else, but it would be difficult to say who his principals were; the contract, as evidenced by the conditions, was to take the land of him and pay him for it.

BLACKBURN, J.—I am of opinion that the rule must be absolute for a new trial, on the ground that there was evidence on which the jury might have found for the plaintiff. The defence the defendant now sets up is, that, although he agreed to pay for the permission to occupy the land, he had title superior to those who let him the land. But it is not open to the defendant, after having entered on the land under an agreement, to dispute the title of those with whom he agreed, until he has restored possession. At the trial, however, the nonsuit proceeded on the ground that the plaintiff was not the proper person to sue; and that was a good ground, for though the defendant had made himself liable to the plaintiff's employers, the plaintiff could not sue the defendant unless he has made himself liable to the plaintiff personally. It may be said that the fact of the plaintiff appearing as auctioneer was evidence that he was only an agent; and, no doubt, where an agent makes a contract, stating who his principal is, the principal and not the agent is the person generally the party to the contract, if the agent have the authority he alleges; but, on the other hand, an agent may, and often does, make himself personally a party to the contract, if the form of the contract be such as to amount to saying, "Although I am agent only, nevertheless I contract for myself." And although the principal may in some cases take advantage of such a contract, the agent, being the contracting party, is clearly liable, and can therefore sue upon it—*Higgins v. Senior* (9). Now, here, the plaintiff says, "I, as auctioneer, that is, as agent, let land, and I contract that, on the

(1) 5 M. & S. 90.

(2) 3 A. & E. 132.

(3) 4 El. & B. 954; s. c. 24 Law J. Rep. (N.S.) Q. B. 250.

(4) 5 El. & B. 65; s. c. 24 Law J. Rep. (N.S.) Q. B. 346.

(5) 4 Com. B. Rep. 637; s. c. 16 Law J. Rep. (N.S.) C. P. 221.

(6) 2 Hurl. & N. 446; s. c. 26 Law J. Rep. (N.S.) Exch. 354.

(7) 29 Law J. Rep. (N.S.) Exch. 275.

(8) 5 Mee. & W. at p. 650; s. c. 9 Law J. Rep. (N.S.) Exch. at p. 103.

(9) 8 Mee. & W. 834; s. c. 11 Law J. Rep. (N.S.) Exch. 199.

price agreed being paid to me, the person paying the price shall have the enjoyment of the land." The agreement was not reduced to writing; but that is the effect of the conditions of the auction and what took place at the auction. It may be that it was known that the plaintiff was not acting for himself, but under the directions of the race, or some other, committee; but that is immaterial for the present purpose, if a contract may be made with an agent notwithstanding he is known to be an agent. There were numerous reasons why the contract should be made by and with the plaintiff himself; and at all events there was evidence for the jury that the contract was with him.

In *Franklyn v. Lamond* (5) the Court of Common Pleas held, that auctioneers selling railway shares as auctioneers, but without naming the owners of them, and making the money payable at their office, made themselves personally liable for the fulfilment of the contract; and that case is therefore an authority that a contract made by a bidding at a sale, when the principal is undisclosed, is evidence of a contract between the highest bidder and the auctioneer personally; and we have, therefore, authority for saying that in the present case there was evidence for the jury that the contract was with the plaintiff, the auctioneer, personally. Then the contract being with the plaintiff personally, may that be answered in an action for use and occupation by shewing that the plaintiff had no title? In general a defendant would be estopped from denying the title of the person from whom he took the land.

In *Evans v. Evans* (2) it was not held that the auctioneer could not maintain an action for use and occupation, but it appeared on the face of the conditions that the auctioneer was letting for David Jones, whose name appeared on the conditions of sale as approving them; the auctioneer therefore was no more than an agent or servant, and *prima facie* when the name of the principal is disclosed, the principal and not the agent makes the contract. It was objected at the trial that there must be a nonsuit, as the plaintiffs, who let as auctioneers, could not maintain an action for use and occupation; but the Judge overruled this objection, on the ground that there was an express contract between the plaintiffs and the defendant, and he told the

jury that *prima facie* the contract was with the auctioneers; but that was held wrong by the Court, but only under the particular form of the conditions of sale and the other facts of the case. Patteson, J. says, "The question here does not turn upon the objection raised as ground of nonsuit. The question is, by whose permission did the occupation take place, and by whom was the contract made? That is in general a matter to go to the jury; but if the question depends upon the construction to be put upon a document which is in evidence, then it rests with the Court. Here the conditions of sale constitute the only document, and upon that I can see no doubt. If the plaintiffs let for themselves, why is David Jones's name added? The plaintiffs would in that case have been the persons to sign. The document does not say by whom the premises are let. It is true that the rent is to be paid into the hands of 'Messrs. Evans & Thomas (the plaintiffs), auctioneers;' but this amounts only to an authority given by Jones to pay into their hands; indeed it is more than authority, it is an express direction. This was not put to the jury by the learned Judge. He has therefore not explained to them the proper construction of the document." And Coleridge, J. says, "At first I thought that the fact was properly left to the jury. But as it was to be determined by the construction of a document, the effect of that document should have been properly explained to them by the Judge. Here the letting was professedly by the plaintiffs as auctioneers, and Jones signed the conditions. As to the contract by the defendant, there was clearly a misdirection."

In the present case there is no named principal; but the question is, whether the defendant had occupied by permission of the plaintiff by reason of the contract by which the defendant agreed to pay the plaintiff, and the plaintiff agreed that the defendant should have the enjoyment of the land. That question ought to have been left to the jury, and there must therefore be a new trial.

MELLOB, J.—I am of the same opinion. There was evidence on which the jury might have found that the plaintiff was entitled to recover. In fact the land belonged to the corporation, and the race committee were permitted to use it for the purposes of the

racea. But the plaintiff advertised the letting by him as auctioneer; and by the conditions the highest bidder was to pay at once on the hammer falling, and there was no statement in the handbill or conditions of sale, nor was there any evidence that the plaintiff was acting for any particular persons; and there were abundant reasons, from the nature of the land and the peculiar title, that the contract should be with the auctioneer, and that he should be made the person to whom the money should be paid on the letting. The defendant clearly had no merits; he had had what he contracted for. The defendant's own case now is, that he had himself an interest in the land; that defence was clearly not open to him. I think there was evidence that the defendant did hold by permission of the plaintiff although he was only auctioneer. The permission was enjoyed by the defendant under the express contract made by his bidding at the auction, and the question for the jury was, whether the contract was between him and the plaintiff.

SHEE, J.—The declaration is in terms for the hire of land; but I cannot distinguish this case from the ordinary case of use and occupation, and I do not understand that either of my learned Brothers thinks there is any distinction. The question is, whether the plaintiff let as agent or as landlord. The plaintiff himself said, "I have been employed on former occasions as well as on this by the race committee"; and it is perfectly clear that he was not letting the land on his own account, but as agent of others. Though I perfectly agree with the rest of the Court that a contract may be made with an agent personally though he be known to be acting as agent, I doubt whether that principle applies here. In *Evans v. Evans* (2), it was perfectly clear that the finding of the jury under the direction given by the Judge was not supported by the facts. In that case the plaintiffs, as auctioneers, had let the land to the defendant under conditions in which the rent was to be paid into the hands of the auctioneers; but these conditions were signed at the foot as affirmed by David Jones, who was the tenant of the land at the time of the auction. Jones was at the time indebted to the plaintiffs, and the Judge having ruled that there was an express contract

between the plaintiffs and the defendant, the jury found on the facts that the plaintiffs let on their own account as creditors under an arrangement with Jones, and not as agents; but the Court were of opinion that the Judge was wrong, as the conditions themselves shewed the contract of letting to be made by the plaintiffs as agents only of Jones. Patteson, J. says, "The question of fact is, by whose permission did the occupation take place, and by whom was the contract made?" That is, was the letting on behalf of Jones or on the plaintiffs' own account? It is true that in the present case it did not appear for whom the plaintiff was acting; but it was only as auctioneer that he let. My learned Brothers think that the omission of all mention of the principal's name in the conditions may make this a contract of letting by the plaintiff himself. I confess I do not see this so clearly.

Rule absolute.

1865. } THE QUEEN v. RICHMOND AND
May 8. } ANOTHER.

Parochial Assessments—Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), ss. 14, 16, 17, 26, 37, and 39.—New Valuation—Costs.

An assessment committee, under 25 & 26 Vict. c. 103. having given notice to the overseers of a parish to return a valuation list (under s. 14.) of their parish in ten days, proceeded before the lapse of three months from their appointment to appoint a valuer, to make a valuation of the parish. Afterwards, and after the three months, the overseers returned a valuation list, which was deemed unsatisfactory by the committee and guardians, and the valuer was directed to complete his valuation, which exceeded by more than one-sixth the amount of the valuation returned by the parish:—Held, that the expense of this valuation by the person appointed by the committee could not be charged against the parish under section 39, nor as compensation under section 37.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 186.]

[IN THE HOUSE OF LORDS.]

1861. }
 June 28. * } BACKHOUSE v. BONOMI AND
 } WIFE.

*Limitations, Statute of—Mines—Damage
 by Working.*

If by the act of A. an injury is occasioned to the foundations of the house of B, of which B. has not at the time any knowledge, but which afterwards exhibits itself by creating actual mischief to B.'s house, B. is not prevented by the Statute of Limitations from maintaining an action for damages, though more than six years have elapsed since the doing of the act which was in reality (though unknown at the time) the origin of the mischief, for the cause of action really accrued when the actual damage first exhibited itself.

Declaration, by Bonomi and his wife, that certain messuages and buildings situate in the parish of West Auckland, in the county of Durham, were in the occupation of William Parkin as tenant thereof, the reversion of and in the said premises then and still being in and belonging to the plaintiff, Bonomi, in right of his wife; that the plaintiffs, in right of the said Caroline, were entitled to have the said messuages and buildings supported by the mines, earth and soil underground, contiguous and near to and under the said messuages and buildings; that the defendant, well knowing the premises, wrongfully, carelessly, negligently and improperly, and without leaving any proper or sufficient support in that behalf, worked certain coal-mines underground, contiguous and near to and under the said messuages and buildings, and dug for and got and took away coals, earth and soil out of the said mines, and wrongfully and unjustly kept and continued the said messuages and buildings, and caused them to be and remain without any proper or reasonable or sufficient support, for a long space of time, whereby and by reason of the premises the foundations of the said messuages and buildings became and were greatly weakened and injured, and the walls of the said messuages and buildings

became and were cracked and injured, and the ground on which the said messuages and buildings stood subsided and cracked, swagged and gave way; and by means of the premises the plaintiffs were injured in their reversionary estate and interest in the said message, &c.

Pleas—first, not guilty; secondly, that the messuages and buildings were not in the occupation of Parkin as tenant; thirdly, that the reversion was not in the plaintiffs as alleged; fourthly, that the plaintiffs were not entitled to have the messuages and buildings supported by the mines, earth and soil underground, contiguous, near to and under them; fifthly, that the alleged causes of action did not accrue within six years before action; sixthly, that the defendant did what was complained of by the plaintiffs' leave. Issues thereon.

At the trial of the cause, at the Summer Assizes for Durham, in 1856, a verdict was taken for the plaintiffs in this and four other actions between other plaintiffs and the same defendant, subject to a reference to Mr. Hindmarch; the referee to state a case for the opinion of the Court. Mr. Hindmarch, having heard counsel and witnesses, subsequently stated the following

CASE.

The messuages and buildings in the declaration mentioned are situated on the north side of the village of West Auckland, in the county of Durham, and they consist of a dwelling-house and outbuilding contiguous to each other, which are now and have for some time past been used as an inn called the Crown Inn, and a yard immediately behind the dwelling-house and buildings. The dwelling-house and other buildings are all ancient, and they had been in existence for more than forty years before they sustained the injuries complained of in the declaration, and immediately before sustaining these injuries they were in good repair. The said messuages and buildings, the land on which they stand and the yard behind them, were, on the 23rd of September 1835, conveyed to the female plaintiff, then unmarried, in fee simple; and on her marriage with the other plaintiff, which took place on the 27th of December 1837, the plaintiffs became and have ever since continued to be

* Decided in the Sittings after Trinity Term, 1861, and inadvertently omitted,

seised of the said messuages, buildings, yard and land, as of fee, in right of the female plaintiff. In the year 1848 the said messuages and buildings and yard were let by the plaintiffs to W. Parkin, who has continued ever since that time to occupy the same as tenant thereof to the plaintiffs, the reversion in fee being in them. The messuages and buildings and the land upon which they stand were, at all times before those messuages and buildings sustained the injuries complained of in the declaration, firmly supported by the mines, earth and soil underground, and as well by those under the lands contiguous and near to, as by those under the said messuages, buildings and land of the plaintiffs. The defendant and some other persons, for several years before and until the month of June 1853, were lessees of West Auckland Colliery, consisting, amongst others, of the colliery lying under all the lands surrounding and immediately adjoining the plaintiffs' said dwelling-house, buildings and land. The defendant and his co-lessees held a large part of these mines under a lease for years granted by the late Bishop of Durham, to whom that part of the mines belonged in right of his see; another part of the mines under a lease for years granted by Sir W. Eden, to whom that part of the mines belonged; the residue of the mines worked by the defendant and his co-lessees were chiefly under small parcels of land, and they worked those parts of the mines generally by special agreements made with the owners of the coal from time to time, but, in at least one case, they worked the coal without consent of the owner of it. The defendant and his co-lessees worked the coal-mines under the plaintiffs' said dwelling-house and buildings and land, and also under all the lands surrounding and adjoining to the plaintiffs' dwelling-house, buildings and land, and had nearly finished their workings under all those lands on the 20th of May 1850; but the residue, being only a small portion of the workings of the mines in that district, and near to the said village of West Auckland, was executed and completed after that time, and within the term of six years next before the commencement of this action. There was not any evidence given before the arbitrator that the plaintiffs in any way assented to

the coal under their said dwelling-house, buildings and land being worked by the defendant and his co-lessees. The coal under the plaintiffs' said house, buildings and land, and under the land surrounding and adjoining the house, buildings and land of the plaintiffs, was of a quality called "cleety," being liable, upon exposure to the air, gradually to become disintegrated and fall to pieces.

The defendant and his co-lessees worked the coal-mines under, contiguous and near to the plaintiffs' house, buildings and land in the usual manner, taking away a portion of the coal, and leaving the residue standing as pillars to support the roof of the mines. The pillars of coal thus left standing unworked by the defendant and his co-lessees in many places would have been amply sufficient to support the roof, and bear the ordinary superincumbent weight and pressure upon them, if all the other parts of the defendant's mines had been worked in the same manner. In several other places the pillars of coal which the defendant and his co-lessees had left standing and unworked were of smaller dimensions than those above mentioned. Those smaller pillars would have been sufficient to support the roof and sustain all the superincumbent weight for many years to come, if the roof of the defendant's mine in all other parts had been properly supported; but owing to the peculiar properties of the coal already mentioned, these last-mentioned pillars would not have permanently supported the parts of the roof which were above them, and they would ultimately have given way, and let down those parts of the roof which were supported by the weak pillars; but it is impossible to determine whether such partial falls in the roof would or would not have caused any injury to the plaintiffs' house and buildings. In working those parts of the mines, where pillars of coal were left standing unworked for the purpose of supporting the roof as above mentioned, the defendant and his co-lessees were not guilty of any negligence or improper working, except in leaving a portion of the pillars too small, having regard to the nature of the coal as above mentioned.

Before the year 1842 the then lessees of the colliery had, in working the mines

under lands to the northward of the plaintiffs' house and buildings, commencing at a point at about 165 yards from that house and buildings, first worked a portion of the coal, leaving pillars in the usual manner, and afterwards, and before the year just mentioned, worked away the whole of the pillars, which is a mode of working amongst miners called "working the broken." The effect of the removal of those pillars was to let down the whole of the roof of that district of the mine, and produce what is called a "goaf." The place in which the mines were thus worked is called the "North Goaf." The defendant and his co-lessees, in the year 1846 and 1847, worked a part of their mines under lands called "The Batts," to the north-east of the plaintiffs' house and buildings, and after working the coal in the usual manner they, during those two years, worked and removed the pillars of coal which had been previously left unworked, and in consequence the roof of that part of the mine fell down. Those parts of the workings in which the pillars were so worked away by the defendant and his co-lessees are called respectively "Batts Goaf" and "South Batts Goaf." Batts Goaf is about 254 yards, and South Batts Goaf about 386 yards from the plaintiffs' property. None of the workings which have already been mentioned could alone have caused, or did in fact cause, any part of the damage complained of by the plaintiffs in this action; but the working of those three goaves did nevertheless render the plaintiffs' house, buildings and land more liable to be injured by the thrust which was produced by the defendant and his co-lessees working "Simpson's Goaf," as hereinafter mentioned; but neither of the three goaves firstly above mentioned produced any thrust such as is hereinafter mentioned. In the year 1848 the defendant and his co-lessees purchased the coal under about four and a half acres of land belonging to Daniel Simpson, and they worked the coal during that and the following year. After working this coal in the usual manner, the defendant and his co-lessees, in the year 1849, worked and removed the pillars of coal which they had previously left unworked, under about two acres of Daniel Simpson's land, and thus formed what is called "Simpson's Goaf," which is about 280

yards from the plaintiffs' property. The removal of pillars of coal in Simpson's Goaf was completed before the latter end of the year 1849, since which time there has not been any working in Simpson's Goaf.

After the year 1849 the roof of that part of the mine commenced to fall, and during the year 1850 the roof and the strata of stone, earth, and other material above that part of the mine fell down, and subsided to such an extent and in such a manner as to produce what is, amongst miners, called "a thrust," and ultimately also the injurious consequences resulting from "a thrust." The "thrust" thus produced by this working of the coal under Simpson's land, or, in other words, by the working of Simpson's Goaf, was similar to other thrusts in its effect upon surrounding lands in its vicinity, and, consequently, those effects slowly and gradually extended to the lands surrounding Simpson's Goaf, under which the coal had been worked, leaving pillars for the support of the roof of the mines under those lands. As the thrust in its progress arrived at any land under which the coal had been worked, the earth and materials above the pillars of coal were dislocated or disturbed to such an extent as to throw down or crush the pillars of coal which had been left to support the roof of the mine, and then the roof of the mine fell and the superincumbent strata, and also the soil on the surface subsided gradually, but irregularly. The houses and other buildings upon the lands which were thus disturbed and let down were extensively injured, and houses and buildings in the immediate vicinity of Simpson's Goaf were thus injured during the year 1850, and the defendant and his co-lessees repaired or paid for the repair of those houses and buildings. The plaintiffs' house and buildings were not injured before the year 1854, but during the course of that year the thrust and its injurious effects began to operate upon the plaintiffs' land and the surrounding lands, and the pillars of coal underneath all these lands were thrown down or crushed, and, consequently, the surface of the land, the foundations of the plaintiffs' house and buildings, and the various strata of stone and other materials between the surface and the coal-mine were disturbed, and sub-

sided in such a manner as, in the month of December 1854, to cause a portion of the damage to the plaintiffs' house and buildings complained of in the declaration. Since the year 1854 the plaintiffs' land had been further disturbed, and has further subsided, in consequence of the continued operation of the thrust above mentioned, and the plaintiffs' house and buildings had in consequence received further damage between that year and the commencement of this action on the 20th of May 1856.

Before the disturbance and subsidence first commenced in December 1854, the plaintiffs did not know, and had no reason to suspect, that the thrust which was the cause of such disturbance and subsidence was in operation or in existence, nor had they any knowledge of the way in which the defendant and his co-lessees had worked the mines under Simpson's land so as to create Simpson's Goaf, and to produce the thrust above mentioned. Since the commencement of the action further subsidence and disturbance of the plaintiffs' land and the foundation of their house and buildings have been occasioned by the thrust, and the house and buildings have in consequence been further injured. The injuries to the plaintiffs' house and buildings above mentioned, and as well those sustained before as since the commencement of the action, are very considerable, and they have much diminished the value of the house and buildings. The thrust produced by the working of Simpson's Goaf by the defendant and his co-lessees, as above mentioned, has been the cause, and the sole cause, of all the damage complained of in the declaration, and all the other damage above mentioned. After the commencement of the thrust the defendant and his co-lessees did not take any steps to arrest the further progress of it, or to prevent it from extending to the plaintiffs' property; and the pillars of coal under the lands surrounding the plaintiffs' land were inadequate alone to withstand the pressure thrown upon them by the thrust. If the coal-mines under the lands surrounding the plaintiffs' house and buildings had been left unworked to a sufficient distance from the house and buildings, they would not have sustained any of the damage complained of in the declaration. The defendant and his

co-lessees, after they had worked the mines under the lands surrounding the plaintiffs' house and buildings, might have supported the roof at those parts of the mines in such a manner as to have prevented the damage complained of in the declaration; but the expense of so doing would have been very great, and would in the whole have amounted to a much larger sum than the value of the property injured. The thrust produced by working Simpson's Goaf as above mentioned is still in operation, and will in all probability continue in operation for a considerable time to come, and in all probability the house and buildings of the plaintiffs will sustain further injury, and the plaintiffs will sustain further damage, by reason of the thrust and its injurious effects upon their house, buildings and land. In the month of June 1853 the defendant and his co-lessees ceased to work the mines, and transferred all their terms and interest in them to Messrs. H. W. F. Bolchow and J. Vaughan (who had agreed to be made parties to the reference), and they ever since that time have been and still are in possession of the above-mentioned mines, and they have been and now are working coals in some parts of the mines at a considerable distance from the plaintiffs' property. By the deed of assignment which transferred the colliery from the defendant and his co-lessees to Messrs. Bolchow and Vaughan those gentlemen covenanted with the defendant and his co-lessees to indemnify them against all claims for damage occasioned by the past or future working of the mines. The acts which occasioned the damage and injuries above mentioned were all of them done without the plaintiffs' leave.

The arbitrator then found that the messuages and buildings in the declaration mentioned were in the occupation of W. Parkin, as tenant thereof, as in the declaration alleged; that the reversion of and in the said messuages and buildings did belong to the plaintiffs, as in the declaration alleged. With respect to the issue upon the defendant's fourth plea, so far as that issue involves any question of fact, that the plaintiffs were entitled to have the said messuages and buildings supported by the mines underground contiguous and near to and under the said messuages and buildings, as in the declaration alleged.

The questions for the opinion of the Court were, first, whether the facts above stated entitled the plaintiffs to a verdict on the issue joined on the first plea, as to all or any and which of the causes of action mentioned in the declaration. If the plaintiffs were so entitled as to all or any of such causes of action, the verdict was to be entered for them on that issue accordingly, otherwise for the defendant.

Secondly, whether the facts above stated entitle the plaintiffs or the defendant to a verdict on the issue joined on the fourth plea, and the verdict on that issue was to be entered as the Court should direct.

Thirdly, whether the facts above stated entitled the plaintiffs to a verdict on the issue joined on the fifth plea as to all or any and which of the causes of action in the declaration mentioned. If the plaintiffs were so entitled as to all or any of such causes of action, the verdict was to be entered for them on that issue accordingly, otherwise for the defendant.

The verdict was to be entered for the plaintiffs on each of the other issues.

If the verdict was to be entered for the plaintiffs upon the issues joined on the first, fourth and fifth pleas, another question for the opinion of the Court was, fourthly, whether the defendant was responsible for all the damages which had been sustained by the plaintiffs by reason of the injuries to their said messuages and buildings above described, or for any and what part of that damage; and whether he was responsible in any and what respect for the probable future damage which might be occasioned in manner above described, or for damage occasioned by the diminution in value of the said messuages and buildings by reason of their insecure state and condition, or the injuries which would probably be hereafter occasioned by the further progress of the thrust as above mentioned.

In the Court of Queen's Bench, judgment was given for the defendant, on the ground that the cause of action had accrued more than six years before action brought (1); but this judgment was reversed in the Ex-

chequer Chamber (2), and this appeal was then brought.

The Judges were summoned, and Pollock, C.B., Wightman, J., Williams, J., Blackburn, J., Byles, J. and Wilde, B. attended.

Sir F. Kelly and *Mr. Phipson*, for the plaintiff in error, contended that the injury occurred and the right of action was complete when the supports were taken away. They cited—

Humphries v. Brogden, 12 Q.B. Rep. 739.

Nicklin v. Williams, 10 Exch. Rep. 259; s. c. 23 Law J. Rep. (N.S.) Exch. 335.

Mellor v. Spateman, 10 Exch. Rep. 267.

Ashby v. White, 2 Lord Raym. 938.

Embrey v. Owen, 6 Exch. Rep. 353; s. c. 20 Law J. Rep. (N.S.) Exch. 212.

Mr. Manisty and *Mr. J. R. Davison*, for the defendants in error, commented on these cases, and cited—

Rowbotham v. Wilson, 8 El. & B. 157 (see 8 H.L. Cas. 348).

Roberts v. Read, 16 East, 215.

Clegg v. Dearden, 12 Q.B. Rep. 576; s. c. 17 Law J. Rep. (N.S.) Q.B. 233.

Howell v. Young, 5 B. & C. 259.

Sir F. Kelly, in reply.

The LORD CHANCELLOR (LORD WESTBURY) moved that the following question be put to the Judges: "A. B. is the owner of a house, C. D. is the owner of a mine under the house and under the surrounding land; C. D. works the mine, and in so doing leaves insufficient support to the house. The house is not damaged, nor is the enjoyment of it prejudiced until some time after the workings have ceased. Can A. B. bring an action at any time within six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient?"

The LORD CHIEF BARON, in the name of the learned Judges, answered, "I am desired by my learned Brothers to deliver our unanimous opinion in answer to your Lordships' question. We are all of opinion that A. B. may bring an action at any time within six years after the mischief done, and we are of that opinion for the

(1) El. B. & El. 622; s. c. 27 Law J. Rep. (N.S.) Q.B. 378.

NEW SERIES, 34.—Q.B.

(2) El. B. & El. 646; s. c. 28 Law J. Rep. (N.S.) Q.B. 380.

reasons given in the judgment of the Court of Exchequer Chamber" (3).

The LORD CHANCELLOR expressed the thanks of their Lordships to the learned Judges, and then observed that no important doubt could be entertained upon the question. It was clear both upon principle and authority, that when the mischief actually occurred the cause of action arose, and the action might then be maintained. The decision in *Nicklin v. Williams* (4) was beyond all question. Some of the dicta there uttered might not be necessary for the decision of the case, but the case itself was a decisive authority. The judgment here ought to be affirmed.

LORD BROUGHAM concurred.

LORD CRANWORTH was of the same opinion. It had been supposed that the right of the party whose land was interfered with was a right to what was called "the pillars," or the support. His real right was to the ordinary enjoyment of his land, and till that was interfered with he had no cause of complaint. The case of slanderous words might furnish an illustration here. Suppose a slander to be uttered, not actionable in itself, but under which special damage afterwards arose to somebody; the person complaining could bring no action till he had actually suffered the damage. The words of the Statute of Limitations did not permit actions to be brought for words beyond a period of six years after the words spoken; but it was that express statutory provision which alone prevented that case from furnishing a clear analogy to the present case.

LORD WENSLEYDALE concurred. The right in this case was the right to the enjoyment of the property, and there was an obligation cast on the owner of the neighbouring property not to interrupt that enjoyment.

LORD CHELMSFORD was of the same opinion.

Judgment of the Exchequer Chamber affirmed.

(3) El. B. & El. 654; s. c. 28 Law J. Rep. (N.S.) Q.B. 880.

(4) *Supra*.

1865. }
April 27. } *In re WINDSOR.*

Habeas Corpus — Extradition — 6 & 7 Vict. c. 76. s. 1. — Forgery — America.

By section 1. of 6 & 7 Vict. c. 76, provision is made for the committal in this country, with a view to being delivered up to justice in the United States of America, of persons charged with the crime of murder, forgery, &c. By a statute of the State of New York, "Every person who, with intent to defraud, shall make any false entry . . . in any book of account kept by any monied corporation within this State . . . shall, upon conviction, be adjudged guilty of forgery in the third degree." A requisition was made by the Government of the United States for the extradition from this country of a person who was charged with committing the offence of forgery under the above statute:—Held, that inasmuch as the offence committed did not amount to forgery by the law of England and of the United States (the two contracting parties to the Treaty of Extradition referred to in the 6 & 7 Vict. c. 76. s. 1), the person charged was not liable to be given up by this country.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 163.]

1865. } THE QUEEN v. THE INHABITANTS OF EAST STOKE.
May 9. }

Indictment, Removal of by Certiorari—Costs—Recognizance—16 Vict. c. 30. ss. 5. and 6.

A prosecutor removing an indictment into the Court of Queen's Bench by certiorari is only liable to pay costs to the defendant, if acquitted, by virtue of the recognizance to pay costs in such event as required by section 5. of the 16 Vict. c. 30; and if the prosecutor has entered into a recognizance only to prosecute with effect, and to do and perform such order as the Court shall direct, he is not liable to costs, and the Court has no power, under section 6, to order costs to be taxed against the prosecutor.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 190.]

1865. }
May 12. } COWPER v. FLETCHER.

*Landlord and Tenant—Joint-Tenants—
Distress—Estoppel.*

One or two joint-tenants may demise his or their portion to another, so as to create the relationship of landlord and tenant between them, with a right to distrain in respect of rent in arrear. Thus, three co-executors may agree that one shall hold land, devised to them in trust, at a fixed rent, and if the rent falls into arrear, he may be distrained upon in respect of it.

Semble, also, that when he has taken possession and has paid rent, he would be estopped from denying their right to distrain.

Trespass for breaking and entering a timber-yard, office and stabling of the plaintiff, and taking away fixtures, goods and chattels of the plaintiff, and keeping him out of possession thereof, until he paid the defendant a sum of money in order to regain possession of them, whereby &c.

There were also counts for money had and received, and on accounts stated.

The defendant pleaded not guilty to the first count, and never indebted to the residue of the declaration.

The particulars delivered in the action shewed that it was brought in respect of a distress which had been put in by the defendant for rent alleged to be due from the plaintiff (James Cowper) to Joseph Cowper and John Scholes Hague; the plaintiff having been compelled to pay 87*l.* 7*s.* 6*d.*, the amount of rent claimed, and 4*l.* 13*s.* 6*d.*, the amount of the expenses.

At the trial, which took place before Mellor, J., at the last Spring Assizes, holden at Manchester, it appeared that, under the will of William Cowper, of Oldham, in the county of Lancaster, all his real and personal estates were devised to his brothers, Joseph and James Cowper, and John Scholes Hague, in trust to pay a legacy of 100*l.*, and, subject thereto, upon trust to pay and divide the residue unto and equally amongst the grandchildren of his late brother Thomas, and his said brothers, Joseph and James, and his sister, in equal shares and

proportions as tenants in common. He also appointed his said brothers Joseph and James and John Scholes Hague executors of his will. Among other property left by the testator, were a timber-yard and premises at Oldham. The plaintiff was entitled to one-ninth part of the property left, and he and the other two executors divided the personalty among the persons entitled to it; but with regard to the real estate, it was determined that it should be let to a tenant.

On the 18th of October 1855 the plaintiff sent the following proposal to his co-executors:

"To the Executors of the late William Cowper, deceased.

"Gentlemen,—I having entered upon the slate-trade, and having had the offer of a yard for a timber-yard, but before accepting the same, I wish to make some proposal to you. That I will take all the slate and timber belonging to you at the yard and at the stations at Oldham at a valuation, to be made by one person, if we can agree upon one, and if not, then each party to appoint one, and they to appoint an umpire before they commence; the said valuer or valuers are then empowered also to fix the annual rent I shall pay for the timber-yard, office and stabling, and for a term of years to be fixed upon between us. That I will receive the rents of the cottages and houses at Oldham, free of expense to you, and see that they are kept in repair as you request. The amount of the value to be secured to your satisfaction, or paid in a month from the delivery of the valuation. I must have an answer in a few days from this date or I shall consider this offer is rejected.

"Yours, &c.,

(Signed) "Jas. Cowper.

"Oldham, October 18th, 1855."

The following document was afterwards signed by all three executors:

"We, the undersigned, executors of the late Mr. William Cowper deceased, do hereby agree to the proposal of Mr. James Cowper, hereunto annexed, on condition that the slate *in transitu*, and also all the plant, moving stock and effects belonging to the deceased's trades (excepting the grey mare), be included therein, and taken by the said James Cowper on the terms con-

tained in his said proposal, and that he do take the timber-yard, office and stabling as a yearly tenant. And it is hereby further agreed between all parties undersigned that the valuation referred to in the said proposal shall be made by a person to be nominated by the undersigned John Scholes Hague, the decision of which person in the premises shall be final and binding upon all parties, the payment of the amount of the valuation to be made or secured as in the said proposal is mentioned.

"Dated this 1st day of November 1855.

(Signed) "Joseph Cowper,

"James Cowper,

"John Scholes Hague."

The plaintiff entered into possession, and in November 1862, 270*l.* was due from him for a year and a half's rent, whereupon a distress was put in, and the following letter was written by the plaintiff:

December 6, 1862.

"I write to you under a very painful case, but I presume you are aware of the proceedings. I only beg of you to be kind enough to accept of me 180*l.* on Tuesday, and let the other half year be paid in May, that is, 180*l.* when due. I have paid this morning 105*l.* before I was aware of these proceedings, and I really can't pay any more at present, and if you be so unkind as to sell for it, I am ruined, for there is no money to buy anything here. I really beg of you to write to Mr. Littler to be so kind as to accept the 180*l.* I have been doing all I could to get my money in for you. Mr. Littler has wrote to Mr. Robinson to-day to hear his reply to what I now have stated to you, hoping you will not see me put into distress at this time; money is very bad to get in; things is very bad here. I wish you to see Mr. Robinson before he writes to Mr. Littler; we are in great distress, and hopes you all will be satisfied with my request."

The rent was subsequently paid; but in May 1863 it became again necessary to press for payment, and the plaintiff then wrote the following letter:

Oldham, May 23, 1863.

"H. T. Robinson, Esq.—Dear Sir,—I saw Mr. J. S. Hague on Saturday night, and he advised me to write to you to see if you could not come to some

better agreement with me than selling me up for this half-year's rent, as I really can't pay it at present; if you could put it in a shape to suit both sides it perhaps would be better for both. I am in a fair way for doing something for myself, I hope. I have been sadly deceived with all I have had about me, and I now have in debts about 300*l.*, but I can't get it at present. If they will be kind enough to wait about two or three months it would suit me, but I will leave it to you to arrange. I can find a sufficient bondsman for the rent."

The plaintiff subsequently became bankrupt, and the rent was paid by his assignees; but he got into possession again, and in May 1864, another distress was put in upon his goods in order to get the rent then in arrear. The plaintiff paid the amount claimed in order to get rid of the distress, and then commenced this action against the defendant, who, as the bailiff of John Scholes Hague and Joseph Cowper, had levied the distress.

The verdict was entered for the defendant; and leave was given to the plaintiff to move to set it aside, and enter the verdict for himself instead.

Brett moved for and obtained a rule accordingly, on the ground that, although Joseph Cowper and J. S. Hague might by agreement with the plaintiff, their co-tenant, give him as against them exclusive possession of the joint property, yet that the agreement did not create such a tenancy as carried with it a right to distrain.

R. G. Williams shewed cause against the rule.—The letters which passed between the defendant and the plaintiff, and the distress which was submitted to by him, conclude the case, and shew that the plaintiff was a tenant, unless it is impossible that two of three joint-tenants should stand in the relationship of landlords to a third. If a man takes land from others, goes into possession, and pays rent for it, there is enough to shew that he is a tenant. But, further, it is laid down in 1 *Bac. Abr.* 5. that, "If one joint-tenant or tenant in common makes a lease for years of his part to his companion, this is good; for this only gives him a right of taking the whole profits, where before he had but a

right to the moiety thereof; and he may contract with his companion for that purpose, as well as he may with any stranger." And he refers, among other authorities, to *Co. Litt.* 186 a. The same passage occurs at p. 496, where a reference is given to *Pleadal's case* (1), where the case was, "That a man seised of lands in fee took a lease by indenture of the herbage and pannage of the same land. It was the opinion of the whole Court that the same was no estoppel to him to claim the soil or the freehold; and it was said by Plowden and agreed by the Court, that if the father and son be joint-tenants for a hundred years, and the son takes a lease of his father for fifteen years, to begin, &c., the same shall conclude the son to claim the whole or parcel of it by survivor."

[MELLOR, J.—The co-executors assume that they have power to demise to the plaintiff, and instead of disputing their right, he assents to it and becomes their tenant. I think that the parol agreement is stronger than the one in the correspondence. BLACKBURN, J. referred to *James v. Portman* (2), where Popham held that one joint-tenant might make a lease to the other, although he cannot infeoff, for a lease is but a contract; but Fenner doubted whether one joint-tenant could make a lease to the other, but said that "by the contract he had excluded himself from the profits," so that it seemed to be left uncertain whether there could be a lease or not.]

That view is adopted by Bacon as being correct. But, further, the plaintiff is estopped from saying that he is not tenant, that there was no demise to him, and that there is no right to distrain, inasmuch as he has assented to the demise and has paid rent.

Brett, in support of the rule.—Before the lease was granted all the executors were in possession of each and every part. There is no doubt that they intended that there should be an agreement, and it may be that two joint-tenants may make an agreement with another; but it is submitted that, under the circumstances, it could not operate so as to give a right to the defendants to

distrain. While the agreement lasted the plaintiff had the reversion.

[BLACKBURN, J.—May it not operate as a severance, and the defendants have power to distrain for the severed part?]

They retire and let the plaintiff have the sole and exclusive possession of the whole. In point of law he was in possession of the whole.

[BLACKBURN, J.—Upon referring to the *Year Book*, 11 Hen. 6. fol. 33, I find that it does not throw much light upon the matter, as the decision turns upon a pleading point; but it is quite clear what construction Lord Coke put upon it—see *Co. Litt.*, book 3, note to section 288, where he says, "And one joyntenant may let his part for yeares or at will to his companion;" and he then refers to the *Year Book*.]

Suppose a stranger was to enter upon the land, it is probable that the plaintiff might bring an action; but if the co-executors had entered, could it have been maintained that they had no right to do so? As regards the rest of the world they continued to be in possession. Again, the only persons who could authorize a distress would be the two defendants, and the plaintiff as well, so that he would be supposed to be authorizing a distress upon himself. It is submitted that the doctrine of estoppel does not apply in any way to such a case, when the law does not sanction the distress.

BLACKBURN, J.—I think that this rule must be discharged. The point which is really raised is this, that the action has been brought in respect of the distress put in by the defendants, who have justified under a plea of not guilty by statute 11 Geo. 2. c. 19. s. 21, and therefore a defence is made out if there was any rent in arrear for which a distress might be made. We have to determine whether, when the cause was tried before my Brother Mellor, there was evidence that there was some lease from the defendants and some rent in arrear. Now, the facts which were proved were a little peculiar, but there is enough to shew that a sufficient relationship of landlord and tenant existed to justify a distress. Under the will of the testator the plaintiff and the two defendants were co-executors, and were also joint-tenants of this property, and it appears by the agree-

(1) 2 Leonard, 159.

(2) Owen, 102.

ment that the plaintiff wrote to the executors, who, to speak literally, were himself and the defendants, and offered to take a lease of the timber-yard, office and stabling, and then that he joined with them in the writing upon which are the words, "We, the undersigned, executors of the late William Cowper," and underneath are the names of all three of them.—[The learned Judge read the agreement.]—This is not the actual agreement under which the distress was afterwards made; but it throws light upon what occurred afterwards when a parol agreement was entered into and the plaintiff took the property at a rent, and when he afterwards submitted to a distress, evidently supposing that he was the tenant. It is now set up that this cannot operate as a lease, and that there was no rent in arrear under such lease for which a distress might be legally made; but I think that it is clear that the parties were agreeing for a lease, and that we ought to give effect to it in this way, that the two defendants who were seised of two-thirds of the land agreed to let to the plaintiff those two-thirds, and allowed him to have the exclusive possession of the remaining third, which was in him.—Lord Coke says, see *Co. Litt.* 186, a, "And where two joyntenants be, the one of them may make the other his baylife of his moiety, and have an action of account against him. And one joyntenant may let his part for yeares or at will to his companion." I can only understand by these words that he meant an ordinary lease with the incident of distress attached to it, and it would amount to making a severance of estate, and there would be a reversion and rent in arrear, with a right of distress. If this be not so then it must come to this, that the parties have agreed together that the plaintiff should retire from the possession of his part, and that they should demise the whole to him; and I venture to think that during the continuance of such possession he would be estopped from saying that he was not tenant, and the case in *Leonard*

seems to shew that the validity of the distress might be supported on both grounds, but I would rather prefer to rest my judgment upon the first.

MELLOR, J.—I am of the same opinion. At the trial my impression was, that the transaction would operate as an estoppel; when the motion was made by Mr. Brett, we thought that we ought to look for some authority upon the subject, and the rule was granted in order that the matter might be inquired into. Although, certainly, we have not met with any great amount of authority, I do not think that any more could be found; and we have really heard the case argued upon the law as laid down in the books. I now prefer to give my judgment upon the first ground taken by my Brother Blackburn, and I think it unnecessary to decide upon the question of estoppel, in which I do not feel much confidence. I think that the rule should be discharged.

SHEE, J.—I am of the same opinion. The authority of Lord Coke is quite sufficient for us. The difficulties which have been suggested by Mr. Brett did appear to exist, but ever since the opinion was expressed by Lord Coke, it does not seem to have ever been disputed that one jointtenant could let his part to the other, and that if he did so he would be entitled to distrain.

Rule discharged.

1865. { THE QUEEN v. THE INHABITANTS
May 6. { OF THE PARISH OF BUCKLAND.

*Highway—Indictment—Costs—25 & 26
Vict. c. 61. ss. 18, 19.*

Where, on the trial of an indictment, ordered by Justices under the 25 & 26 Vict. c. 61. s. 19. for the non-repair of an alleged highway, the road is found not to be a highway, the Court has no power to order costs.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 178.]

CASES ARGUED AND DETERMINED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL FROM THE QUEEN'S BENCH.

TRINITY TERM, 28 VICTORIÆ.

1865. { THE QUEEN v. THE COMPANY
June 10. { OF PROPRIETORS OF THE
 { BRADFORD NAVIGATION AND
 { OTHERS.

Nuisance—Canal Company.

A canal company were empowered by an act of parliament to take the water of certain brooks and use it for the purposes of their canal; the water in one of the brooks at the time the act passed was pure, but it afterwards became polluted by drains, &c. before it reached the canal, and it was then penned back in the canal, and became a public nuisance:—Held, that the company were liable to be indicted for the nuisance, as there was nothing in the act compelling them to take the water, or authorizing them to use it so as to create a nuisance.

The King v. Pease (1) distinguished.

SPECIAL CASE.

1. An indictment was found on the 10th of August 1864, at the assizes held at Leeds for the West Riding of Yorkshire, against the Company of Proprietors of the Bradford Navigation and Jeremiah Crow-

(1) 4 B. & Ad. 80; s.c. 2 Law J. Rep. (N.S.) M.C. 26.

ther and Samuel Dixon, for a public nuisance, by collecting, impounding and keeping exposed on the 1st of July 1864, and thence continuously until the 10th of August 1864, in a canal, commonly called the Bradford Canal, at Bradford, large quantities of foul liquid, filth, sewage and polluted water, near dwelling-houses and public streets and common highways, whereby noisome and unwholesome smells and stench arose, and the air thereby was corrupted and infected.

2. This indictment having been removed by *certiorari* into the Court of Queen's Bench, came on for trial at the Spring Assizes, at Leeds, in March 1865, before Martin, B., when a verdict for the Crown was, by consent of the parties, returned, subject to the following CASE for the opinion of the Court of Queen's Bench.

3. The Company of Proprietors of the Bradford Navigation (hereafter called "the company") were incorporated by an act of 11 Geo. 3. passed in the year 1770 (to be found at p. 723 of the Acts for that year), intituled 'An act for making a navigable cut or canal from Bradford to join the Leeds and Liverpool canal at Windhill, in the township of Idle, in the county of York.' By this act it was recited and

enacted as follows (p. 723): "Whereas an act was made in the last session of parliament for making and maintaining a navigable cut or canal from Leeds Bridge, in the county of York, to the North Lady's Walk in Liverpool, in the county palatine of Lancaster, and from thence to the river Mersey: and whereas the making a navigable cut or canal from the town of Bradford, through the several townships, parishes or hamlets of Bradford, Bolton and Idle, to join and communicate with the said canal navigation from Leeds to Liverpool, at Windhill aforesaid, for the navigation of boats and other vessels with heavy burthens, will open a short, easy and commodious communication between the said town of Bradford and the said canal navigation, which will be of great advantage to the trade carried on there and at the places adjacent, and will also tend to the improvement of the lands near the same, the relief of the poor and preservation of the public roads, and moreover be of great public utility: and whereas the persons hereinafter mentioned are desirous, at their own proper costs and charges, to begin, carry on and complete the said proposed navigable cut or canal. Wherefore, for obtaining and perfecting the good ends and purposes aforesaid, be it enacted by, &c., that Mary Hodgson and (several other persons named in the act), together with such person or persons as they or the major part of them at any public meeting shall nominate and appoint under their hands and seals, shall be united into a company for the better carrying on, making, completing and maintaining the said navigable cut or canal according to the rules, orders and directions hereinafter expressed and laid down, and shall for that purpose be one body politic and corporate by the name of the Company of Proprietors of the Bradford Navigation, and by that name shall have perpetual succession and a common seal, and by that name shall sue and be sued, and also shall and may have power and authority to purchase lands for the use of the said navigation without incurring any of the penalties or forfeitures of the Statute of Mortmain; and the said company of proprietors shall be and are hereby empowered, as soon as 6,000*l.* shall have been subscribed by themselves, their deputies,

agents, officers, workmen, servants and assigns, to make and complete a cut or canal navigable and passable for boats, barges and other vessels, from or near a certain bridge in Bradford aforesaid, called Hoppy Bridge, through the said township of Bradford, and through the said townships of Bolton and Idle, to join to and communicate with the said canal navigation from Leeds to Liverpool, at Windhill aforesaid, in such course and direction as is delineated in the map or plan hereafter mentioned, or within the space of twenty-four yards from the same, *and to supply the said cut or canal, while the same shall be making and when made, with water from such springs, soughs, brooks, drains, streams, and watercourses as shall be found in making the said cut or canal, and from such springs, brooks, soughs, streams, drains, and watercourses running into a brook, called Bowling Mill Beck, as shall be found within the distance of 2,000 yards of Hoppy Bridge aforesaid, except such water as may supply any house or houses by pipes, and also to make such reservoirs as shall be found necessary for the purposes of the said cut or canal within the said distance, for the more convenient supplying the said canal with water and for the purposes aforesaid, as also for the making, using, completing, extending and maintaining of such trenches, passages, gutters and watercourses, soughs and drains as shall be proper and necessary to convey water into, out of or under the said cut or canal, according to the tenor or purport of this act, and the said company of proprietors and their agents, servants and workmen are hereby authorized and empowered in, upon and through the lands and grounds of or belonging to all bodies politic, corporate or collegiate whatsoever, to enter, and to bore, dig, cut, trench, &c., and to alter, divert and change the courses of any brooks or watercourses lying within 300 yards of Hoppy Bridge aforesaid, that may in any manner hinder, damage or obstruct the said cut or canal, and to carry, divert and convey such brooks or watercourses through and over the grounds adjoining to or near the course of the said cut or canal, and to make such banks between the same, where necessary, as will be sufficient for a road and towing-path, and to separate such brooks or watercourses from the said cut or canal, and also*

to make, build, erect and set up in or upon the said intended cut or canal, or upon the lands adjoining or near the same, such and so many bridges, tunnels, aqueducts, sluices, locks, weirs, pens, water-tanks, reservoirs, drains, wharfs, quays, landing-places, loading-places, weigh-beams, cranes and other works and conveniences as and when they the said proprietors shall think requisite and convenient for the purposes of the said navigation, and also to alter, repair, amend, widen or enlarge the said works of or belonging thereto, and also to place, lay, work and manufacture the said materials on the grounds near to the place or places where the said works, or any of them, shall be or are intended to be made, erected, repaired or done, and also to make, maintain, repair and alter any fences or passages over, under or through the said cut or canal, or the tunnels, aqueducts, soughs, trenches, passages, gutters, watercourses and sluices respectively which shall communicate therewith, and also to make, set up and appoint such roads, towing-paths, banks and ways convenient for towing, hauling or drawing of boats, barges or other vessels passing in, through or upon the said cut or canal as they the said proprietors shall think convenient, and to construct, erect and keep in repair any piers, arches and other works in, upon and across any rivers or brooks for the making, using, maintaining and repairing the said cut or canal and towing-paths on the sides thereof, and also to construct, erect, make and do all matters and things which they shall think it convenient and necessary for the making, effecting, preserving, improving, completing and using the said navigation, in pursuance and within the true intent and meaning of this act, they the said proprietors doing as little damage as may be in the execution of the several powers to them hereby granted, and making satisfaction in manner hereinafter mentioned to the owners and proprietors of such lands, tenements or hereditaments, waters, watercourses, brooks or rivers respectively as shall be changed, altered, taken, used, diverted or prejudiced for all damages to be by them sustained in or by the execution of all or any of the powers of this act, and this act shall be sufficient to indemnify the said company of proprietors, and their servants, agents and

workmen and all other persons whatsoever, for what they, or any of them, shall do by virtue of the powers hereby granted, subject to such provisions and restrictions as are hereinafter mentioned."

4. Power is then given (p. 742) to the company to make and alter from time to time their by-laws, and impose fines for non-compliance with them. "And be it further enacted (p. 745), that in consideration of the great charges and expenses the said company of proprietors will be at in making, maintaining and supplying with water the said cut or canal, and in making and maintaining all the other works hereby authorized to be made and erected, it shall and may be lawful to and for the said company of proprietors from time to time, and at all times hereafter, to ask, demand, take and recover, to and for their own proper use and behoof, for tonnage and wharfage for all clay, brick, stones, coal, manure, dung, compost, ashes, timber, goods, wares, merchandise and commodities whatsoever which shall be navigated, carried or conveyed upon or through the said cut or canal, such rates and duties as the said company of proprietors shall think fit, not exceeding the sum of 6*d.* for every ton of any kind of clay, brick, stone, coal, lime, dung and manure, and not exceeding 9*d.* for every ton of timber, goods, wares, merchandise or other commodities which shall be navigated, carried or conveyed upon or through the said cut or canal, and so in proportion for a greater or lesser quantity than a ton, which said rates and duties shall be paid to such person or persons, at such place or places near to the said cut or canal, in such manner and under such regulations as the said company of proprietors shall direct or appoint; and in case of denial or neglect of payment of any such rate or duty, or any part thereof, on demand to such person or persons as aforesaid, the said company of proprietors may sue for the same by action of debt or upon the case in any Court of Record, or the person or persons to whom the said tolls ought to have been paid may and he and they is and are hereby empowered to seize and detain any such boat or vessel or goods for or in respect whereof any rates or duties ought to be paid, or any part of such goods, and detain the same until payment thereof,

together with the reasonable charges for such seizure and detainer ; and if the same shall not be redeemed in five days after the taking thereof, the same may be appraised and sold, as the law directs, in case of a distress for rent. And be it also further enacted and declared, that the said rates, tolls and duties shall at all times hereafter be exempt from the payment of any taxes, rates, assessments or impositions whatsoever, any law or statute to the contrary notwithstanding, other than such taxes, rates and assessments as the said land shall be used for the purpose of the said navigation would have been subject to if this act had not been made. Provided also, and be it further enacted, that if any goods whatsoever which shall be so navigated, carried or conveyed shall remain upon any wharf or wharfs belonging to the said company of proprietors for above the space of twenty-four hours, then and in such case the company of proprietors shall be entitled to and receive such allowance over and above the tonnage rates hereinbefore limited as shall be agreed upon between the said company of proprietors, or their agent or agents, and the owner or owners of such goods : Provided always, and be it further enacted, that all persons whatsoever shall have free liberty, with boats and other vessels, to use the navigable cut, canal and sluices, to be made by virtue of this act, for the purpose of conveying coal, stone, timber, and other goods, wares, merchandises and commodities whatsoever to or from the said cut or canal, trenches or passages, and also to navigate upon the same respectively with any boats or vessels not exceeding fourteen feet in breadth, and to use the said wharfs or quays for loading and unloading coals and other goods, and the said towing-paths for hauling and drawing such boats or vessels, upon payment of such rates and duties as shall be demanded by the said company of proprietors, not exceeding the rates herein mentioned."

5. After the passing of this act, a canal (hereafter called "the canal") was constructed by the company, which was opened for traffic in the year 1774, and has to the present time been used by the public for navigation. It extends from the place called Hoppy Bridge, in the town of Brad-

ford, to Windhill, in the township of Calverly, about three miles, where it joins the Leeds and Liverpool Canal.

6. The head of the canal at Hoppy Bridge forms a basin, into which the supplies of water in the manner hereafter described were brought for the purpose of the navigation. The length of the canal from this basin to the first lock, called Spinkwell Lock, is about three-fourths of a mile, passing through the townships of Bradford and Bolton, down a valley near the course of the Bradford Beck, between Manningham Lane, which runs at a distance of about 600 yards from the canal on the left, and the Eccleshill and Bradford turnpike-road, which runs at a distance of about 500 yards from the canal on the right.

7. At the time when the canal was first constructed, buildings and public streets, forming part of the town of Bradford as it then existed, lay near the basin and head of the canal. The lands and districts along the course of the canal from the basin to Spinkwell Lock, before and at the time mentioned in the indictment, were occupied by a number of suburban residences of families who dwell in and around Manningham Lane aforesaid and the said Eccleshill and Bradford turnpike-road and Otley and Dudley Hill high road ; but when the canal was first constructed, and from that time till about thirty years next before the time mentioned in the indictment, the lands and neighbouring districts so occupied in and near Manningham Lane and the Eccleshill and Bradford turnpike-road and the Otley Hill and Dudley Hill high road, were almost entirely open fields, with very few houses or buildings thereon.

8. During the summer of 1864, and at the time to which the indictment refers, the part of the canal from Hoppy Bridge to Spinkwell Lock aforesaid, was in so foul and polluted a state (caused as hereafter described) that the smell and stench arising from the liquid sewage and polluted water in the canal became a public nuisance to the inhabitants of the above-mentioned streets of the town of Bradford, and of the said districts, buildings and suburban residences, and to the persons passing along the streets and highways aforesaid.

9. The principal and largest stream of

water flowing through Bradford, and in the neighbourhood of the course of the canal, is called the Bradford Beck, which at the time of and since the passing of the said act passed away from Thornton Manor on the west of and above the town of Bradford, and ran down through the town, turning to the north at the town of Bradford towards Windhill and Shipley, and entering the River Aire about four miles below Bradford.

10. The brook called Bowling Mill Beck rises on the south side of Bradford, and flowing past Bowling Mill, in the township of Bowling, enters the Bradford Beck about 350 yards above the place called Hoppy Bridge and the floodgates hereinafter mentioned.

11. A brook called Low Beck falls into the Bowling Mill Beck from the west, about 800 yards above the point where the Bowling Mill Beck enters the Bradford Beck.

12. Before and at the time of the passing of the said act, two soughs or drains emptied themselves into the Bowling Mill Beck, below the point where the Low Beck falls into the Bowling Mill Beck as above mentioned. These soughs are artificial drains, one from the Low Moor Colliery and the other from the Bowling Colliery.

13. The brook called Low Beck and the two colliery soughs run, and continue to run, into the Bowling Mill Beck, within the distance of 2,000 yards of Hoppy Bridge.

14. A stream of water called the East Brook, or Tomshawfoot Beck, flowing from the east side of the town of Bradford, enters the Bradford Beck 150 yards above the place called Hoppy Bridge.

15. Another stream of water called Chillow Dean Beck, flowing from the north and west, also enters the Bradford Beck at a point about two miles above where the Bowling Mill Beck flows into the Bradford Beck.

16. Other tributary streams, besides those above mentioned, also flow into the Bradford Beck above the town of Bradford and the points where the Tomshawfoot Beck and the Bowling Mill Beck enter.

17. The supply of water to the canal

before and at the time mentioned in the indictment was derived from the Bradford Beck, at a point in its course about fifty yards from the basin of the canal and below the junctions with that beck of the Bowling Mill Beck and the other streams above referred to. The bed of the Bradford Beck at this point is several feet below the level of the bed of the basin of the canal.

18. In constructing the canal in 1773 and 1774, water for the supply of the canal was derived from the Bowling Mill Beck, the same being diverted from that beck by means of a dam across it at Cuckoo Bridge, and carried by means of a drain through a place in Bradford called Hall Ings to Hoppy Bridge, under which the water was carried into the basin of the canal.

19. In constructing the canal the company found it necessary for better supplying the canal with water, and for the further improvement of the navigation, to divert into the canal part of the water flowing in Bradford Beck, by erecting dam stones across the beck at the point above mentioned, at about fifty yards from the basin of the canal, and making a culvert above them out of the same beck into the canal basin as a feeder.

20. After the canal was supplied with water from the Bradford Beck, in manner aforesaid, drains were from time to time made by the owners of corn and paper mills on the Bradford Beck, lower down the stream; and to prevent all disputes with such owners respecting the water taken from them for the purposes of the navigation, the company purchased these mills. In the year 1802 an act of parliament was passed for vesting the mills so purchased and other property in the company, discharged from all claims of the Crown in respect of any forfeiture incurred under or by virtue of the laws of mortmain.

21. In 1796 the company placed a clough in the dam across the Bradford Beck where the water was taken into the canal basin.

22. In the year 1798 the company erected a new weir and floodgates across the Bradford Beck, in lieu of the old weir at the head of the navigation, and have

maintained and continued the same there ever since.

23. By means first of the said dam stones and culvert, and afterwards of the said floodgates and culvert, water has been diverted from the Bradford Beck into the basin of the canal for the purpose of supplying the canal with water for the navigation thereof up to the present time.

24. After the making of the said floodgates, but at what period of time is not known, the supply of water to the canal by means of the drain from Bowling Mill Beck, as above described, was discontinued, and since then the supply of water to the head of the canal has been mainly derived from the Bradford Beck by means of the said floodgates and culvert.

25. In the year 1842 an act of parliament was passed, entitled 'An act for better supplying with water, the town and neighbourhood of Bradford, in the West Riding of the county of York,' by which the Bradford Waterworks Company thereby incorporated was invested with certain powers for the purpose of better supplying the town and neighbourhood of Bradford with water.

26. By the 274th section of this act it was enacted as follows: "That nothing herein, or in the schedule to this act annexed contained shall extend or be deemed or construed to extend to authorize or empower the company to alter, direct, change the course of, or make use of the water flowing in a certain brook called Chillow Dean Brook, or any of the springs, watercourses, brooks or streams of water arising or flowing through any other brooks or streams of water towards and unto the Bradford Canal Navigation, or the mills called Frizzinghall Mills belonging thereto, or either of them, so as to prevent the same springs, watercourses, brooks or streams of water respectively, or any of them, from arising and flowing in and supplying the said navigation and mills with water, in as full, ample and beneficial a manner as heretofore accustomed. Provided always, that it shall be lawful for the company to make and maintain a new channel or watercourse for conveying the Chillow Dean Beck along the side of and past a reservoir intended to be made at or near to Hedge

Side Farm, as marked and described in the plan deposited with the clerk of the peace."

27. In the year 1850 another act of parliament was passed, called "The Bradford Improvement Act, 1850," by which the mayor, aldermen and burgesses of the borough of Bradford were invested with powers for draining and otherwise improving the said borough.

28. By the 32nd and 33rd sections of the last-mentioned act it was enacted as follows: "That it shall be lawful for the council from time to time, as they may think fit, to cleanse the Bradford Brook, the Bowling Brook and any other brook, rivulet or stream of water within the said borough, and from time to time to drain any stagnant pool of water, and remove all filth within the said borough as the council may think fit, and the said council, their officers and servants, may from time to time enter into and upon any premises in the day-time to do all necessary acts for the purposes aforesaid, so that the same may be executed with all convenient despatch, and without injuring or endangering the foundation or wall of any erections or buildings already built and erected, or to be lawfully built and erected, adjoining to or over any such brook, rivulet or stream: provided always, that nothing in this act contained shall authorize or empower the said council to injure the Bradford Canal Navigation, or to divert any of the streams, brooks or rivulets which supply with water the Bradford Canal Navigation, or the mills called Frizzinghall Mills, belonging to the Company of Proprietors of the Bradford Canal Navigation, or to injure or interfere with any of the locks towing-paths, bridges, banks or any other works of or belonging to the said navigation, without the consent in writing of the said company of proprietors, under their common seal first had and obtained. That it shall be lawful for the council from time to time, as they may think fit, to construct and provide upon any land belonging to or to become vested in the mayor, aldermen and burgesses, by virtue of this act, such cesspools or other receptacles as may be necessary for the purpose of collecting and depositing the sewage water and refuse from the drains and

sewers and other places within the limits of this act, and to provide and lay such pipes, pumps and apparatus in such manner and in such places as may be necessary for the collecting and distributing the same for sale or otherwise to any persons who may from time to time agree with the said council to take the same by sale or otherwise."

29. The Bradford Brook and Bowling Brook, mentioned in the last-mentioned act, are the Bradford Beck and the Bowling Mill Beck before mentioned.

30. In the year 1854 the Bradford Waterworks Company were incorporated by another act passed in that year, and in this latter act a clause was introduced to the same tenor and effect as the said 274th section of the act of 1842.

31. At the time when the canal was first supplied with the water from the Bradford Beck, and for many years afterwards, the water of the canal was pure and free from the pollution before described; but within the last thirty or forty years the town of Bradford has been greatly extended and increased in size above the point where the supply of water to the canal from the Bradford Beck as above described has been so obtained, and for many years last past a great number of the drains and sewers of the town of Bradford have run and emptied themselves into the Bradford and Bowling Mill Becks in their course through the town above that point, and large quantities of filth and sewage refuse and other foul and polluted matter have been emptied and discharged into those becks above the same point from the drains, sewers, privies, mills, dye-houses and factories of the town, by reason whereof, for many years before and at the time mentioned in the indictment, the water in the Bradford Beck, before being diverted into the canal in the manner before described, was greatly fouled and polluted, and at all times there were collected into the waters and channels of the Bradford and Bowling Mill Becks above the said floodgates very large quantities of foul and feculent matter, which ran down the channel as in an open sewer, or under the streets and buildings, and thus reached the floodgates, where the water in the foul and polluted state above described was diverted into the basin of the

canal in the manner hereinbefore described. It was by reason of the water so diverted into the canal being in such a foul and polluted state that the canal was at the time mentioned in the indictment in so foul and polluted a state that the smell and stench arising from it became a public nuisance.

32. The residue of the water in the Bradford Beck not diverted into the basin of the canal as aforesaid flows down the course of that beck below the floodgates in the foul and polluted state in which it reaches the floodgates, the course of the beck below the floodgates being near to the course of the canal; and running like the canal itself between Manningham Lane aforesaid on the left, and the said Eccleshall and Bradford turnpike road and Dudley Hill high road on the right.

33. The fall in the course of the Bradford Beck from the floodgates for a distance equal to the length of the upper level of the canal between the basin and the first lock is such as would enable the contents of the beck, if not diverted into the canal as before described, to run off through that distance in a much less time than it takes the contents, diverted as aforesaid, to pass down the same distance of the channel of the canal; the effect is that a large quantity of the foul and feculent matter above described flows into the basin and channel of the canal, and is there deposited, and forms a thick bed at the sides and bottom of them, and is from time to time stirred up by the passage of the vessels navigating the canal.

34. More than thirty drains flow directly into the Bradford Canal, between the basin at Hoppy Bridge and Spinkwell Lock, which discharge hot water, and the refuse from cottage dwellings, vitriol works, grease works, dye works, stables, and privies into the channel of and liquid contained in the canal.

35. No reservoirs for the purposes of the said cut or canal have, under the powers of the said act of 1770, ever been constructed by the company for the more convenient supplying the canal with water.

36. The area drained by the brooks, soughs, and tributaries running into the Bowling Mill Beck within the distance of 2,000 yards of Hoppy Bridge, is about 1,330

statute acres, and the area drained by the Tomshawfoot Beck and its tributaries, within the same distance of Hoppy Bridge, is about 1,100 statute acres.

37. Before and at the time mentioned in the indictment the defendants Jeremiah Crowther and Samuel Dixon were the lessees under the company of the canal and works thereto belonging, under an indenture of demise dated the 30th of July 1864.

39. Under the circumstances and facts of the above case the promoters of the prosecution of the indictment against the defendants above named contend that the defendants are criminally liable for causing or continuing a public nuisance.

The question for the opinion of the Court is, whether, under the circumstances and facts above stated, the defendants are criminally liable for such nuisance. If the Court shall be of opinion that they are, the verdict returned for the Crown is to stand; but if the Court shall be of opinion that they are not, a verdict of not guilty is to be entered for the defendants.

Mellish (*Field* and *Maule* with him), for the prosecution.—There is no power in the act of Geo. 3. to take the water of the Bradford Beck; but the company have enjoyed the use for sixty years. Assuming, however, that there is an authority, at most it is only permissive; and there is no duty imposed or power given to do the very thing which is the nuisance; and this distinguishes the case from that of *The King v. Pease* (1). The company are just in the position of a private individual, who, being himself a riparian proprietor, obtains the leave of others to divert the stream and make a reservoir to supply his mill, and then some one wilfully or wrongfully fouls the stream; surely the owner of the reservoir would be liable if it became a nuisance by reason of the foulness of the water. *The King v. Pedley* (2) is an authority that the company, as the owners, would be liable, as well as the lessees, as occupiers.

[BLACKBURN, J.—The use of the canal need not necessarily involve a nuisance, though it be a probable consequence;

and *Rich v. Basterfield* (3) is therefore an authority against the liability of the company.]

If the owner of property let it in such a state as to be a nuisance, he is liable as well as the occupier—*Todd v. Flight* (4).

Manisty (*Kemplay* with him), for the defendants.—The defendants have a right to the water of the beck.

[BLACKBURN, J.—That may be, but they are not obliged to take it; if the act obliged them to take it, there might be something in the argument. CROMPTON, J.—In *The King v. Pease* (1) the legislature contemplated the very act which was itself a nuisance.]

The later acts of parliament set out in the case expressly recognize the right of the canal company to use the waters of the different becks in their present state. They simply continue to do what they have done for sixty years, and leave matters as they were; and it is the persons who foul the water and so actively create the nuisance who are liable to be indicted for the nuisance. At all events, the company are not liable.

Mellish having intimated that he should be content with a verdict against the two lessees, this point was not further argued, and he was not heard in reply.

COCKBURN, C.J.—I am of opinion that our judgment must be for the prosecution. The existence of the nuisance caused by the state of the water, as accumulated in the defendant's canal, is admitted; and the question is, whether the lessees, who are undoubtedly entitled either under the act or otherwise to take water and apply it to the purposes of their canal, are criminally liable for taking and accumulating in their canal water made foul (and so becoming a nuisance) not by their own act, but by the act of others from whom they receive it already polluted. It was not contested by Mr. Manisty, that if the water was taken by private individuals and used as in the present case, they would be responsible criminally and civilly for a nuisance so

(1) 4 B. & Ad. 30; s.c. 2 Law J. Rep. (N.S.) M.C. 26.

(2) 1 Ad. & E. 822; s.c. 3 Law J. Rep. (N.S.) M.C. 119.

(3) 4 Com. B. Rep. 783; s.c. 16 Law J. Rep. (N.S.) C.P. 273.

(4) 9 Com. B. Rep. N.S. 377; s.c. 30 Law J. Rep. (N.S.) C.P. 21.

caused; but he says the present defendants are not liable because they take it by virtue of an act of parliament. Now, conceding that the company, or their lessees, do take this water by virtue of the powers of the act of parliament, that seems to me to afford no answer to the present indictment. The case does not come within the ruling in *The King v. Pease* (1); there the nuisance, which formed the subject of the indictment, was the very thing contemplated by the legislature in conferring the powers on the company; and, therefore, although what happened amounted to a nuisance, and would have been actionable or indictable without those powers, yet, inasmuch as the legislature authorized it, the criminal or unlawful character of the act was taken away. But that is very distinguishable from the present case. On the facts here, it must be taken that the thing actually done was never in the contemplation of the legislature. All parties, no doubt, contemplated that it should be lawful for the company, or their lessees, to take the water of certain becks and accumulate it in their reservoirs or locks for the purposes of their canal; but it was contemplated that the water should be taken in its then comparative state of purity. And I am clearly of opinion that when statutory powers are conferred, under circumstances in which the powers may be exercised without in themselves causing any nuisance, and new and unforeseen circumstances render the exercise of the powers impossible without a breach of the law, those powers cannot be exercised without rendering the parties liable. Here, the exercise of the powers previously conferred became a nuisance owing to the altered state of circumstances. Water no longer pure, but fouled by the previous discharge into it of filthy matter, is taken and used by the defendants in a condition in which they cannot use it without creating a nuisance. It seems to follow, as a necessary consequence, that they cannot legally use it at all. The case is very different when certain duties are to be performed under legislative enactment and the performance involves a nuisance; it may be that the persons on whom the duties are imposed would not be liable for the consequences; but that is not the case here. The powers granted are for the benefit of the public, no doubt; but the duty or autho-

rity is to do an act in itself lawful, and it can only be co-extensive with the ability to exercise it without infringing the general law. Mr. Manisty put the case as if the defendants would be indictable if they did not take the water; but they cannot, because they have power to take the water, be therefore bound to take it at all times, without regard to their own interests and the interests of the public, when it cannot be taken without creating a nuisance and committing a legal offence. The defendants are authorized to do certain acts consistent with the general law, and these powers can only be exercised within the limits prescribed by that general law.

CROMPTON, J.—I am of the same opinion. The indictment charges the defendants with a public nuisance, by collecting and keeping exposed in their canal foul and polluted water. It is quite clear that the lessees did take the water of the becks, did collect it and bring it into a particular part of their canal, and that a collection of filth was left in the place, so as to be more stagnant than it would have been if left in the beck, and so as to make an undoubted nuisance. They are clearly liable, unless they were authorized by some statute to commit the nuisance. But it is equally clear that no such power can be shewn. We must take it that the lessees would be protected if the company themselves would have been. But the principle is the same whether a power only be conferred or a duty imposed; we must look to see what the intention of the legislature was. Here the authority is to take water; but that does not involve of necessity bringing feculent matter and allowing it to accumulate in their canal so as to be a nuisance. The judgment in *The King v. Pease* (1) proceeded on the ground that the very act of nuisance was authorized by the legislature. In the course of the argument (5) the case of *The King v. Sir J. Morris* (6) was cited, in which a local act enabled proprietors of lands, &c. to make railways through such lands and across and along any roads to communicate with another railway; and Parke, J. observed, that supposing this clause to be taken

(5) See 4 B. & Ad. at pp. 36 and 41.

(6) 1 B. & Ad. 441.

alone, it must at least be understood with the limitation, that when a railway was laid upon another road, sufficient space must be left, independently of it, for the public to pass. And then in the principal case (5) after referring to the clauses of the special act, Parke, J., delivering the judgment of the Court, says, "The legislature must be presumed to have known that the railway would be adjacent for a mile to the public highways, and consequently that travellers upon the highway would be in all probability incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by the rest of the public by the use of the railroad." But in the present case it is admitted that the legislature never intended or contemplated anything of the kind which has happened; but a new state of facts has arisen since. The legislature may have authorized the taking of water, but did not intend to legitimate a nuisance arising from taking the water in a state in which it was not at the time the act of parliament was passed. Suppose a company had power given them to erect necessities, no one could say that that power alone would extend to enable them to create a nuisance by the erection. So, here, there is a power to make a reservoir, but none to accumulate filth, which was not a necessary consequence; indeed the filth may be got rid of; and it is not found that it was necessary for the purpose of the navigation to take the water of this particular beck.

BLACKBURN, J.—I am of the same opinion. It is admitted that there is no precise authority in point, but we must have recourse to general principles. Now, it is very clear that those who maintain their property so as to be a public nuisance are indictable; and, so far as the occupiers are concerned, they have maintained and kept their canal in such a state as to be a public nuisance. The question is, whether anything is shewn which prevents their being indictable for so maintaining it. Assume the defendants had power to take the

water from Bradford Beck, which in itself was pure, but had been made very foul by the accumulation of filth poured into it by others, and that the defendants took it in this filthy condition,—what answer is that to an indictment for the nuisance? If the act of parliament enjoined or compelled them to take the water of the beck, and others had converted it into a sewer, possibly the case of *The King v. Pease* (1) would be an authority in the defendants' favour; but the fact is, that assuming the defendants to take the water under the provisions of the legislature, these enactments at most are only permissive; the defendants may use the water in a pure state or leave it alone; but there is nothing to authorize them to take the water with the filth in it so as to create a nuisance. It may be very inconvenient if from the want of pure water the defendants' supply runs short; but that can afford no justification for their creating a nuisance; and the principle of the common law must apply, unless an express statutory authorization be shewn, that parties keeping their premises so as to be a nuisance are liable to be indicted for it.

SHEE, J.—I am of the same opinion. It is admitted that the canal in its present state is a nuisance; and the question is, whether there is anything in the acts of parliament which exempts the lessees, or those under whom they act, and renders them irresponsible for the consequences of having created a nuisance. Assuming the act authorizes them to take the water of Bradford Beck, when the act passed the water was sufficiently pure not to be a nuisance; so that the authority to take it in its then state does not authorize their using it in its present state. The case of *The King v. Pease* (1) is clearly distinguishable; there the act authorized the nuisance, viz. the use of locomotive steam-engines in the way and place they were used. But if a mode of using locomotives had been afterwards discovered creating a greater nuisance than the mode used when the act passed, the act would not have authorized or extended to make legal this new mode of use.

Judgment for the Crown.

1865. } HERNULEWICZ AND OTHERS
June 2. } v. JAY.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192.—Deed of Inspectorship—Inequality.

A deed of inspectorship, purporting to be made under section 192. of the Bankruptcy Act, 1861, contained the following clause: "Provided always, that in case any dividend shall be declared before all the creditors shall have executed or assented to these presents, or before the amount of dividends payable on all their respective debts shall have been ascertained, the said inspectors shall retain sufficient sums for the purpose of paying a like rateable dividend to any creditor or creditors who shall not have assented to or executed the same, or the amount of dividend payable on whose debts shall not have been ascertained, and shall afterwards pay or cause to be paid such dividend to such creditor or creditors, upon his or their request in writing," &c. By the deed the dividends were made payable unconditionally, and no necessity was imposed upon assenting creditors of making a demand in writing for the payment of their dividends:—Held, that no such inequality was created by the above clause between the two classes of creditors, as would make the deed invalid.

Declaration on a bill of exchange drawn by the plaintiffs and accepted by the defendant.

Plea—That after the acceptance by the defendant of the bill of exchange, and after the coming into operation of the Bankruptcy Act, 1861, the defendant being a contractor, and unable to pay and discharge his debts and liabilities, on the 14th of November 1864 entered into a deed of inspectorship made between himself of the first part, W. Lee and M. Marshall (the inspectors) of the second part, and the several persons, companies and co-partnership firms, who were creditors of the defendant, or who would be entitled to prove under an adjudication of bankruptcy filed on the day of the date thereof, thereafter called the creditors, of the third part. The plea then set out the deed at length, which, after reciting that the defendant was un-

able to pay his debts in full, and that he had proposed to his creditors to provide for a gradual liquidation of their debts by the carrying on of his business, with a view of winding up the same, and the collection and realization of his personal estate and effects (the defendant's estate consisting only of a large railway contract which he had in hand, and of certain household furniture, which latter, subject to certain limitations, he was to be allowed to retain), under the inspection of the parties thereto of the second part—Witnessed that, in pursuance of the said agreement, and in consideration of the covenants and stipulations thereafter contained, by and on the part of the debtor to be observed and performed, the said creditors did respectively give and grant unto the said debtor free, full and absolute liberty and licence thenceforth to collect, get in and realize, and dispose of all his estate under the inspection and subject to the approbation, direction and control of the said inspectors, &c. Then followed covenants between the parties relative to the mode of carrying out the said arrangement, and the deed proceeded: "And it is hereby agreed and declared that all monies which shall arise or be produced from the said estate in the course of the collection and realization hereby contemplated, shall, after payment thereof of all costs of and incidental to such collection and realization, be applied by or under the direction of the said inspectors or inspector in the first place in payment of the costs of and incidental to the investigation of the affairs of the said debtor with a view to this arrangement, and the preparation, executing, stamping and registration of these presents, and procuring the signatures and assents of the said creditors thereto; and in the second place in payment of the costs, charges and expenses of and incidental to the carrying out of the powers and provisions of these presents, including the payment of such salary or remuneration as aforesaid; and in the third place in and towards payment rateably and without preference or priority of the debts due from the said debtor to the said creditors respectively, until the said creditors shall respectively have received the amount of their said respective debts, and if there shall be any surplus of the said monies after making

the several payments, the same shall belong to the said debtor, his heirs, administrators and assigns. And further, that they or he shall from time to time, when and as often as the monies in hand shall in their or his opinion be sufficient, after allowing for current expenses, to pay a rateable dividend to the said creditors, declare and pay such dividend accordingly. Provided always, and it is hereby agreed and declared, that in case any dividend or dividends as aforesaid shall be declared before all the said creditors shall have executed or assented to these presents, or before the amount of dividend payable on all their respective debts shall have been ascertained, the said inspectors or inspector shall retain, or direct the retention of, a sufficient sum or sums for the purpose of paying a like rateable dividend to any creditor or creditors who shall not have executed or assented to the same, or the amount of dividend payable on whose debt shall not have been ascertained, and shall afterwards pay or cause to be paid such dividend to such creditor or creditors upon his or their request in writing, or on the amount of dividend payable on his or their debt being ascertained, or in case no such retention shall have been made by, or by the direction of, the said inspectors or inspector, they or he shall out of the monies from time to time in hand (after allowing for current expenses) pay or direct the payment to such creditors or creditor upon such request, or on the amount of dividend payable on his or their debt being ascertained, a rateable dividend on the amount of his or their debt or debts, before any further dividend shall be paid to the general body of creditors, but not so as to disturb any dividend or dividends which may have been previously paid to the general body of creditors. Provided always, and it is hereby agreed, that if any of the said creditors shall at any time hereafter while these presents are in force commence or prosecute any action, suit or other proceeding against the said debtor in respect of their respective debts, claims or demands, these presents and the provisions herein contained shall operate and have the same force and effect as an order of discharge granted to the debtor under the Bankruptcy Act, 1861; and this declaration and agreement may be pleaded

as a defence to every such action, suit or proceeding in like manner and with the same effect as an order of discharge under the Bankruptcy Act, 1861," &c.

(The deed then provided for the release of the defendant from the debts and demands of his creditors, upon the inspectors certifying in writing that the estate had been collected and the funds distributed.)

Averment of performance of all things necessary to give the deed validity under section 192. of the Bankruptcy Act, 1861. That at the time of the execution of the deed the plaintiffs were creditors of the defendant within the meaning of the said act, and that the causes of action in the declaration mentioned were debts and demands upon the amount of which the said composition would become payable under the deed.

Replication—That the plaintiffs never executed or assented to the said deed, and that the inspectors had not by writing under their hands certified that all the said estate had been collected and recovered, and the proceeds distributed.

There was a demurrer to the plea, and the replication was demurred to by the defendant. Joinders in demurrers.

Joseph Browne, for the plaintiffs.—This deed is unequal as between assenting and non-assenting creditors, and therefore void under section 192. of the Bankruptcy Act, 1861. The first objectionable clause is that whereby it is "agreed and declared that in case any dividend or dividends as aforesaid shall be declared before all the said creditors shall have executed or assented to these presents, or before the amount of dividend payable on all their respective debts shall have been ascertained, the inspector or inspectors shall retain, or direct the retention of, a sufficient sum or sums for the purpose of paying a like rateable dividend to any creditor or creditors who shall not have executed or assented to the same, or the amount of dividend payable on whose debt shall not have been ascertained, and shall afterwards pay, or cause to be paid, such dividend to such creditor or creditors, upon his or their request in writing, or on the amount of dividend payable on his or their debt being ascertained," &c. This provision as to the request in

writing makes the deed unequal, inasmuch as non-assenting creditors will be compelled to make a request for payment of their claims, while the other creditors who have assented to the deed will be paid the amount without any such request being made. The manifest intention was to compel those creditors who had not assented to the deed to do an act which might be insisted upon afterwards as equivalent to an assent, and thus to prevent the arrangement becoming inoperative by reason of the deed not having been executed by a sufficient number of the creditors, as provided for by section 192. of the Bankruptcy Act, 1861. *Armstrong v. Baker* (1) shows that such restraint and compulsion ought not to be imposed upon creditors. If creditors act under a composition-deed, they are as much bound by it as if they had executed it — see *Forsyth on Composition Deeds*, p. 36. (Other objections were urged against the deed; but as the Court were of opinion that they were governed by the decision of *Strick v. De Mattos* (2), it is unnecessary to report them.)

Lusk (*Hannen* with him), contra.—The clause requiring the inspectors to pay the dividend to non-assenting creditors, upon their request in writing, does not create such an inequality as will make the deed invalid. The same objection might have been made in *Wells v. Hacon* (3), for in that case there was one creditor upon whom there was no obligation to make any demand in writing, while such an obligation was imposed upon the general body of creditors. The objection that the demand in writing is intended to be equivalent to an execution of the deed is of no weight, inasmuch as the inspectors cannot have any power to enter upon the division of the profits of the business until the deed has become operative by reason of the assent of a sufficient number of creditors.

[BLACKBURN, J. — The distinction between the two bodies of creditors in respect of one being bound to make a demand in

writing, and the other not being so bound, is a very trifling one.]

Just so; and it can never have been intended that a deed should become inoperative by reason of such a trifling matter. Further, the clear meaning of the deed is, that all the creditors should receive their dividends, but that the non-assenting creditors should make a demand in writing, simply because, if they did not do so, the inspectors would not be cognizant of their claims.

J. Browne replied.

COCKBURN, C.J. — The whole of the questions arising in this case, with one exception, are involved in the case of *Strick v. De Mattos* (2), now pending in error; and with respect to those further consideration is at present unnecessary. But a point has been raised by the plaintiffs' counsel, upon that part of the deed which relates to the retention by the trustees of a sum of money, upon the declaration of a dividend, for the purpose of meeting the demands of non-assenting creditors, and those the amount of whose claims shall be then unascertained, and which creditors are to receive their dividend only upon demand in writing. It is argued that the effect of this provision is to place non-assenting creditors in a position of inequality with those assenting, and that its object is, in fact, to compel non-assenting creditors to do that which virtually would amount to an assent to the deed. I was, I confess, at first somewhat struck with the ingenious manner in which this argument was pressed upon us; but upon consideration I cannot assent to it. The Courts have now put upon section 192. this construction, namely, that although upon the assent of a certain proportion in number and value of the creditors, the deed shall be binding alike upon assenting and non-assenting creditors, yet that the latter are to be bound only by such conditions as are reasonable. Now, here, all that is required by the deed of a non-assenting creditor is this, that before receiving his dividend he shall send in a request in writing for its payment; and the question is, whether this is or is not an unreasonable condition. If I thought the object of the condition was, as contended for, to

(1) 10 Law Times, 526.

(2) 33 Law J. Rep. (N.S.) Exch. 276.

(3) 5 B. & S. 196; s.c. 33 Law J. Rep. (N.S.) Q.B. 204.

compel the assent of an unwilling creditor, I should agree with the plaintiffs' counsel that it would be unreasonable; but I cannot recognize this as the purpose of the deed. I think that, upon a full examination of this deed, the intention is apparent that the estate should be worked in conformity with the provisions of section 192; and so far from thinking that it contains anything which can prejudicially affect a non-assenting creditor, I am directly of the contrary opinion. The inspector, upon funds derived from the estate coming to his hands, is not to dispose of those funds without reference to the claims of non-assenting creditors; on the contrary, the duty is imposed upon him of retaining in hand an amount sufficient to cover their demands, as also the demands of those creditors the amount of whose debts have not been ascertained. The object of calling upon creditors of this class to demand payment in writing, as it seems to me, was to enable the inspector to judge whether their claims were such as should be entertained, and to ascertain the amounts payable. I do not, therefore, regard this clause as an attempt to enforce the assent of an unwilling creditor, but simply as designed to enable the inspectors the more efficiently to discharge their duty. Its effect is, undoubtedly, to impose upon non-assenting creditors the performance of something which is not required of others; but I think that we must, nevertheless, have regard to the substantial effect of this requirement; and if we think the difference it creates between the two classes of creditors is so trifling as to be immaterial, we should treat it as practically amounting to no difference at all. To hold otherwise would render the task of framing a valid deed under the act almost an impossibility; and in conformity with the maxim *de minimis non curat lex*, I am of opinion that the defendant is entitled to our judgment.

CROMPTON, J., BLACKBURN, J. and SHEE, J. concurred.

Judgment for the defendant.

1865. } WYATT v. THE GREAT WESTERN
June 6. } RAILWAY COMPANY.

Railway—Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20.) s. 47.—Level Crossing over Turnpike-Road.

The effect of section 47. of the Railways Clauses Consolidation Act, 1845,—which enacts, that if a railway crosses any turnpike or public carriage-road on a level, the company shall erect and maintain sufficient gates across the road on each side of the railway, and shall employ proper persons to open and shut the gates, which shall be kept constantly closed across the road, except during the time when horses, carriages, &c., passing along it, have to cross the railway, and the person having the care of the gates shall, under the penalty of 40s., cause them to be closed as soon as the horses, &c. have passed through,—is to make the road a highway only when the gates are opened by one of the company's servants; and if, there being no servant there, after waiting a reasonable time, a passenger open the gates, and attempt to pass through with his horse and carriage, and damage ensue to him from the gates swinging to, he is committing an illegal act, and the company are not liable for the damage — (So held by Cockburn, C.J., Crompton, J. and Shee, J.; Blackburn, J. dissenting.)

Declaration—That before the passing and coming into force of the 27 Vict. c. cxliii, intitled 'An Act for the Amalgamation of the West Midland Railway Company with the Great Western Railway Company, and for other purposes,' and after the passing and coming into force of the Railways Clauses Consolidation Act, 1845, a certain other act of parliament, called 'The Oxford, Worcester and Wolverhampton Railway Act, 1845,' was passed and came into force, and with which said act the Railways Clauses Consolidation Act, 1845, was incorporated, and by which said Oxford, Worcester and Wolverhampton Railway Act a certain railway and works therein mentioned were authorized to be constructed and made and maintained by the Oxford, Worcester and Wolverhampton Railway Company therein mentioned, and which railway and works were accordingly

constructed; and afterwards by another act of parliament, passed before the first-mentioned act, the railway and works became and were vested in and belonged to a company called "The West Midland Railway Company;" and afterwards, and after the passing and coming into force of the said first-mentioned act of parliament, and before and at the times of the neglect of duty and negligence by the defendants hereinbefore mentioned, the railway became and was vested in the defendants, under the provisions of the first-mentioned act, and was in the possession of the defendants; and the railway was then worked and used by the defendants; and which railway crossed and crosses on a level a certain turnpike-road leading from the Cross Hands, on the Worcester and Oxford turnpike-road, to Holford Bridge and other roads in the counties of Gloucester, Warwick and Worcester, and passing through Chipping Campden, in the county of Gloucester, to Ebrington in the same county; and under and in pursuance of the provisions of the said Railways Clauses Consolidation Act, 1845, in that behalf, certain gates had, before the time aforesaid, been and were erected, and at the times aforesaid were maintained by the defendants according to the provisions of the said Railways Clauses Consolidation Act, 1845, across the said turnpike-road on each side of the said railway where the same communicated with the said road, and which gates were of such dimensions, and were so constructed, as when closed to fence in the railway from the turnpike-road, and wholly to prevent horses and carriages travelling upon and along the turnpike-road from passing upon the turnpike-road across the railway, and which gates were also so constructed and hung that the same when open would shut themselves across the turnpike-road by their own weight, and which gates the defendants, according to the provisions of the acts of parliament hereinbefore mentioned, kept constantly closed across the turnpike-road, except during the time when horses, cattle, carts or carriages passing along the turnpike-road had to cross the railway. Yet the defendants, not regarding the provisions of the acts of parliament hereinbefore mentioned, nor their duty in

that behalf, did not nor would, whilst the gates were so maintained by them as aforesaid, employ, have or keep any proper person or persons to open or shut the gates for the passage there-through of horses, cattle, carts and carriages passing along the turnpike-road across the railway on the level, and to watch and superintend the level crossing, according to the provisions of the before-mentioned acts of parliament, and their duty in that behalf. And the defendants negligently and improperly, during the time aforesaid, left the gates wholly without any proper person or persons whatever to open and shut the same for the passage there-through of horses, cattle, carts and carriages passing along the turnpike-road across the level of the railway; and also negligently and improperly left the level crossing without any person or persons whatsoever to watch and superintend the same. That during the time aforesaid, whilst there was no person or persons as aforesaid to open and shut the gates, or to watch and superintend the level crossing, the plaintiff was travelling along the turnpike-road, in a carriage drawn by a horse, upon a journey from Chipping Campden to Ebrington, and the plaintiff necessarily had occasion to cross and was desirous of crossing the railway at the level crossing with the horse and carriage through the gates; and by reason of the defendants' neglect of duty and negligence hereinbefore mentioned, the plaintiff was unable so to cross the railway, and to proceed upon his journey, without himself necessarily opening the gates in order to enable the horse and carriage to pass through the same and across the railway at the crossing. That before the plaintiff himself opened the gates as hereinbefore mentioned, he waited for a long and reasonable time in that behalf for some such person or persons, for and on behalf of the defendants, to come to and open the gates in order to allow the plaintiff and the horse and carriage to pass through the gates across the railway, and the plaintiff used all reasonable means in that behalf to call the attention of and to make known to any person or persons having the care or management of the railway there, or the care and superintendence of the gates and level crossing, his the plaintiff's desire, and

that he required to pass through the gates with the horse and carriage, and to have the gates opened for that purpose ; but no person or persons whatever appeared or came to open the gates, and there was no person or persons whatever to open the gates for the plaintiff in that behalf ; and by reason whereof the plaintiff, in order to proceed upon his journey, was necessarily forced and obliged to and did open the gates himself and pass through the same over the railway by the level crossing ; and it then being night-time and dark, and the plaintiff having passed through one of the gates with the horse and carriage on to the crossing, and having set open the other of the gates, and was getting into the carriage in order to drive through the last-mentioned gate, when, without default on the plaintiff's part, whilst the plaintiff was passing through the same gate with the horse and carriage, the last-mentioned gate, by its own weight, flew back and shut itself across the turnpike-road, and in so doing the gate struck the horse with great violence, and drove it back, and thereby caused the horse to swerve suddenly round and become unmanageable, whereby the plaintiff was thrown out of the carriage upon the railway, and was thereby greatly hurt, lamed and injured, &c.

Demurrer and joinder.

T. J. Clark (*Digby* with him), for the defendants, in support of the demurrer.—The declaration is founded on the statutory duty imposed on railway companies by the 47th section of the Railways Clauses Consolidation Act, 1845, (8 Vict. c. 20.) which enacts that, "If the railway cross any turnpike-road or public carriage-road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates ; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway ; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway, and

prevent cattle or horses passing along the road from entering upon the railway ; and the person intrusted with the care of such gates shall cause the same to be closed as soon as such horses, cattle, carts, or carriages shall have passed through the same, under a penalty of 40s. for every default therein : Provided always, that it shall be lawful for the Board of Trade, in any case in which they are satisfied that it will be more conducive to the public safety that the gates on any level crossing over any such road should be kept closed across the railway, to order that such gates shall be kept so closed, instead of across the road, and in such case such gates shall be kept constantly closed across the railway, except when engines or carriages passing along the railway shall have occasion to cross such road, in the same manner and under the like penalty as above directed with respect to the gates being kept closed across the road." Conceding that there is a breach of duty shewn on the part of the defendants, the damage alleged is not the natural result of that breach. The object of the enactment is to prohibit or render the use of the road by the public, if crossed by a railway on a level, illegal, except when the gates are opened by the company's servants ; and this is clear from the course of legislation on the subject. Former railway acts had enacted that the gates should be kept closed across the railway ; but the 5 & 6 Vict. c. 55. s. 9. recites this, and that experience had proved that it was much safer to have them kept closed across the highway, and enacts for the future that they shall be kept closed across the road, in similar terms to the present enactment. The company's servants alone therefore have the duty and right to open these gates ; and, whatever other remedy the plaintiff had, he had no right to open the gates himself : and if he does so, and injury ensues, although he be guilty of no negligence, the consequences must fall on himself.

[BLACKBURN, J.—The plaintiff is a traveller lawfully using the highway, and the defendants are allowed to obstruct this highway, subject to the conditional duty of always keeping a person to remove this obstruction at times when any of the

public want to pass; is the plaintiff, by the neglect of this duty on the defendants' part, to be shut out from using the highway? Would not an action lie?]

Very possibly. But it is clear that the intention of the legislature was that, in so dangerous a place as a level crossing, no one, except railway officials, should interfere.

[COCKBURN, C.J.—If a stranger has a right to cross the railway when the assistance of the railway company's servants is not at hand, he might be crossing the line at a time when a train is coming, and the result might become a catastrophe to the train and passengers, for the consequences of which it might be sought to make the railway company liable. SHEE, J.—May not the attendant be absent without any default at a time when it would not be safe to open the gates? CROMPTON, J.—The declaration does not allege that at the time the plaintiff wanted to cross it would have been safe to open the gates.]

That is the defendants' second point.

[BLACKBURN, J.—Suppose a trench dug partly across a road, and the plaintiff using due care, his horse, nevertheless, falls into the trench, the person digging the trench would be liable?]

No doubt; but that is not this case: the obstruction here is legalized by the legislature. The case of the trench is *Clayards v. Delhick* (1).

[BLACKBURN, J.—I do not quite see the distinction between the trench being illegal and the gates being illegal; they are only made legal conditionally on the company keeping some one always to open them. In *Thompson v. the North-Eastern Railway Company* (2) it was held a question for the jury whether a man of ordinary prudence would have gone out of the Shields Dock knowing the state it was in; and if yes, it was held that the owners of the dock were liable for the damages. CROMPTON, J.—There is another objection to this declaration; the damage is too remote; suppose a fence wrongfully put on the highway, and a passenger takes a hatchet to remove it, and injures himself,

that is not the direct consequence of the nuisance.]

Sir G. Honyman, for the plaintiff.—If the defendants are held not liable under the circumstances stated in the declaration, it will involve serious consequences to the public. How long is a person to wait when he finds no one in attendance at the gates? It is averred that the plaintiff waited a reasonable time; but, according to the contention on the other side, there is no limit to the delay. It is expressly alleged that the plaintiff was guilty of no negligence.

[COCKBURN, C.J.—No doubt; but the result shews that he was attempting what a man embarrassed with a horse and carriage could not do.]

By the 8 Vict. c. 20. s. 46. it is only when authorized by the special act that a railway can cross a carriage-road on a level; but where, as in the present case, the special act authorizes such a crossing, then the crossing is legal. The temporary obstruction is lawful conditionally on the defendants keeping a person constantly ready to remove it; but the highway is not less a highway.

[COCKBURN, C.J.—Is that so? Is not the intention rather that the highway shall always be obstructed so as to prevent danger, except when the company's servants themselves think it right to open the gates for the passage of the public? No doubt an action would lie against the company for unreasonable delay; but does not the legislature intend that no one shall cross, except when the gates are opened by the company? BLACKBURN, J.—There is nothing in express terms to say, that on no occasion shall the highway be used, except when there is a person employed by the company there to open the gates.]

No doubt the legislature intended that the company should always have some one in attendance on the gates; but there is nothing in the act of parliament saying, "the public shall not go across if there is no one there." It cannot be that after waiting a reasonable time the passenger notwithstanding the most pressing business must yet go back.

[CROMPTON, J.—Is not that inconvenience better than the danger to himself

(1) 12 Q.B. Rep. 439.

(2) 2 B. & S. 106; s. c. 30 Law J. Rep. (N.S.) Q.B. 67; and 31 Law J. Rep. (N.S.) Q.B. 194.

and the trains, which would follow from allowing a man with a carriage and horse to attempt to open the gates for himself?]

The effect of the statute is only to give the railway company a conditional right to obstruct the highway, and if they neglect their conditional duty of keeping a person ready, then they are in the position of an ordinary person putting an obstruction, as a log, across a highway, and they are liable for the consequences.

[COCKBURN, C.J.—The fallacy of that argument is in supposing this a conditional authority to obstruct the highway. The special act says, it shall be lawful for you to make the railway across the highway so as to obstruct it, and you shall have a gate always across the highway for the safety of the public and the railway, and you shall have a person there so as to allow persons to pass across the railway at safe times. CROMPTON, J.—In the case of the log, if the man rupture himself in attempting to remove it, I doubt if he could recover damages for that injury.]

The case is like that where a company was empowered to obstruct a highway, provided they afforded the public reasonable accommodation in lieu of it, and it was held they were indictable for nuisance if they did not afford this accommodation—*The Queen v. Scott* (3). So here, the defendants are authorized to obstruct the highway, provided they keep a person ready; and if they do not, then they unlawfully obstruct the highway; and if so, then the plaintiff, after waiting a reasonable time, has a right to proceed and remove the nuisance and open the gates for himself, and if he do this without being guilty of any negligence, the defendants are liable for any damage that ensues as the consequence of their breach of duty, which rendered it necessary for the plaintiff to do as he did.

Clark, in reply, cited *Ellis v. the London and South-Western Railway Company* (4) and *Dimes v. Petley* (5).

(3) 3 Q.B. Rep. 543; s.c. 11 Law J. Rep. (N.S.) Q.B. 254.

(4) 2 Hurl. & N. 424; s.c. 26 Law J. Rep. (N.S.) Exch. 349.

(5) 19 Law J. Rep. (N.S.) Q.B. 449; s.c. 15 Q.B. Rep. 276.

COCKBURN, C.J.—I am of opinion that the judgment should be for the defendants; and my reason for this opinion is, that on reading the Railways Clauses Consolidation Act, I consider that it amounts virtually to a prohibition to the public—to individuals constituting the public—from passing over the railway under the circumstances which are set forth in the present case. The act of parliament authorizes a railway company to make a railway, and so to construct it that it shall pass over a highway on a level; but at the same time the legislature add an enactment by which they authorize, and not only authorize but enjoin, the railway company to make the railway so as to obstruct the public highway. It is not, therefore, like the case of a wrongful obstruction, it is an obstruction created by the act and the injunction of the legislature; and when one comes to look at the 47th section, I think it is plain that what is meant is, Whereas it is expedient for the purposes of public traffic that the railway shall cross the highway, the highway shall be obstructed to this extent, that no one shall be allowed to pass across it, except under circumstances by which the safety of individuals, horses, and cattle, crossing the railway, can be insured. There shall be gates of a certain kind, and these gates, says the legislature, shall be constantly closed. When circumstances require them to be opened, and justify their being opened with due regard to safety, the person employed by the railway company for that purpose shall open them, and so soon as the occasion requiring their being open has ceased, that person shall close them again; and otherwise they shall be kept, according to the express language of the section, constantly closed. I take that to amount virtually to a prohibition to the members of the public to open these gates or pass across the railway, except at a time when these gates are opened by those persons whose duty it is to open them. I go further and say, that the terms of the act of parliament say, they shall be kept so closed that nobody can open them without breaking open the gates; and that, I apprehend, no one is justified in doing. Although it may be true that where there is an obstruction to the highway, any person requiring to use it has a right to remove

the obstruction, that appears to me not to apply to obstructions enjoined by act of parliament; therefore it appears to me that the plaintiff was clearly in the wrong in opening these gates, and endeavouring to cross the railway. Of course, I do not mean to say that he would not have his remedy if the statutory duty imposed upon the railway company by act of parliament was not fulfilled, or if there was not a person ready to open the gates upon the plaintiff's requirement, if the time and occasion were a fit one for him to cross the line. It may be that he might be exposed to delay and inconvenience, and that he would have a remedy against them for not discharging the statutory duty. But it is a different thing to say, Whereas these gates are to be kept closed, except when opened by the servants of the company employed for that purpose, if he chooses to open the gates and take upon himself the risk of crossing the railway, he is to be at liberty to bring an action against the company for damage. It seems to me it would be fraught with danger and serious consequences if, where the legislature has thought it right to create for the public safety an obstruction, private individuals are, in spite of the warning which the statutory enactment impresses upon them, to remove that obstruction and go across the railway at their own discretion. It might lead to serious consequences, and at all events I cannot but think, when the legislature directed that such an obstruction as this should be created, that it never could have intended that persons were to open the gates when they required, or that individuals should take upon themselves to incur the risk and danger which it was manifestly the intention of the legislature to prevent them incurring; and to visit the railway company with all the consequences. It seems to me that the damage the plaintiff incurred is too remote a consequence of the breach of duty on the part of the defendants, and for which they cannot be made liable.

CROMPTON, J.—I am of the same opinion. The declaration seems to me to amount in effect to this, that the defendants have a duty thrown upon them to keep people at the gates to open and shut them when carts or carriages come, and at the time in ques-

tion there was no person there in attendance, and that the plaintiff then, without, as he says, any contributory negligence on his part, took upon himself to perform the duty of opening and shutting the gates, and in so doing he hurt himself. That is the effect of the declaration. Now, it is perhaps a nice point to say whether there is not some kind of negligence on the plaintiff's part, for it is hardly possible to read the declaration without seeing that what the plaintiff did was a dangerous act. I think, short of our saying there was no contributory negligence, a matter which would arise on the plea of not guilty, we may suppose any imaginable state of facts; but I think, short of this, that the damage to the plaintiff is not a consequence, within the rules of law, of the breach of duty. I am quite clear, if the plaintiff incurred any damage, and perhaps, without any damage, for the mere delay, an action would lie against the company for not performing their duty in this respect. But I cannot think that the plaintiff has any right to take upon himself the duty of opening and shutting these gates; and I agree with what has fallen from the Bench, that it would be dangerous if he were to be allowed to do so. And if, according to Sir George Honyman's argument, he might break the gates open when locked, and pass through with a cart or carriage, that would be extremely dangerous, because the great object is to prevent passengers being caught by a train, and the train being caught by a cart or carriage or animals passing on the line. It is this ordinary danger that the section is framed to prevent. And it appears to me that the present is not a damage under the circumstances which really flows from the defendants' acts, but flows from the plaintiff's act. It is a consequence not of the defendants' act, but a consequence of the plaintiff taking upon himself to open the gates. It seems to me there is no negligence alleged as to the construction of the gates. They are to swing back and get into their proper position, according to the act of parliament, when the passenger has passed and the servant is there to close them. It is to be practically a swinging gate, and there is no charge in the declaration against the construction. The plaintiff seems to me to have hurt himself in trying to get

across, and I think it is very like some of the cases put in the course of the argument. I agree with the case, that if a man finds a log on the high road, and he trying to drive very near it meets with an accident, and the jury choose to say there is no negligence, or suppose he drives into a trench, and the jury negative there being carelessness,—in all those cases, if no contributory negligence be shewn, the damage arises as the direct consequence of the defendant's act. But suppose the case of a log upon the highway, and a man who has a right to do so, tries to remove it, and in removing it hurts himself; or suppose that in removing the log he brings on a rupture;—or take the case of the gates of a dock, in a large town, where a man takes upon himself, the means of doing so being left, to bring the gates together and damage arises,—is that the consequence of the other's negligence? So, in the present case, it is difficult to say that the damage the plaintiff suffered is in consequence of the proper person not being in attendance, or other negligence of the defendants. It seems to me no such damage could be contemplated at all. The damage contemplated by the act is the train going backwards and forwards, and not that of a man hurting himself in going across. The plaintiff seems to me improperly to have chosen to take this act upon himself; just as if he had fallen down in getting over a high gate, that would not be a legitimate and necessary consequence that would flow from leaving the gates unattended. I cannot help thinking that this damage is too remote, upon the whole; although it is somewhat a nice question, whether it resolves itself into a question of negligence. But, I think, it is sufficient that we must take it on this declaration that the plaintiff hurt himself,—not as a direct consequence of the defendants' negligence for which they were liable, but that he hurt himself in consequence of trying to cross the line by opening the gates himself; and, therefore, I think judgment ought to be for the defendants.

BLACKBURN, J.—In this case, I have come to a different conclusion from my Lord and my Brothers Crompton and Shee; but I do not think the case is one in which we should gain any benefit from taking time to consider. It is not a case upon which light would be thrown by authorities. The

whole point on which we differ is on the construction of a few words in the act of parliament. In this case it appears the turnpike-road was a public highway, along which the plaintiff had a right to travel, and was travelling at night. The railway crosses the highway on a level, but still it remains a highway on which the plaintiff and all the Queen's subjects had a right of way to go along, except so far as the Railways Clauses Consolidation Act had enabled the company to put an obstruction upon it. And that brings me to the 47th section of the Railways Clauses Consolidation Act, which applies to this case. It is there enacted, "If the railway cross any turnpike-road or public carriage-road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway." It seems to me, therefore, that that shews in plain terms that the gates have to be put up, and in plain terms it is said that the railway company shall keep servants there to open and shut such gates and keep them closed, "except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway." If I could come to the conclusion, which my Lord has intimated, in the construction of that act, that the effect was, that if the servants of the company were away and if the gates were closed, though it shall be lawful for persons to go along there, yet persons must wait till the servants of the company come back, however long they may be,—if I thought the act said that, I should say that this plaintiff, who went across the railway, had done an illegal act, and could not recover for this damage. I have looked at the section of the act, and I cannot come to that conclusion. It seems to me that inasmuch as this continues a turnpike-road, and a turnpike-road for all the liege subjects of the Queen, which they have a right to pass along, if the company's servant was not there, the plaintiff might still use it, and

open the gates. Of course, I need not say, that in so doing he must take due care that he do not endanger the traffic of the railway, for if he does he would be responsible civilly or criminally. He must take all reasonable precaution as to himself, and if he does not, and if mischief happens, he cannot recover; but I think he does nothing illegal in opening the gates, if he takes reasonable care; and if mischief arises from the consequences of the railway company having neglected their duty which has been cast upon them to open the gate, I do not see why the plaintiff should not recover. It does not seem to me that he has done anything illegal. The case is extremely like that of *Clayards v. Dethick*, in which Patteson, J. says, after having stated the facts (6), "The defendants had clearly no right to leave a trench open in the passage to this mews, without a proper fence, and having done so to tell the plaintiff, 'You shall keep your horse in the stable till we inform you you may remove him.'" So, on the construction that I put on the act of parliament, I say the railway company have no right to leave the gate shut and let their servants go away and tell the plaintiff, "You must wait all night till our servants come back." Then Patteson, J. goes on to say, "Whether or not the plaintiff contributed to the mischief that happened by want of ordinary caution is a question of degree. If the danger was so great that no sensible man would have incurred it, the verdict must be for the defendants." The question in that case was rightly left to the jury. In the present case no question has been left to the jury, because it has not gone to them; but in my opinion the question would be required to be left to the jury in that way. The question would be, "Did the plaintiff in going through use ordinary caution?" Assuming, according to my view, although the majority of the Court is the other way, assuming he had a right to go across that railway, the question of fact would be, "Did he in doing so use ordinary caution in opening the gate?" If he did so, was it an accident arising from the default of the company in having omitted to perform their clear and statutable duty in not keeping their servant there to look

after the opening and shutting of the gates? That again is a question of fact. It may be that the accident was not such a direct consequence of that breach of duty, but arose from the improper conduct of the plaintiff in managing the gates carelessly. It may be that the facts may turn out against the plaintiff by reason of his own negligence. But it is a question of degree more or less, and it appears to me the declaration is good upon demurrer. Although there are questions upon the plea of not guilty to leave to the jury, and it may be that the jury might find for the defendants; yet that has nothing to do with the demurrer, and I think that our judgment ought to be for the plaintiff.

SHEE, J.—I agree with my Lord and my Brother Crompton. It seems to me in construing the act, that we must look to the object that the legislature had in view. And it seems to me their object was to provide against the great danger which might arise, unless proper precautions were taken for a railway crossing any turnpike-road or public carriage-road on a level; and the object of the legislature, as it seems to me, was not merely to protect careful persons but negligent persons; not only to protect the persons crossing the railway from their own negligence, but the negligence of the company's servants as far as that can be provided for; and for that purpose it appears to me to have enacted that the gates shall be constantly closed. It shall be the duty of the company to keep them constantly closed, "except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway." It further provides that the company shall keep proper persons, and employ proper persons to open and shut such gates. That seems to me to be the fair meaning of this provision—they shall keep proper persons to open and shut such gates at such times "when horses, cattle, carts or carriages passing along the same shall have to cross such railway." And for the protection of the public, except when those gates are opened by the servants of the company, it shall be the duty of the company to see that they are constantly closed. It seems to me the legislature thus imposed upon the company the duty of obstructing the

(6) See 12 Q.B. Rep. at p. 446.

public highway; and there was no such duty thrown upon the defendants in the case of *Clayards v. Dethick* (1), to which my Brother Blackburn has referred. Here they are to keep the gates constantly closed, except when carriages and horses have to cross the railway. When they have to cross such railway it is the duty of the company to have persons employed by them there to open the gates, and if they do not have persons there to open the gates, then they are obstructing the highway at a time when they are not authorized to obstruct the highway, and if any person having a right to cross the highway sustain any particular damage by the obstruction, then the company is liable for the damage. It seems to me on that ground this declaration is bad, and that the plaintiff is not entitled to recover. And I also think that he is not entitled to recover on this ground: the injury he has sustained was not the necessary result of the breach of duty on the part of the company in not keeping persons there to open the gates. It was the result of his own act, his own indiscretion. He chose to do a thing which it is exceedingly difficult to do, to get his horse and carriage through a swing-gate without any assistance. It is true in this declaration we are not at liberty to consider there was any default on his part; but we are at liberty to consider that the injury which happened to him was the result of his own act, something done by him beyond what was done or omitted to be done by the company or the company's servants. It appears to me any damage resulting from that act of his, additional to the omission or neglect of the company and its servants, is too remote to be the consequence of the breach of duty of which the plaintiff complains, and I think, therefore, he is not entitled to recover.

Judgment for the defendants (7).

(7) By the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92. s. 6), it is enacted as to any railway authorized by any special act passed after or incorporating that act (see section 3), "For the greater convenience and security of the public, the company shall erect and permanently maintain a lodge at the point where the railway crosses on the level the turnpike-road or public carriage-road; and the company shall be subject to and abide by all such regulations with regard to the crossing thereof on the level, or with regard

1865. } BARBER AND ANOTHER v.
May 30. } WHITELEY AND ANOTHER.

Easement—Fences—Liability to Repair—Presumption of Fact from Ancient Inclosure.

The owners and occupiers of an ancient copyhold inclosure, and they alone, had from time to time repaired the fence belonging to the inclosure between it and the common waste land of the manor:—Held, that the proper inference for a jury to draw was that at the time the lord granted the exclusive possession of the land, he granted it subject to the obligation on the part of the grantees to keep it fenced as against the cattle of the lord and the other copyholders turned out on the wastes of the manor, and that the owner or occupier was therefore bound to keep up the fence as against adjoining occupiers after the wastes of the manor were inclosed under a modern Inclosure Act.

SPECIAL CASE.

1. This was an action of replevin removed from the Manor Court of the manor of Wakefield in the county of York, whereupon the plaintiffs complained that the defendants, on the 1st of May 1862, in the parish of Almondbury, in the said county, in a certain close and lands there situate, being part of a farm called Bartin Farm, in the township of Austonley, in the said parish, took the sheep and lambs of the plaintiffs and unjustly detained them against sureties and pledges. The defendants pleaded, first, that they did not take the sheep and lambs; and secondly, the defendant Whiteley avowed, and the defendant Moorhouse acknowledged the taking the sheep and lambs, because Whiteley was lawfully possessed of the said close and land in which, &c.; and because the sheep and lambs were wrongfully in the said close and land, doing damage to the defendant Whiteley, they took the said sheep

to the speed at which trains may pass the level crossing, as may from time to time be made by the Board of Trade. If the company fails to erect, or to maintain, such lodge, or to appoint or keep a proper person to watch or superintend the level crossing, or to observe or abide by any such regulation as aforesaid, they shall for every such offence be liable to a penalty not exceeding 20*l.*, and also a penalty of 10*l.* for every day during which the offence continues after the penalty of 20*l.* is incurred."

and lambs in the said close and land as a distress for the said damage.

2. To this avowry and cognizance the plaintiffs pleaded in bar, by first joining issue thereon; secondly, they pleaded that they were before and at the time of taking the sheep and lambs by the defendants, possessed of certain land and a close contiguous to the close and land of defendant Whiteley, and that defendant Whiteley and all other tenants of the said close and land in which the sheep and lambs were taken, had immemorially and of right repaired and ought of right to repair and keep in repair, and that defendant Whiteley still of right ought to repair and keep in repair the hedges and fences between the said close and land of the defendant Whiteley and the said land and close of the plaintiffs, that the cattle respectively therein might not escape into the said contiguous closes and land, and because the said hedges and fences between the said land and closes of the defendant Whiteley and the plaintiffs were ruinous and broken down for want of needful repair and renovation, the sheep and lambs of the plaintiffs, being in plaintiffs' close and land, escaped into the close and land of the defendant Whiteley, in which they were taken as aforesaid, until the defendants took the same and unjustly detained them.

3. The defendants joined issue upon the plea in bar.

4. The cause came on to be tried before Wilde, B., at the Summer Assizes for the county of York, who by consent of both parties heard the evidence without a jury, and thereon a verdict was entered for the defendants subject to the opinion of the Court on the following case.

5. The plaintiffs are the joint occupiers and tenants under the devisees of the late William Leigh Brook, the owner of 400 acres of copyhold land held of the manor of Wakefield, called Good Bent, in the township of Upperthong, in the parish of Almondbury, in the said county, and have been such occupiers and tenants since about the year 1859.

6. The defendant William Whiteley has since about the year 1842, been the occupier and part owner of a farm called Bartin Farm, in the township of Austonley, in the same parish. This farm consists of ancient inclosures, of which nine acres are copyhold of

the manor of Wakefield, and two roods freehold. These nine acres of copyhold include the land forming the southern boundary of Bartin Farm, where it abuts on and is contiguous to the northern boundary of the land of Good Bent, a distance of about 400 yards. The line of this boundary is defined by a barrier or fence, partly natural and partly artificial, hereinafter described.

7. The lands of Good Bent were formerly part of certain common and uninclosed waste lands within the graveship of Holme, in the said manor of Wakefield, over which some of the copyholders of the manor had rights of common until the inclosure hereinafter mentioned.

8. An act of parliament was passed in the year 1828, for inclosing the said waste, and a copy of this act was to be referred to, if necessary, as part of this case.

9. The Commissioners appointed to carry out this act had thereby powers granted to them to sell and absolutely dispose of portions of the said waste lands in order to raise money for the expenses of the act.

10. In pursuance of these powers, the Commissioners sold to the before-named William Leigh Brook the said 400 acres of land called Good Bent, and also two other pieces of the said waste lands, one containing twenty acres and the other thirty-two acres, and on the 12th of April 1834 they made their award under the said act.

11. The deed by which the Commissioners conveyed to the said W. L. Brook these three pieces of land, dated the 4th of March 1834, and also their said award dated the 12th of April 1834, and the plan referred to by the said award, were to be considered to form part of and be used for the purposes of this case, so far, and so far only, as they are by him admissible in evidence against the defendants.

12. By the said deed of conveyance to the said W. L. Brook, Good Bent is described as containing by survey 400 acres more or less, and is bounded northward in part by ancient inclosures in Austonley. The ancient inclosures here mentioned are the said ancient inclosures of Bartin Farm.

13. This piece of land called Good Bent and the said two other pieces of land so sold to the said W. L. Brook as aforesaid, are shewn and described in the margin of the said conveyance, and a copy of the plan

marked A, so far and so far only as the same is admissible in evidence against the defendants, was to be used for the purposes of this case.

14. By the said conveyance the said two other pieces of land, containing respectively twenty acres and thirty-two acres, were thus conveyed, subject to the condition that the said W. L. Brook, his heirs and assigns, should within six months from the date thereof, make and for ever uphold and repair good and sufficient stone walls of five feet at least in height, in good and sufficient quickset hedges as fences of all sides of these two pieces of land respectively, but no condition or provision as to fencing or walling was imposed by the said conveyance as to the said piece of land called Good Bent.

15. By the said award the said three pieces of land so sold and conveyed to the said W. L. Brook as aforesaid, were allotted to him by the same description as in the said conveyance, and with the same requirements as to fencing with respect to the said two pieces containing respectively twenty acres and thirty-two acres, but without any requirement as to fencing with respect to the said piece of land called Good Bent. The award also contains directions and provisions as to the fencing or walling of the several other allotments made thereunder.

16. A copy of the plan referred to by the said award and marked B, was to be referred to for the purposes of this case as correctly delineating the general position and features of the locality, but for no other purpose save so far as it may be legal evidence against the defendants.

17. The state of things now existing with respect to the boundary line between Bartin Farm and the said piece of land called Good Bent, and which is the same as existed before and at the time of the said act and the inclosure thereunder, is as follows :

18. Bartin Farm lies on the north side of a brook called Marsden Clough, which flows from the west to east. The length of the southern boundary of the farm is about 418 yards, along which there is a barrier or fence, partly natural and partly artificial, forming the whole length of the southern boundary of the farm, and abutting in some places upon the brook. In some parts there are between the brook and the said barrier or fence, strips, portions of

moorland, varying in width from ten to twenty yards; but the said barrier or fence and not the brook is and always was the boundary line between Bartin Farm and Good Bent. For about one-fourth of its length, namely, between the western end of it and a fall in the brook, called Lumb Fall, the said barrier or fence is almost entirely an artificial wall built of stone, and now varying in height from three to six feet, but formerly of six feet uniform height, between which stone wall and the brook part of the said strips and portions of moorland lie.

19. The remaining three-fourths of the said barrier and fence is formed by natural shale or rocks, with small pieces of artificial walling built up here and there, in part on the top of the bank of rock, and in other parts in places where the rocks have been excavated.

21. This barrier or fence had the effect of forming an obstruction between the lands of Bartin Farm and the lands of Good Bent, by means of which the cattle and sheep depasturing on the one side of it were stopped from straying out of the lands of that farm into those of the other farm.

22. The owners and occupiers of Bartin Farm had from time to time repaired this barrier and fence prior to the inclosure of Good Bent common lands, and since their inclosure have repaired it down to the month of September 1860, and no one else has ever done so.

23. The cattle and sheep on Good Bent have always, except in flood time, been able and accustomed to cross the stream of the Marsden Clough and depasture the strips and portions of land lying on the north of that stream between it and the said barrier and fence.

24. All the lands south of the said barrier or fence, as well those which lie on the north of the said brook as those that lie on the south thereof, form part of Good Bent, and are and were at the several times in question in this case occupied by the plaintiffs as part thereof.

25. These lands of Good Bent are still partly kept as moorlands and sheep pasture, and at the time mentioned in the pleadings the plaintiffs' sheep, being and pasturing therein, escaped through a portion of the said barrier and fence that had fallen and was out of repair, and got into the ancient

inclosures on the north side occupied by the defendant Whiteley.

26. On several occasions about the year 1824, and before the said inclosure, the sheep of one Arthur Turton, being one of the copyholders who turned sheep on Good Bent common lands, crossed the said barrier or fence, and strayed on to Bartin Farm and were there distrained and impounded by the then occupier of Bartin Farm as damage feasant, and on each of those two occasions the said A. Turton made payments in order to release his sheep which had been so distrained. He also put up some thorns on the south side of the brook near to Lumb Fall to prevent his sheep crossing over the brook at that point.

27. On two or three occasions during the two years next before the present cause of action the sheep of the plaintiffs strayed from Good Bent on to Bartin Farm through defects in the said barrier or fence, and on each of these occasions the defendant W. Whiteley caused the same to be distrained and the plaintiffs made payments in order to release their sheep. These last-mentioned payments were made under protest, but the plaintiffs took no steps to dispute these distresses, except that on one occasion they took out a summons against the defendant W. Whiteley for overcharges for trespass and poundage fees. On the 22nd of May 1862 the plaintiffs' sheep and lambs mentioned in the pleadings in this action, whilst depasturing on Good Bent, strayed therefrom on to the lands of Bartin Farm, in consequence of some defects in the said barrier and fence as above mentioned, and were then and there distrained by the defendants as damage feasant, and thereupon the plaintiffs replevied their said sheep and lambs and brought the present action against the defendants to recover damages for the said distress as being illegal.

28. The Court was to be at liberty to draw conclusions of fact; and the question for the Court was, whether upon the above facts the verdict should be entered for the plaintiffs or the defendants.

Manisty (*Maule* with him), for the plaintiffs.—The defendant Whiteley avows for cattle damage feasant on his land called Bartin Farm, and the plaintiffs plead that he was bound to keep up the fence between this farm and the adjoining land on the

side at which the plaintiffs' cattle escaped. Now Bartin Farm is an ancient inclosure adjoining on this side what remained until late years uninclosed land; and the owners and occupiers of Bartin Farm, and they only, have from time to time repaired the fences; therefore, the proper conclusion to draw is, that when the old inclosure was granted out of the wastes, the lord granted it subject to the duty of fencing against cattle turned out on the uninclosed land; the lord would otherwise have been subjecting the commoners to the burden of being obliged to take care that their cattle did not trespass on the inclosed land. *Boyle v. Tamlyn* (1) (the marginal note of which is not borne out by the judgment) shews that even without the additional circumstances in this case, the mere fact of one owner having always repaired the fence is evidence, though slight, of an obligation to keep it up.

Kemplay, for the defendants.—There can be no doubt that the law is as laid down in *Gale on Easements*, 412, 3rd edit.: "The only general obligation with respect to fences imposed by the common law is, that every proprietor of land should prevent, by fences or other means, his cattle from trespassing on the land of his neighbours"—*Churchill v. Evans* (2). So in 3 *Dyer*, 372 b, case 10; it is said, If the lord of a waste of 200 acres enfeof another of 50 acres, the feoffee must inclose them or keep his cattle from straying into the residue; and so ought the lord of the residue to do for his cattle as it seems. *Boyle v. Tamlyn* (1) is an authority for the defendants; in that case the repairs had been done by the defendant after notice to do them. *Littledale, J.*, who tried the cause, told the jury (3), "that if they thought that the fact that the occupier of Dead Moor (the defendant's close) having always repaired the gate, and having in two instances repaired it after notice from the plaintiff to repair, amounted to an admission on his part that he was bound to repair the fence for the benefit of the plaintiff, they might presume that there had been an agreement between the plaintiff and defendant that the gate should be kept up by the latter for the benefit of the plaintiff, and that if they

(1) 6 B. & C. 329.

(2) 1 Taunt. 529.

(3) See 6 B. & C. at p. 332.

were of opinion that there was such an agreement, they should find for the plaintiff." The jury found that the defendant was bound by agreement to repair the gate. Leave having been reserved to enter a nonsuit, the Court refused this, but made the rule absolute for a new trial, intimating that the evidence strongly preponderated in favour of the defendant.

Manisty, in reply.—The notices to repair in *Boyle v. Tamlyn* (1) amounted to nothing, for they were only notices to the defendant to keep *his own* cattle in.

COCKBURN, C.J.—I am of opinion that the verdict ought to be entered for the plaintiffs. It is unnecessary to say what would have been the effect of the evidence had it stood simply that the fence had always been repaired by one party; because here there are other circumstances leading to the inference of the obligation to repair being on the part of the owner of Bartin Farm; viz. the fact that originally this farm was land inclosed from the waste of the manor, and that the plaintiffs' land was also part of the waste, but inclosed in modern times under an Inclosure Act. Now the very purpose of inclosing lands by the lord must have been that the land should be used as cultivated land, and since such a use, beneficial to the owner alone, makes it necessary that the land should be protected from grazing animals, it is more likely that the lord would enforce the obligation of keeping up a fence and so preventing a trespass on the person whom he had allowed to inclose than on the other tenants of the manor, who had rights of common, over the waste which they could have exercised before the inclosure without being subject to the risk of having their cattle distrained for trespassing, and who would be, moreover, a varying and fluctuating body. Granting, therefore, that when no obligation to fence is shewn to be upon either of two adjoining landowners, the principle of law is that each must fence or take care that his own cattle do not stray; yet a different inference arises when, as in the present case, there is on the one hand, the fact of land being inclosed from common land for the benefit of a particular person, and on the other a body of commoners entitled to exercise rights on the open land adjoining. Therefore, looking at

the fact that beyond the time of memory the fences on Bartin Farm have been repaired by the owner; looking at the circumstances under which the inclosure originated, the fair and reasonable presumption is, that the obligation to repair was coeval with the inclosure, and the duty flowed from the right to the exclusive possession; or, in other words, that the lord imposed as part of the terms on which the exclusive possession was permitted by him, that the owner should take upon himself the obligation to fence as against the cattle of the commoners. Therefore, the right conclusion to draw from the evidence is, that the owner of Bartin Farm was bound to keep up the fences, and therefore there must be judgment for the plaintiffs.

CROMPTON, J.—I am of the same opinion. *Boyle v. Tamlyn* (1), which is the case generally relied on against the general obligation to repair for the benefit of an adjoining owner, is not to be explained as Mr. Kemplay would explain it, by reference to the notice mentioned in it. The judgment is not put on the notice. Bayley, J., in his judgment, says, "It appeared that applications were made by the plaintiff to the occupier of Dead Moor (the defendant's close) to repair. On the first occasion the tenant was told that if he did not repair and his cattle trespassed on the plaintiff's land, he would impound them. On the other occasion the defendant was merely told that he must repair, but he was not told on either occasion that if he did not, and the plaintiff became damaged in consequence of his cattle trespassing upon the lands of other persons, he, the plaintiff, should look for compensation to the occupier of Dead Moor. The fact, therefore, of the defendant having repaired upon these two occasions did not distinctly shew that he did so by virtue of his being under any legal obligation to the plaintiff so to do. But still it appears to me that there was some (though very slight) evidence to go to the jury, that the defendant was bound to repair; for the fence might be considered a mutual benefit to the plaintiff and the defendant, and if that were so, unless one were bound by law to repair at his own expense, it might fairly be expected that each would contribute to the repairs; but the proof was, that the gate was always

repaired at the expense of the occupier of Dead Moor; that fact afforded some evidence, though very slight, that the latter was bound to repair" (4). In the present case there are, in addition to the mere fact of repair, other circumstances from which I think an obligation on the part of the defendants to repair may be inferred. We have to see whether, as a jury, we ought not to infer the obligation, and if we see any evidence tending that way we ought to support the ancient usage. Now, very slight circumstances in addition to the constant repair ought to preponderate. In the present case the defendants' predecessors and the defendants alone ever repaired this fence; that is some evidence in itself; and is perfectly consistent with the way in which the right is supposed, by Mr. Manisty, to have originated. The inclosure must have been very old. When the lord granted a new copyhold tenement it is very unlikely that he would put on the rest of his copyholders the liability of keeping up a fence, or would build one himself. He would have been doing a great injury to the copyholders in general if he made an inclosure, or rather gave exclusive occupation of land to one, without imposing on him the obligation to fence and keep up the fence as against the adjoining open land. I think very little of the fact that the occupier of Bartin Farm distrained the cattle of a copyholder on one occasion; it is not even said that they got on the farm through defect of fences; and then equally little weight is to be given to the payments under protest. On the whole therefore, as a jurymen, I think, as Mr. Manisty suggested, that we ought to find that the owner of Bartin Farm took the land, subject to the obligation to keep up the fences, and the verdict should therefore be entered for the plaintiffs.

SHEE, J.—I am of the same opinion. It is in the highest degree probable that on the inclosure of the Bartin Farm, the person to whom it was granted should have taken it subject to the obligation to repair the fences as against the then adjoining open lands: first, because it was for the interest of the lord and the tenants that the lord should insist on the grantee taking upon him this liability; and, secondly,

because it was also for the interest of the grantee of the Bartin Farm that he should keep up the fences to keep his own cattle in and those of the commoners from getting on to his inclosed land. It is therefore highly probable that the new owner would have submitted to take upon himself this liability for his own sake; this probability therefore, coupled with the fact that the owner of Bartin Farm has always repaired, leads to the inference that such an obligation did exist.

Judgment for the plaintiffs.

1865. }
May 10, 26. } AUSTIN v. BUNYARD.

Post-dated Cheque—Innocent Holder.

A cheque payable to bearer, and stamped with a penny stamp, was on the 22nd of June drawn by the defendant and given by him to G. It was at that time dated the 22nd of July. On that day G. indorsed it to W, who handed it to the plaintiff, and received in return the plaintiff's cheque for the same amount. The plaintiff took the defendant's cheque without notice or knowledge that it had been post-dated:—Held, in accordance with Williams v. Jarrett (1) and Whistler v. Forster (2), that the cheque appearing to be correctly stamped according to its purport, and having been taken by the plaintiff, without notice that it was post-dated, and innocently, he was entitled to recover upon it against the defendant.

This was an action upon a cheque for 350*l.*, payable to bearer, and dated the 22nd of July 1864.

Plea, traversing the making of the cheque.

At the trial, which took place before Cockburn, C.J., at the Sittings at Westminster after Michaelmas Term, 1864, it appeared that the cheque in question had been given by the defendant with several others to Charles Garrett. At the time it was given it was dated the 22nd of July 1864, and Garrett called the attention of the

(1) 5 B. & Ad. 32.

(2) 14 Com. B. Rep. N.S. 248; s. c. 32 Law J. Rep. (N.S.) C.P. 161.

(4) See 6 B. & C. 339-340.

defendant to the fact that it was post-dated. On the 22nd of July Garrett indorsed it to one Warden, and Warden handed it to the plaintiff in exchange for an open cheque for the same amount, which he said he preferred to a crossed one. The defendant insisted that the plaintiff could not recover, inasmuch as the cheque was post-dated, and was therefore void, and the learned Judge nonsuited the plaintiff, giving him leave to move to set the nonsuit aside and enter a verdict for him instead thereof.

A rule *nisi* was subsequently obtained, against which

Laxton and Wills shewed cause.—The question in this case turns upon the construction to be put upon several acts of parliament, the first of which is the 31 Geo. 3. c. 25. By section 2. of that act certain duties are to be charged upon every piece of vellum or parchment, or sheet or piece of paper, upon which bills of exchange, promissory notes, &c., are ingrossed, written or printed. And by section 4. it is enacted that nothing in the act contained shall extend "to charge any draft or order for the payment of money to the bearers on demand, bearing date on or before the day on which the same shall be issued, and at the place at which the same shall be drawn and issued, and drawn upon any banker or bankers, residing and transacting the business of a banker or bankers, within ten miles of the place where such draft or order shall be actually drawn and issued." But here there is no exemption in favour of a post-dated cheque. By section 19. all vellum, parchment and paper liable to stamp-duty are to be stamped before they are ingrossed, printed, or written upon, and no bills, &c. are to be given in evidence unless they are stamped as required. Therefore, it appears that when a document ought to be stamped, but is not stamped, it is not admissible in evidence. Now, the cheque in question falls within the terms of section 2, and the question is, whether it is also within the exemption clause in section 4. The next statute is the 55 Geo. 3. c. 184, which, by section 8, continues all the powers of the former act, 31 Geo. 3. c. 25. The 13th section of 55 Geo. 3. c. 184. subjects to the payment of a penalty of 100*l.* any person who

makes or issues, or causes to be made and issued, "any bill, draft or order for the payment of money to the bearer on demand upon any banker or bankers, or any person or persons acting as a banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued unless it shall be duly stamped as a bill of exchange, according to the act." Under this section the cheque in question is void, and could not be pleaded or produced in evidence.

[MELLOR, J.—Yes; but even if that section should have the effect of making it void in the hands of the maker, the question still remains whether it is so when the bill is in the hands of an innocent holder. CROMPTON, J.—Can it be said section 13. makes the bill void when it is in the hands of a person who cannot know anything about its being post-dated.]

It is submitted that it is void. Then the 16 & 17 Vict. c. 59, by section 2, continues the duties chargeable under the powers, provisions, clauses, regulations, directions, allowances and exemptions, fines, forfeitures, pains and penalties imposed by former acts, and then, by section 3, imposes upon drafts a stamp of one penny; but the question of exemption from stamp-duty still depends upon the old exemption appearing in section 4. of 31 Geo. 3. c. 25. The next statute is the 21 & 22 Vict. c. 20, which continues the provisions and penalties under former acts, and by section 1. enacts that drafts or orders for the payment of any sum to the bearer on demand, being payable to any banker, &c., shall be chargeable with the stamp-duty of one penny. It is submitted that this cheque was properly objected to, and that it was not admissible in evidence: firstly, because it was not stamped as a bill of exchange, as it ought to have been; and next, because it is void by the 13th section of 55 Geo. 3. c. 184.

[*Horace Lloyd*, in support of the rule, admitted that the objection was purely one of want of stamp, and was properly taken.]

The question has been before the different Courts several times. In *Dunsford v. Curlewis* (3) Hill, J. refused to allow a post-dated cheque to be received in evi-

dence. In *Oliver v. Mortimer* (4) the point was again raised, but not determined. In *Key v. Matthias* (5) Bramwell, B. admitted such a cheque in evidence. Then these cases were cited in *Whistler v. Forster* (6), and the decision in that case is not against the proposition now contended for, inasmuch as it was said that the 55 Geo. 3. c. 184. s. 13. and 21 & 22 Vict. c. 20. s. 1. applied only to drafts payable to bearer, which are made void by being post-dated—see the judgment of Willes, J.,—and not to drafts payable to order. The decision, therefore, is so far in favour of the defendant, and there was an early case of *Allen v. Keeves* (7), in which it was said, by Lord Kenyon, C.J., to be too clear for argument that a draft on a banker payable to bearer, and post-dated, could not be admitted in evidence. So also in *Whitwell v. Bennett* (8). *Williams v. Jarrett* (9) was cited at the trial of this cause, and will be relied on now; but it is submitted that it does not apply: it was decided on the 12th section of the 55 Geo. 3. c. 184, while the section upon which the defendant here relies is the 13th, which has the effect of making it void—see *Serle v. Norton* (10), where the Court held that a post-dated cheque was altogether void. Next, the recent act, 21 & 22 Vict. c. 20, has no operation so as to make the cheque admissible.—They also referred to *Peacock v. Murrell* (11), and to *Upstone v. Marchant* (12).

Horace Lloyd, in support of the rule.—Before the statute 21 & 22 Vict. c. 20. an unstamped instrument, purporting to be a cheque on a banker, but post-dated, could not be read in evidence; but on the face of it this document appears to be a properly stamped cheque, and is admissible. In *Dunsford v. Ourlewis* (3) the point was not raised. In *Oliver v. Mortimer* (4) the count upon the cheques was abandoned, and the nonsuit was on the common counts; and *Key v. Matthias* (5) is in favour of

the plaintiff if the cheque had been payable to bearer. The decision in *Whistler v. Forster* (6), if against the plaintiff at all, is only an *obiter dictum*. The real questions upon the cheque being tendered in evidence were, What does it purport to be? and Is it properly stamped according to that purport? The penalty in section 13. of the 55 Geo. 3. c. 184. was intended to be a security against the perpetration of frauds, but can never have been intended to make a cheque void when in the hands of an innocent holder. But the decision in *Williams v. Jarrett* (9), confirmed by *Whistler v. Forster* (6), expressly decides this case, because it shews that the Court must look at what the document purports on its face to be. In the latter of the two cases, Willes, J. said, “Now, in the case of bills of exchange, it has been held in *Williams v. Jarrett* (9), and other cases, that the Court can only look to the date appearing on the face of the instrument. That, no doubt, was the key to my Brother Bramwell’s ruling in *Key v. Matthias* (5).” Upon the face of the cheque in question, everything appears to have been in accordance with the terms of the statute, and it was stamped according to its purport.

COCKBURN, C.J.—I am of opinion that this rule should be made absolute. I quite concur in thinking that *Williams v. Jarrett* (9) and *Whistler v. Forster* (6) are expressly in point. If it was necessary to state my opinion whether the legislature intended by the 31 Geo. 3. c. 25. and the 55 Geo. 3. c. 184. to make void all instruments which were post-dated the moment it was shewn that the apparent date was not contemporaneous with the date on which they were issued, I should be inclined to say that it was so intended, and I am by no means satisfied with the reasons given for the decisions I have referred to, but I consider that they are binding upon us; they have long been acquiesced in, and I bow to their weight, as we are not to sit in error upon them. The rule must, therefore, be absolute; and I am not sorry that it must be so, for the defence set up was founded on gross injustice and fraud.

CROMPTON, J.—I quite agree that we

(4) 2 Fost. & Fin. 127.

(5) 3 Ibid. 279.

(6) 14 Com. B. Rep. N.S. 248; s.c. 32 Law J. Rep. (N.S.) C.P. 161.

(7) 1 East, 435.

(8) 3 Bos. & P. 559.

(9) 5 B. & Ad. 32.

(10) 9 Moo. & W. 309; s.c. 11 Law J. Rep. (N.S.) Exch. 212.

(11) 2 Stark. 558.

(12) 2 B. & C. 10.

are bound by *Williams v. Jarrett* (9), which was approved of in *Whistler v. Forster* (6), and was decided on the ground insisted on by the plaintiff's counsel. Those cases establish the principle that in construing the early statutes on the subject we ought to look to the purport of the instrument. If the matter was new I am not convinced that we should arrive at the same conclusion as the Courts did in those cases; but it seems clear that we must now look to what the instrument purports to be on the face of it.

BLACKBURN, J.—I think that *Williams v. Jarrett* (9) has established that the objection can only be taken when the instrument does not bear the stamp which, according to its purport, it ought to bear.

SHEE, J. concurred.

Rule absolute.

1865.
June 15. }

In re PYKE.

Attorney and Solicitor—Re-admission.

An attorney having been struck off the Roll, in order to be called to the bar, was afterwards disbarred for professional misconduct. After the lapse of twenty years, he applied to be re-admitted an attorney. It appeared that since his disbarral he had lived a very secluded life; but he had filed affidavits two months before the application, stating every place at which he had lived, and no affidavits were filed impeaching his character. The Court dispensed with the affidavits usually required of professional and other persons as to his good conduct and character in the interval, and re-admitted him without a re-examination.

Stammers now renewed his application on behalf of Henry Hugh Pyke to be re-admitted an attorney (1).

In addition to the facts disclosed on the former occasion, the applicant filed an affidavit stating that he had lived a very secluded life with his family since he was disbarred, and that, consequently, he was unable to bring the affidavits or testimonials required by the Court as to his character and conduct in the interval.

(1) See *ante*, p. 121.

But he mentioned in his affidavit every place, with the dates, at which he had been resident, and this affidavit was filed two months before the present application.

Garth, on behalf of the Law Society (no affidavits being filed in opposition), left it to the Court whether there was sufficient shewn to dispense with the affidavits of good conduct generally required by the Court; and also submitted that if the Court decided to re-admit the applicant, he ought to pass a fresh examination before he could be re-admitted; and he cited the case of a *Mr. Sewell*, who had been struck off the Roll ten years before, in order to be called to the bar; and Mellor, J. refused to order his re-admission without he underwent a fresh examination, although *Mr. Sewell* in the mean time had been practising as a barrister, and stated, as *Mr. Pyke* did in the present case, that he had been keeping up his professional knowledge by reading legal works.

COCKBURN, C.J.—I think we may accede to this application. We were certainly desirous of satisfying ourselves that *Mr. Pyke*, during the time he has been excluded from professional practice, has conducted himself with perfect propriety in any business that he had been carrying on. We felt it to be due to the branch of the profession to which *Mr. Pyke* sought re-admittance, that satisfactory evidence of that should be given; because we were extremely anxious to give effect to that which was present to our minds, that the same character of honour which belongs to one branch of the profession should belong also to the other, and that we ought to be as watchful, in order to protect its honour and credit, over the branch of the profession to which *Mr. Pyke* seeks re-admittance, as over that branch to which we and the Bar belong. But we cannot expect impossibilities; and if *Mr. Pyke*, during the twenty years that he has been excluded from the profession, has not been brought into relations of business with persons to whom he can apply for testimonials as to his conduct, I do not think that impossibility ought to stand in the way of his re-admittance, if we think under all the circumstances he has done enough to atone for any professional

misconduct for which in earlier life he was removed; and I think we may safely say that Mr. Pyke has been excluded long enough, reference being had to the matter which was the cause of his exclusion. I think we may accede to this application, and allow Mr. Pyke to be re-admitted an attorney.

BLACKBURN, J. and SHER, J. concurred.

Order accordingly.

1865. } WILLIAMS v. REYNOLDS AND
June 17.* } ANOTHER.

Contract of Sale—Measure of Damages for Non-Delivery—Profit on Re-Sale.

On a contract to sell cotton of a certain quality at a certain price, to be delivered at a future time, the measure of damages for non-delivery is the difference between the contract price and the market price at the time limited for the delivery; and the buyer cannot recover for the loss of profit which he would have made by carrying out a re-sale at a higher price made in the interval between the contract and the time for delivery.

Declaration, that it was agreed between the plaintiff and defendants, that the defendants should sell and deliver to the plaintiff, and that the plaintiff should buy of the defendants, about 500 piculs of China cotton, at the price of 16½d. per lb., to be delivered in the month of August 1864, guaranteed fair; that the defendants delivered and the plaintiff accepted 181 piculs, but although all conditions had been performed, &c., and the plaintiff was ready and willing to receive, yet the defendants did not, in the said month of August or at any time, deliver to the plaintiff the residue of the cotton, whereby the plaintiff was incapacitated from performing a sub-contract for the sale of the cotton at a higher price than 16½d., and the plaintiff lost the profit he would have received for the performance of the said sub-contract.

Pleas—First, that it was not agreed as alleged; secondly, that the plaintiff was not ready and willing to accept the residue as

alleged; thirdly, that the defendants did deliver the residue in August; fourthly, that the defendants were prevented from delivering by the acts of the plaintiff.

Issues joined thereon.

At the trial, before Shee, J., at the Liverpool Spring Assizes, it appeared that the plaintiff and defendants were Liverpool cotton brokers. On the 1st of April 1864 the plaintiff and defendants contracted by bought and sold notes for the purchase by the plaintiff of the defendants, of "about 500 piculs China cotton, @ 16½d. per lb., to be delivered in August this year, guaranteed fair." And on the 25th of May 1864 the plaintiff contracted to sell to Messrs. Mayall & Anderson "about 500 piculs China cotton, @ 19½d. per lb., guaranteed fair, August delivery." The defendants delivered about 181 piculs before the end of August, which were handed over by the plaintiff to Mayall & Anderson; but the defendants did not deliver any more cotton by the end of August. On the 1st of September the market price of cotton had again fallen, and the price of "fair China cotton" was then 18½d. per lb. It was admitted that it was the universal custom at Liverpool in contracts like the present, for "forward delivery," for the purchaser to re-sell as in the present case. A verdict was taken for the plaintiff for 515*l.* 19*s.* as damages on account of the residue not delivered which included the loss of profits which the plaintiff would have realized on his re-sale; with leave to the defendants to move to reduce the verdict to 257*l.* 19*s.* 6*d.*, if the Court should be of opinion that the measure of damages was only the difference between the contract price and the market price on the last day for delivery, when the breach of contract occurred.

A rule *nisi* having been obtained accordingly,—

R. G. Williams shewed cause.—He contended that as it was well known that on such contracts, the contract was, as it were, sure to be transferred by a sub-sale, the defendants were liable to any loss of profit which might have been made by the plaintiff on a re-sale; for which a contract had been made, subject only to the condition that the re-sale had been made at the actual market price at the time. The following cases were re-

* At the Sittings after Term.

ferred to in the course of his argument—*Borries v. Hutchinson* (1), *Gee v. the Lancashire and Yorkshire Railway Company* (2), *Wilson v. the Lancashire and Yorkshire Railway Company* (3), *Randall v. Raper* (4), *Smeed v. Foord* (5) and *Dunlop v. Higgins* (6).

Quain, in support of the rule, was not called upon to argue.

CROMPTON, J.—The rule must be made absolute to reduce the damages. The extra damages which the plaintiff claims are not recoverable either on authority or principle. The contract is to deliver cotton within a certain time; between the making of the contract and the limit of the time for the delivery the price rises, so that the buyer is in a position to make an advantageous re-sale; afterwards the price again falls, and at the time the contract is broken by the non-delivery the real or market price is higher than the contract price, but lower than that at which the plaintiff agreed to sell. What is the measure of damages? In general, the difference between the contract price and the real or market price at the time of breach. But the plaintiff contends that the criterion of the market price does not apply; but he says the loss of his profits by the re-sale is the measure of damages. I do not agree to this proposition. The plaintiff maintains that he is entitled to special damage, "because," he says, "having made a contract of sale at a higher price, by your (the defendants') default I have lost this bargain, and I have a right to pin you to that price." But this is not within the rule that measures the damages by the consequences naturally flowing from the breach, or such as are within the contemplation of the parties at the time of the contract. Mr. Mayne, in his book on Damages, p. 15,

citing *Hadley v. Baxendale* (7), says rightly, "The first, and in fact the only inquiry is, whether the damage complained of is the natural and reasonable result of the defendant's act; it will assume that character if it can be shewn to be such a consequence as in the ordinary course of things would flow from the act, or in cases of contract, if it appears to have been contemplated by both parties." The extra damage here sought to be recovered does not come within either branch of the rule; and all the authorities are against it. *Dunlop v. Higgins* (6) was a case under the Scotch law, and all that Lord Cottenham says amounts to no more than that it was not a case to reduce the damages to the English rule. In *Borries v. Hutchinson* (1) the Court must be taken to have considered the sub-contract as contemporaneous and known to the defendant at the time of his contract. In *Mayne on Damages*, p. 18, after noticing *Dunlop v. Higgins* (6) as no authority in England, Mr. Mayne observes, "It is, however, remarkable for a vigorous onslaught upon the English law by so formidable an opponent as Lord Cottenham," and after noticing Lord Cottenham's dicta, he then makes this very good remark: "The question is, not what profit the plaintiff might have made, but what profit he professed to be purchasing. Not what damage he actually suffered, but what the other contemplated and undertook to pay for. It is quite clear that loss of profits by a re-sale can never be contemplated, unless the re-sale has taken place at the time and is communicated to the other party. The reason is that such a profit is utterly incapable of valuation. It may depend upon change of weather, a scientific discovery, an outbreak of war, a workmen's strike. It will depend upon the energy and sagacity of the person who purchases the goods, and the solvency of the person to whom he sells them again. In short, if the Scotch rule were to be carried out to its fair extent, no one could contract to sell goods which were not actually in his possession without charging an additional premium commensurate to the profits which the vendee might pos-

(1) *Post*, C.P. 169; s.c. 18 Com. B. Rep. N.S. 445.

(2) 6 H. & N. 211; s.c. 30 Law J. Rep. (N.S.) Exch. 11.

(3) 9 Com. B. Rep. N.S. 632; s.c. 30 Law J. Rep. (N.S.) C.P. 232.

(4) E. B. & B. 84; s.c. 27 Law J. Rep. (N.S.) Q.B. 266.

(5) 1 El. & El. 602; s.c. 28 Law J. Rep. (N.S.) Q.B. 178.

(6) 1 H.L. Cas. 381.

(7) 9 Exch. Rep. 341; s.c. 23 Law J. Rep. (N.S.) Exch. 179.

sibly make, and for which he himself would have to pay, if prevented from carrying out his agreement." There would be great difficulty in saying, where a contract is made for delivery at a particular date, at a time when the price is constantly fluctuating, that the seller contemplated as part of his liability, in case of default, the loss of any more advantageous contract that the buyer might have the opportunity of making. This is just like the case of the purchase of stock for the account, and it never was thought of looking at anything but the price of stock at the time of delivery, the loss to the buyer being the loss of the stock; any other loss would not be "the natural consequence" of the breach of contract (which is, perhaps, a better phrase than being "too remote"), and not in the contemplation of the parties. The seller contracts on a speculation of what the price may be at the time of delivery, and not with reference to five or six bargains which the buyer may make in the mean time, about which he knows nothing; and this is very different from the case where parties contract for the supply of materials to carry out an actual contract already made and known to both of them. The rule must be absolute to reduce the damages to 267*l.* 19*s.* 6*d.*, the difference between the contract price and the market price at the date for delivery.

BLACKBURN, J.—I am of the same opinion. On the 1st of April 1864 the plaintiff and the defendants entered into a contract by which the defendants agreed to sell 500 piculs of China cotton at 16½*d.* per lb., to be delivered in August. They had therefore all the month of August to supply a certain quantity of cotton, answering the description given, at a certain price; and at the end of August they had not delivered the whole of the cotton. On the above facts the measure of damages would have been the difference between the contract price of 16½*d.* and the market price at the end of August, the latest time for delivery, which was 18½*d.* The question is, whether the further facts in the case make any difference. This was a contract in the ordinary course for the sale, not of any specific cotton, but of cotton of a particular description bought on speculation. It was admitted that such contracts were to a

certain extent the subject of re-sale, that is, that in the ordinary course the buyer does not re-sell or transfer the contract, like a bill of lading, but he contracts with some other person to sell a similar quantity of goods of a like description to those he has bought, relying on his purchase as the source by which to carry out his sub-contract. There are, no doubt, cases in which by the course of business, if one party makes a contract binding himself to deliver goods, he makes the contract to deliver to others whom the purchaser may name, who rely only on the original seller's liability; but that is not the present case. The additional facts here are, that on the 25th of May 1864 the plaintiff contracted to supply to Messrs. Mayall & Anderson 500 piculs of China cotton at 19½*d.*, to be delivered in August. When the end of August came, if the defendants had fulfilled their contract, the plaintiff would have handed over the cotton to his purchasers and would have gained a considerable profit by the transaction. It was argued that because this purchase was made at Liverpool, and all there know that cotton is bought on speculation to sell again, and that the purchaser as a matter of course would enter into a fresh contract relying on the performance by the defendants of their contract to enable the plaintiff to carry out his, and that the non-delivery of the cotton by the defendants would entail the breach by the plaintiff of his sub-contract, the loss of the profits by the re-sale would be a natural consequence of the defendants' breach of contract. But no one case cited, or which could have been cited, bears out this proposition; and I cannot see that this loss of profit was the natural consequence of the defendants' breach of contract. It was not at all a necessary consequence, not even a natural one, that the purchaser should rely on the seller's contract alone to fulfil his own contract. If he had reason to doubt the seller's solvency, it would have been very imprudent of him to do so. The plaintiff might have gone into the market and supplied the cotton for his sub-contract from thence. In point of fact the plaintiff did rely on the defendants, but that is no reason for saying that therefore the defendants are liable for all the consequent loss. Many

analogous cases may be put. One constantly sees in the advertising columns of the *Times* such advertisements as that "in consequence of failure of remittances from abroad, Messrs. A. are obliged to stop payment." Could it be maintained for a moment that the merchant here could recover as damages from his foreign correspondent all the loss he has suffered by being obliged to suspend payment? There can be no doubt that all he could recover would be the amount due, with interest; and the loss of credit consequent on the failure of the remittances could form no ground of special damage. So in the case of bills of lading, by which goods are made deliverable to the consignee or assigns for the express purpose of making them transferable on delivery, so that they may be used for the purpose of fresh contracts, if the shipowner fails to deliver, it has never been suggested to include in the damages to be recovered the increased value at which the goods had been sold during the interval of carriage. So again on the Stock Exchange, in the sale of shares or stock for the account, the contract is made for the express purpose that the purchasers may pass the contract from hand to hand, yet it has never been contemplated that the original seller would be liable for the highest price obtained between the day of contract and the day of account; yet if the argument for the plaintiff is good, it would follow that he would be so liable. We must, therefore, look to the consequences that would follow were we to allow this present claim; and not only is there no authority in any analogous case, but the inconveniences would follow which are pointed out in the passage read by my Brother Crompton from *Mayne on Damages*, and against which the writer gives very good reasons. I, therefore, am clearly of opinion that the rule must be absolute to reduce the damages to the smaller sum.

SHEE, J.—I am of the same opinion. I think we ought to adhere to the rule laid down in *Hadley v. Baxendale* (7), which meets this case exactly. In that case, it is laid down that the damages are to be such as naturally—that is, in the ordinary course of things—arise from the breach of duty complained of, or such as may be fairly considered to have been in the contempla-

tion of the parties at the time they entered into the contract. Take the first proposition: can the loss of the profits on the sub-contract be said to arise naturally and in the ordinary course of things from the breach? Not unless, in the ordinary course of things, the plaintiff could have sold at a profit, on the last day of August. But it cannot be that the loss of any profit he might make in the interval is the natural consequence of the breach; for whether a profit may be made depends on circumstances altogether out of the ordinary course of things; this loss of profit, therefore, cannot be the natural result of the defendants' breach of contract. Again, can it be said to have been fairly and reasonably in the contemplation of the parties at the time of the contract? Both parties had communicated all they knew; but they could not have formed any opinion, and could not foresee whether or not the purchaser would be able to realize a profit in the mean time. The extra damages, therefore, do not fall within either alternative of the rule, and the verdict must be entered accordingly.

Rule absolute. (8)

1865. } THE QUEEN v. GUARDIANS OF
June 3. } STOURBRIDGE UNION.

Pauper Lunatic—Irremovability—Constructive Residence.

A pauper, having occupied lodgings in a parish, left the parish intending to return as soon as his trade became better; he did not retain his lodgings, but left some old clothes there in the hands of the landlord, and in his absence his lodgings were not occupied, and he could have had them at any time on his return. After three months' absence, he returned:—Held, that the pauper was not constructively resident in the parish during the three months, and that the absence formed a break in the residence.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 179.]

(8) The law of France as to damages in such a case seems to be precisely that laid down in the English Courts: see *Pothier, Traité des Obligations*, part 1, ch. 2, art. 3, § 161.

1865. }
June 17.* } RICHARDSON v. LOCKLIN.

Venue — Local Action — Nuisance —
Pleading.

An action for damage arising from a public nuisance on real property, as on a public highway, is a local action; and if there is no local description in the body of the declaration, the county in the margin must be taken to be repeated in the declaration, and it is a material allegation; and on a plea traversing the existence of the highway, proof that the highway is in another county is a fatal variance and ground of nonsuit.

Declaration.—Surrey, to wit. The plaintiff complains, &c. For that the defendant wrongfully altered and diverted a certain footway through a certain piece of land over which the public had a right of way, and that the defendant negligently and improperly made the alteration and diversion by leaving a tree in the middle of the pathway so altered and diverted, and also by wholly or partly filling up a certain ditch on one side of the pathway, so altered and diverted, by placing in the ditch a quantity of faggots, and laying thereon certain earth, which faggots and earth being so negligently and improperly laid down became unsound, unsafe and unfit for use as a public footway, whereby the plaintiff whilst lawfully passing along the footway was tripped up by reason of the faggots not being properly put down, and fell and was injured, &c.

Plea.—First, not guilty; secondly, that the plaintiff was not lawfully passing along the footway; thirdly, that the defendant did what is complained of by the plaintiff's licence. Issue thereon.

At the trial, before Bramwell, B., at the Surrey Spring Assizes, 1865, the plaintiff was nonsuited on the opening of counsel, on the ground that the cause of action was local, and that Loughton, the place in which the alleged footway was situate, was in the county of Essex.

A rule nisi having been obtained to set the nonsuit aside, and for a new trial, on the ground that the cause of action was not local, and that the objection was not open to the defendant on the record as it stood; and that the objection that the action was

* At the Sittings after Term.

improperly brought, and the venue laid in Surrey was not ground of nonsuit.

Pearce shewed cause.—The action is for a nuisance to a highway which is clearly local.

[CROMPTON, J.—There can be no doubt of that: the question is, whether the fact of the road being in another county was ground of nonsuit.]

It would appear to be so. If the objection appear on the record it is ground of demurrer—*The Mayor of Berwick v. Ewart* (1); but if not, it is ground of nonsuit—1 *Chitty on Pleading*, 290, 7th edit., and the cases there cited.

[CROMPTON, J.—*Boyes v. Hewetson* (2) is an authority the other way.]

Bullen and Leake's Precedents of Pleading, p. 2, 2nd ed., cites the Pleading Rule 4, Trin. Term, 1853, which is the same as Rule 8, Hil. Term, 4 Will. 4. "The name of a county shall in all cases be stated in the margin of the declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading. Provided, that in cases where local description is now required, such local description shall be given." And then proceeds: "The venue, or the county named in the margin of the declaration, is the place where all the facts alleged in the declaration are supposed to have happened. Where the place of the happening of a fact is a material allegation, the venue so stated in the margin supplies that allegation in the absence of any other statement"—citing *Cook v. Swift* (3) and *Boydell v. Harkness* (4).

Yeatman, in support of the rule, contended that the action was not local but transitory, being not *in rem*, but *in personam*.

[BLACKBURN, J.—This is an action for a nuisance caused on real property; such an action is clearly local.]

If the Court are of opinion that the cause of action is local, there can be little doubt that the objection is ground of nonsuit.

CROMPTON, J.—There is clearly nothing in the first point; and as to the other, on consideration I think the plaintiff's counsel

(1) 2 W. Black. 1068.

(2) 2 Bing. N.C. 575.

(3) 14 Mee. & W. 235; s.c. 14 Law J. Rep. (N.S.) Exch. 361.

(4) 3 Com. B. Rep. 168; s.c. 15 Law J. Rep. (N.S.) C.P. 233.

is right in declining to argue the question. This is an action founded on a nuisance on real property, and there can be no doubt that such causes of action are always local. Then, was the nonsuit the proper mode of taking advantage of the action being brought in the wrong county? That depends on whether the venue in the margin amounts to an allegation in the declaration that the act complained of took place in Surrey; for, if it does, then the fact of the footway being in Surrey is a material part of the issue on a traverse that there was any such footway. Now, under the 4th Pleading Rule, Trin. Term, 1853, "the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration"; that is, the venue in the margin shall be taken as an averment that the cause of action arose in the county named in the margin. The only question in my mind was, whether there was any exception as to local actions by reason of the proviso in the rule, "that in cases where local description is now required such local description shall be given;" but the cases of *Cook v. Swift* (3) and *Boydell v. Harkness* (4) cited in *Bullen and Leake*, seem to shew that the venue in the margin must be taken to be incorporated in the declaration for this purpose, when it is material that the place in which a fact happened should be stated. And other text writers seem to adopt this view, and, therefore, as we have the authorities and text writers agreeing, I think we ought to follow them. I therefore think that the nonsuit was right.

BLACKBURN, J.—I am of the same opinion. The declaration is very inartificially drawn, but in effect it amounts to saying that the plaintiff was guilty of a public nuisance in obstructing a public footway, and that in consequence the plaintiff suffered damage. Such a cause of action is clearly local. Now, it seems to me that what is said in *Roscoe on Evidence*, p. 487, 10th edit., is quite true: "If the action is local, and it appears in evidence that the premises are not situate within the county, this is not a ground of nonsuit or objection at *Nisi Prius*, unless the plea raises the point of venue, or the effect is to produce a variance." And the question is, whether

on the present pleadings the effect is to raise a variance. Now, if by reason of the venue in the margin the allegation is to be taken as repeated in the declaration that the footway was in Surrey, then that fact is a material part of the issue on a plea that there is no such public footway. In *Bullen and Leake's Pleading* (page 2, 2nd edit.), *Cook v. Swift* (3) and *Boydell v. Harkness* (4) are cited in support of the proposition that "when the place of the happening of a fact is a material allegation, the venue stated in the margin supplies that allegation in the absence of any other statement," and those cases fairly bear out that proposition. We therefore must take it that in the present declaration there is what amounts to an allegation that the footway was in Surrey, and that being a material averment, a variance is raised by the plea between the allegation and the proof.

CROMPTON, J. added,—The declaration amounts to an allegation that there was a public footway in Surrey; and the plea, that there was no footway in Surrey.

Rule discharged (5).

[IN THE EXCHEQUER CHAMBER.]
(Appeal from the Court of Queen's Bench.)

1865. }
June 16. } THACKERAY v. WOOD.*

Vendor and Purchaser—Qualified Covenant for Title.

In a deed of conveyance in fee from the defendant to the plaintiff of a house and premises then in the occupation of the defendant, "together with all lights, liberties, privileges, easements and appurtenances to the premises belonging or in anywise appertaining or usually held and enjoyed therewith, or deemed or taken as part, parcel or member thereof," the defendant covenanted "that notwithstanding any act, deed, matter or thing whatsoever made, done or permitted by him, or any person claiming through him, he, the defendant, hath now good title to convey the messuage and premises with the appurtenances." Some years before

(5) The Court seem to have assumed that there was a traverse of the right of way; but the plea was as above set out.

* Decided in the Sittings after Trinity Term, coram Erle, C.J., Martin, B., Willes, J., Channell, B., Keating, J., Pigott, B. and Smith, J.

this conveyance the defendant, being then owner in fee and occupier of the same house, &c., which was then in the same state and condition, entered into a contract in writing with the owners of the adjoining premises that the cornice and spouts and three windows of the defendant's house overlooking the adjoining premises were encroachments, and agreed to pay an annual sum of 5s. so long as he was permitted to use the said cornice, spouts and windows. The defendant had never acquired any easement in respect of the cornice, spouts or windows by twenty years' user:—Held (affirming the judgment of the Court of Queen's Bench), that there was no breach of covenant for title by the defendant, for that he only conveyed the premises so far as he was possessed or could convey them, and that his qualified covenant for title limited his covenant to that which he actually had, or but for any act of his would have had, and that he had not and never would have acquired any easement in the windows, &c., inasmuch as the adjoining owners would have interfered to prevent him but for his acknowledgment.

This was an appeal, by the plaintiff, from the judgment of the Court of Queen's Bench, making absolute a rule to enter a verdict for the defendant upon a point reserved at the trial (1).

The action was brought to recover damages for the breach of a covenant contained in a deed of conveyance by the defendant to the plaintiff of a certain house, garden, hereditaments and premises, in the town of Nottingham. The deed conveyed the premises in fee to the plaintiff, "together with all lights, liberties, privileges, easements, profits and appurtenances to the said messuage, garden, hereditaments and premises belonging or in anywise appertaining, or usually held, occupied or enjoyed therewith, or deemed or taken as part, parcel or member thereof;" and the defendant covenanted in the said conveyance, "that notwithstanding any act, deed, matter or thing whatsoever made, done or permitted by him or any other person claiming through him, he, the defendant, then had good right and title to grant and convey the messuage and garden with the appurtenances.

(1) 33 Law J. Rep. (N.S.) Q.B. 275.

At the trial, it was proved that the defendant had entered into an agreement, some years previous to this conveyance, with the owners of a chapel adjoining his house, that a cornice, three windows and two spouts belonging to his house were encroachments on the chapel, and in consideration thereof agreed to pay to the owners of the chapel an annual sum of 5s. There was no evidence of fraud on the part of the defendant. The jury found a verdict for the plaintiff; leave being reserved to the defendant to move to enter the verdict in his favour, and a rule nisi was obtained on the ground that there was no breach of covenant; which rule was made absolute. The case is reported in the 33 Law J. Rep. (N.S.) Q.B. 275.

Hayes, Serj., for the appellant (the plaintiff in the Court below).—The defendant is liable for the breach of his covenant. The Court has only to look at the plain words of the covenant and at the facts as proved at the trial, and it is at once clear that there is a breach of the covenant. The agreement with the owners of the adjoining premises was the act of the defendant himself; but for the agreement the defendant might have acquired an easement by user. At least the cornice, spouts and windows should have been excepted from the conveyance. There are no cases precisely in point. The case of *Browning v. Wright* (2) is a different and rather a converse case. The defendant in this case has made the encroachments himself. This is, in fact, a covenant for quiet enjoyment.

[MARTIN, B.—That means that the party conveying has done nothing to hinder quiet enjoyment. It does not meet the case of an encroachment.]

The words of the conveyance are, "Together with all lights, liberties, privileges, easements and appurtenances." The meaning of the covenant must be that the defendant had a title to what he conveyed; not that he conveyed what had been conveyed to him. *Butler v. Swinerton* (3) may be said to be a charter for a liberal construction of covenants, and it was there held that "acts" mean something done by the party conveying. The construction sought to be put on this covenant would certainly be a very narrow and illiberal construction. He referred to 2 *Sugden's Vendors and Pur-*

(2) 2 Bos. & P. 13.

(3) Cro. Jac. 656.

chasers, 81, 9th edit., *Hobson v. Middleton* (4), *Spencer v. Marriott* (4) and *James v. Plant* (5).

Field (Cave with him), for the respondent (the defendant in the Court below).—There was no breach of covenant. The defendant, the vendor, had no title to the windows, cornice and spouts to convey. The maxim *caveat emptor* is applicable to this case. That maxim applies when a vendor has no title to convey, and the purchaser has then no action for a breach of covenant. This rule was adopted in *Bell v. Holbeck* (6), and in *Cripps v. Reade* (7). This covenant was, in fact, that the defendant had not incumbered. A purchaser says, "Having satisfied me as to your title, now covenant that you have not incumbered." The conveyance does not purport to grant any right in the nature of an easement in respect of the windows, cornice and spouts. It only purports to grant such rights in respect of the windows, cornice and spouts as appertained thereto, or as were usually held and enjoyed therewith. There was no easement appertaining or belonging to the windows, cornice or spouts at the time of the conveyance. The defendant had no power to grant the windows, cornice and spouts, but it was not by reason or in consequence of any act, deed, or thing done or permitted by him. The cases all shew that the vendor is not liable on a covenant of this kind, unless he has been guilty of some act injurious to the title. All he contracts and covenants for is, that he has done no act to incumber—*Stannard v. Forbes* (8), *Woodhouse v. Jenkins* (9) and *Nash v. Ashton* (10).

Hayes, Serj., in reply.—It is said that the vendor never had any title to the cornice, spouts and windows, and that these were not therefore within the covenant; but the covenant cannot admit of so narrow a construction. The agreement to admit the encroachment and pay an annual sum to

the owners of the adjoining premises was an act in derogation of the defendant's title, and amounted, in fact, to an incumbrance.

ERLE, C.J.—We are all of opinion that the judgment of the Court of Queen's Bench was right and ought to be affirmed. There was a conveyance in fee by the defendant to the plaintiff of a house and premises, together with all lights, liberties, privileges, easements, and appurtenances to the premises belonging or in anywise appertaining or usually held and enjoyed therewith; and in the conveyance there was a covenant by the defendant that, notwithstanding any act, deed, matter or thing whatsoever made, done, or permitted by him, or any other person claiming through him, he had then good title to convey the said messuage and premises, with the appurtenances. It appears that some time previous to the sale and conveyance of the house and premises by the defendant, he had pulled down an old house, and had built a new house on the same site, but that in building the new house the defendant had encroached upon the adjoining premises, and had, in fact, extended the cornice of his house into and over the land of the owners of the adjoining premises, and had also carried the waterspouts from his own house into and over the adjoining premises, and had opened three windows into the adjoining premises. Now, it is not disputed, that in respect of the cornice and spouts the defendant had no title, or that he had any right to the light by the windows; and the owner of the adjoining premises had several years previous to the date of the conveyance to the plaintiff, and before the defendant had acquired any title by reason of user, called upon the defendant to acknowledge the encroachment, and the defendant had entered into an agreement with the owner of the adjoining premises to admit the encroachment, and had agreed to pay in respect and for the same an annual payment of 5s.; and it is said that this agreement was an act done by the defendant in derogation of his title to the premises conveyed to the plaintiff, and was therefore a breach of covenant. The plaintiff has, no doubt, been wronged; but there was no fraud proved at the trial, and I am of opinion that the plaintiff has no remedy in an action for

(4) 6 B. & C. 295.

(5) 1 B. & C. 457.

(6) 4 Ad. & E. 749; s.c. 6 Law J. Rep. (N.S.) Exch. 280.

(7) 2 Doug. 654.

(8) 6 Term Rep. 606.

(9) 6 Ad. & E. 572; s.c. 6 Law J. Rep. (N.S.) K.B. 185.

(10) 9 Bing. 430; s.c. 2 Law J. Rep. (N.S.) C.P. 38.

(11) Sir T. Jones, 195.

breach of covenant. The liability of a vendor on a qualified covenant for title of this kind has been laid down in a series of cases, and I can see no reason for overruling those decisions. On a sale of real property it is for the purchaser to satisfy himself whether the vendor has a good title or not. The vendor then makes a conveyance, and usually covenants that he has by no act of his done anything to derogate from his title. It is clear that on such a covenant a vendor would not be liable even if he never had any title to the property conveyed whatever, and in this case there was nothing in the agreement which the defendant entered into with the owners of the adjoining premises to derogate from the defendant's title, or to render it less good than when he first came into possession. I may add that I concur in the reasons given for the judgment in the Court below.

MARTIN, B.—I am of the same opinion. I agree with the judgment of my Lord and that of my Brother Mellor delivered in the Court below. I think the reasons given for my Brother Mellor's judgment well founded. By the terms of the agreement entered into between the defendant and the trustees of the chapel, it is clear that the trustees may put an end to the agreement at any time. The defendant's only title to the cornice, spouts and lights was by virtue of this agreement, which, in fact, is no title at all. It appears to me that this is a case in which the maxim *caveat emptor* applies, because the jury found distinctly that there was no fraud on the part of the vendor. The purchaser therefore has no redress. This maxim *caveat emptor*, no doubt, in some cases, may operate harshly; but the principle works well, and in putting a stop to litigation is on the whole beneficial. The cases cited on behalf of the defendant are conclusive as to the rule of law on this subject. It has been the practice of conveyancers to insert certain covenants in conveyances for the protection of purchasers, and these covenants have been inserted for centuries, viz. an absolute covenant for title, a covenant for quiet enjoyment, and a qualified covenant for title that the vendor has done no act to incumber. Now, the first two of these are not in this conveyance; if they had been, perhaps the defendant would have been liable; but this qualified covenant is quite distinct from the

absolute covenant. The words of this covenant are to be construed literally according to their true meaning. The covenant in this conveyance in effect only provides that the defendant, by himself, or by any person or persons claiming through, under or in trust for him, has done no act, deed, matter or thing to injure or impair or derogate from his title. I am clearly of opinion that there has been no breach of this covenant by the defendant. The act of the defendant in entering into the agreement did not affect his title to the property either one way or the other. However hard the result may be on the purchaser, we should do very wrong to strain the law in his favour. I am therefore of opinion that the judgment of the Court below ought to be affirmed.

The other JUDGES concurred.

Judgment affirmed.

1865.

July 4.

} MAINPRICE v. WESTLEY.

Auction—Peremptory Sale—Liability of Auctioneer—Principal and Agent.

An auctioneer was instructed by the owner of premises to offer them for peremptory sale, by public auction, at a named day and place. He issued handbills, in which it was represented that the premises would be offered for sale by himself in manner above stated. It was also represented in the handbills, that the premises would be offered for sale by direction of the mortgagee, but not disclosing his name; and there was a notice at the bottom of the handbills, "For further particulars apply to Mr. Hustwick, solicitor, or the auctioneer." Hustwick was the solicitor of the vendor. The plaintiff attended the auction, and made the highest bid, except that Hustwick bid a larger sum and bought in the premises; whereupon the plaintiff brought an action against the auctioneer:—Held, that upon these facts there was no contract upon which the auctioneer was personally liable.

Declaration against the defendant, an auctioneer. Averments, that he was retained to sell a house and shop by public auction; that he published and circulated handbills, in which it was stated and represented by him that he would offer them for peremptory sale by public auction on a day and at a place named; that the plaintiff, confiding in

these statements and representations, attended at the time and place; that the house and shop were offered according to the representations and statements; that the plaintiff bid a price, which was the highest bid except a sum which, to the knowledge of the defendant, was bidden by an agent on behalf of the vendor, contrary to the representation that the sale was peremptory; yet the defendant did not nor would sell the house and shop peremptorily or accept the offer of the plaintiff, or declare the plaintiff the highest bidder and purchaser.

Pleas—First, not guilty; secondly, a denial that the defendant caused the handbills to be published and circulated as alleged.

At the trial it appeared that the defendant had circulated handbills, in which it was stated,—that the premises, on the day in question, “will be offered for peremptory sale by auction by Mr. J. Westley, by direction of the mortgagee, with a power of sale, subject to such conditions as will be then declared.” At the bottom of the bills was a statement, in large capitals: “For further particulars apply to Mr. Hustwick, solicitor, or the auctioneer.” Mr. Hustwick was the solicitor of the vendor, and the representations were made by his authority, and he bought in the premises at the auction by bidding over the plaintiff.

A verdict was entered for the plaintiff, with leave to move to set that verdict aside and enter one for the defendant instead thereof.

A rule *nisi* was accordingly moved for and granted, against which—

Lush, Douglas Brown and Markby shewed cause (April 24).—There are two points to be considered: First, whether the declaration is proved; secondly, whether there is anything in the Statute of Frauds which can disentitle the plaintiff from recovering in the action. As to the first point, everything which is alleged and put in issue was proved. It was proved that the defendant entered into a contract that the house and shop should be offered for peremptory sale. At the trial there was not any contest as to the meaning of peremptory sale, and it must be taken that the property was to be sold without reserve, and that the highest bidder had a right to have it knocked down to him.

[BLACKBURN, J.—Does the defendant do more than put himself forward as the agent of some one else?]

Yes; he puts himself forward as a known

person acting for another whose name he does not disclose. It is just the same as where a reward is offered for the recovery of lost property. *Warlow v. Harrison* (1) is an authority in favour of the plaintiff. That case was decided in the first instance in this Court, the judgment being that a nonsuit should be entered, and that judgment was affirmed in the Exchequer Chamber, though for slightly different reasons. Judgment was delivered by Martin, B. for himself, Byles, J. and Watson, B.; but Willes, J. added, “My Brother Bramwell and myself do not dissent from the judgment which has been pronounced. But we prefer to rest our decision, as to the amendment, upon the ground that the defendant undertook to have, and yet there was evidence that he had not, authority to sell without reserve.” The whole Court considered that the auctioneer had made a contract, and it is submitted that the defendant has done so in this case.

[COCKBURN, C.J.—It seems hard to make him liable; his authority may be revoked at any moment.]

The persons who go to an auction have no one to look to except the auctioneer, and if he does not disclose the name of his principal, he ought to be held to be liable upon the contract made by him. In the course of the argument in *Warlow v. Harrison* (1), Martin, B. says, “Does the auctioneer do more than ‘say that the owner has directed him to sell without reserve’?” But he afterwards says, in delivering the considered judgment of the Court, “upon the facts of the case, it seems to us that the plaintiff is entitled to recover.” Now here the handbill is published by the auctioneer; he assumes the authority of the principal: suppose, after issuing the bills, he was to refuse to hold the auction, or to knock down the articles sold to the highest bidder, he would be liable to an action. If he has a right to say that his power has been revoked by his principal, no one would think it worth while to attend the sale. In *Hanson v. Roberdeau* (2) Lord Kenyon said, “The defendant, after having agreed to take 50*l.* for the deposit, cannot object that too little was paid. And though, where an auctioneer names his principal, it is not proper that he should be liable to an action, yet it is a very

(1) 1 E. & E. 309; s.c. 28 Law J. Rep. (N.S.) Q. B. 18; 29 Law J. Rep. (N.S.) Q. B. 14.

(2) 1 Peake's Nisi Prius Reports, 120.

different case where the auctioneer sells the commodity without saying on whose behalf he sells it; in such a case the purchaser is entitled to look to him personally for the completion of the contract." In *Story on Agency*, a 267, it is said, "Thus where a contract is made with an auctioneer for the purchase of goods at a public sale, and no disclosure is made of the principal on whose behalf the commodity is sold, the auctioneer will be liable to the purchaser to complete the contract, although, from the nature of public sales, it is plain that he acts as agent only." This is in accordance with the decision in *Warlow v. Harrison* (1); for the intention of the Court is clear, although no judgment was ever really entered, as the parties consented to a *stet processus*, as appears from the case as reported in the *Law Journal Reports*.

O'Malley (May 4), in support of the rule. —The bill of advertisement mentions that the defendant is selling for the mortgagee, and refers to Mr. Hustwick as his solicitor; it shews, therefore, that the defendant was acting for a disclosed principal, and in such a case the contract is, *prima facie*, with the principal, and not with the agent. *Warlow v. Harrison* (1) is no authority against the defendant. The majority of the Judges in the Exchequer Chamber decided against the auctioneer, holding him liable on the ground that no principal was disclosed; but here the principal is disclosed. Lord St. Leonards is express upon the point; in the *Handy Book*, p. 25, 7th edit., he says, "If you state in the particulars, or advertisements, that the estate is to be sold *without reserve*, the sale would be void against a purchaser if any person were employed as a puffer, and actually bid at the sale. But although the owner himself, or an agent for him, bid at a sale, notwithstanding such a condition, and the lot is knocked down to him, the last *bond fide* bidder cannot claim the lot, whatever remedy he may have for a misstatement: *against the auctioneer he has no remedy*." *Manser v. Back* (3) shews that the auctioneer's authority may be revoked at any time before the sale has actually taken place; how then can an action be maintained against him upon a contract which he had no power to make? It must be remembered that no misrepresentation is either alleged or proved.

Cur. adv. vult.

(3) 6 Hare, 443.

The judgment of the Court (4) was now delivered by—

BLACKBURN, J.—The declaration in this case contains averments that the defendant, being an auctioneer, retained to sell by public auction a house and shop, published and circulated handbills in which it was stated and represented by the defendant that he, the defendant, would offer the said message and shop for peremptory sale by public auction, on a day and at a place named; that the plaintiff confiding in these statements and representations, attended at the time and place; and that the message was offered according to the representations and statements, and the plaintiff then bid a price, which was the highest bid except a sum which, to the knowledge of the defendant, was bidden by an agent on behalf of the vendor, contrary to the representation that the sale was peremptory; yet the defendant did not nor would sell the message peremptorily, or accept the offer of the plaintiff, or declare the plaintiff the highest bidder and purchaser. There were pleas, amongst others, of not guilty, and a denial that the defendant caused the handbills to be published and circulated as alleged.

If it had been alleged that any part of this representation was false to the knowledge of the defendant, and that the plaintiff was induced by such deceit to incur expense by going to the place of auction, or the like, the count would have been good, and the plaintiff, on proof of the deceit, would have been entitled to such damages as he might have sustained by reason of expenses or loss of time occasioned by his attendance at the sale, or possibly to merely nominal damages. But intentional deceit is neither alleged, nor was it attempted to be proved; what the plaintiff relied on was, that there was a contract on the part of the defendant that, if the plaintiff was the highest bidder, the premises should be knocked down to him, and if he had proved such a contract, the declaration would probably after verdict be understood as alleging it, or at all events might easily be made to do so by an amendment. But we think that no such contract was proved.

It appeared on the trial that the defendant was an auctioneer, and that he had

(4) Cockburn, C.J., Blackburn, J., Mellor, J. and Shee, J.

circulated handbills, in which it was stated that the premises, on the day in question, would be offered for peremptory sale by auction by Mr. J. Westley, the defendant *by direction of the mortgagee*, with a power of sale, subject to such conditions as will be then declared; and at the bottom of the bill was a statement, in large capitals, "for further particulars apply to Mr. Hustwick, solicitor, or the auctioneer." There is no doubt that this was a representation by the defendant that he intended to put up the premises for peremptory sale; but it is also a statement that he did so by the direction of the mortgagee, and as agent for him, and though the name of that mortgagee is not disclosed on the bill, the name of the solicitor, Mr. Hustwick, is disclosed, and he is referred to as being the party from whom further particulars were to be obtained. These parts of the handbill very materially qualify the representation stated in the declaration, and it appeared that they were true. Hustwick was the solicitor of the vendor, and the representations were made by his authority; and the plaintiff's complaint was that Hustwick bought in the premises. If there was a contract on the part of the defendant that the sale should be peremptory, it was truly enough said that the contract was broken by allowing the property to be bought in.

The plaintiff's counsel, in the argument before us mainly relied on the authority of the case of *Warlow v. Harrison* (1), where, in the Exchequer Chamber, three learned Judges gave their opinion that where an auctioneer advertised a sale without reserve, not disclosing in any way who his principal was, he personally contracted that there should be a sale without reserve. Two other learned Judges did not agree in this view: and it appears that ultimately the Court of Exchequer Chamber pronounced no other judgment than that the pleadings should be amended to enable the parties to raise the question, unless they consented to a *stet processus*, which they did. We do not think, therefore, that we are precluded by this, as a judgment of a Court of error; and if necessary we should be at liberty to consider the question whether, even in a case where the name of a principal is not disclosed by an auctioneer, there is a contract by the latter, such as is now insisted on. The Lord Chief Justice and my Brother Shee

are of opinion that there is not, inasmuch as the character of an auctioneer as agent is unlike that of many other agents, as to whom, so long as the fact of there being a principal is undisclosed, it remains uncertain whether the contracting party is acting as principal or agent; while in the employment and duty of an auctioneer, the character of agent is necessarily implied, and the party bidding at the auction knowingly deals with him as such, and with the knowledge that his authority may be at any moment put an end to by the principal. I myself should pause before deciding upon this ground. I do not, however, wish to express dissent from the view thus expressed; and we are all of opinion that it is unnecessary to decide this point. The three Judges who formed the majority of the Court in *Warlow v. Harrison* (1) base their opinion entirely upon the fact that the vendor was not disclosed—that he was a concealed principal; but in the present case, the passages in the handbill (which are not set out in the declaration) shewed that the defendant was acting for a principal—the mortgagee, who was described, and whose agent Mr. Hustwick, the solicitor, was named. Now, as a general rule, where an agent acts for a named principal, the contract, if any, is, *prima facie*, with the principal, not with the agent, and, accordingly, acting on this principle, the Court of King's Bench, in *Evans v. Evans* (5), decided that where premises were let by auction by the plaintiffs as auctioneers, but at the foot of the written conditions was written, "approved by David Jones," the contract of letting was not with the plaintiffs, the auctioneers, but with David Jones; Patteson, J. saying, "On the document I can see no doubt; if the plaintiffs let for themselves why is David Jones's name added?" We think this an express authority, that if there was any contract in this case it was with Hustwick, not with the defendant.

We are not to be understood as deciding that the plaintiff could not have maintained this action against Hustwick, but merely that he has failed in proving any case against the defendant.

The rule, therefore, must be absolute to enter the verdict for the defendant.

Rule absolute.

1865. }
June 13. } KEMP v. HALLIDAY.

Marine Insurance—Total Loss—General Average.

If a ship is submerged in deep water with cargo on board so that it cannot be got out without raising the ship, the cost of raising is general average, to which the cargo must contribute. In such a case, in order to ascertain whether a ship is a constructive total loss, the sum to be contributed by the cargo as general average must be taken into consideration; and if, after deducting that sum, the remaining cost of raising together with the cost of repairs of the ship is less than her value when repaired, the ship is not a total loss. So held by Blackburn, J.; Shee, J. dissenting.

Declaration on a policy of insurance, dated the 6th of October 1863, effected by the plaintiff on the ship *Chebucto*, from Liverpool to Rio de Janeiro, valued at 1,500*l.*; underwritten by the defendant for 25*l.*

The defendant paid 18*l.* 15*s.* into court.

At the trial, before Mellor, J., at the Sittings in London after Trinity Term, 1864, a verdict was found for the plaintiff, subject to the following

CASE.

1. The *Chebucto*, the vessel insured, belonging to the plaintiff, sailed on the 21st of October 1863 from Liverpool for Rio de Janeiro on the voyage insured, laden with a general cargo.

2. In the due prosecution of her voyage the ship met with heavy gales, and worked, strained and leaked very much, so that it became necessary by reason of the perils of the seas, for the safety and preservation of the cargo, ship and crew, to cut away all forward, and to bear up for and put into Falmouth harbour as a port of refuge, where the vessel with her cargo on board came to anchor on the 12th of November 1863.

3. By reason of the premises a certain general average loss was sustained.

4. On the arrival of the ship at Falmouth the master of the ship applied to Messrs. Broad & Sons, who are ship agents at Falmouth, requesting them to act as agents

for the ship, and Messrs. Broad & Sons agreed so to do.

5. On the recommendation of surveyors employed by the master, the ship was passed inside the breakwater, and was moored to the pier for the purpose of being repaired, and a portion of the cargo was discharged, the heavier portion of the cargo, however, being left in the ship. The repairs were then proceeded with, but were not completed by the 2nd of December 1863.

6. On the 2nd of December, whilst the ship was lying moored to the pier, there blew a hurricane, which caused the ship, with that part of the cargo which had not been discharged, to sink at her moorings, at a place where at low water there was a depth of twenty-two feet and at high water a depth of forty feet.

7. On the same day, namely, the 2nd of December 1863, the plaintiff was informed by a telegram sent to him by the master of the ship that she had sunk in Falmouth harbour; and on the following day a Mr. Amos, a person experienced in the surveying and repairing of ships, arrived at Falmouth with full authority from the plaintiff to investigate the whole matter, and to act for him in all matters concerning the ship as according to the best of his judgment would be best for all concerned. Mr. Amos having examined the position of the ship, and having informed himself of her prior condition, and taking into consideration the probable injuries the ship had sustained, and having formed a judgment of the cost of raising her and of her further repairs, came to the conclusion that it would cost more to raise and repair her than she would be worth when repaired. Accordingly, on the 4th of December he, on the part of the plaintiff, gave notice to Broad & Sons that the plaintiff abandoned the ship, and would not be responsible for and would have nothing to do with raising or repairing her.

8. On the 7th of December a surveyor, Mr. Thomas, by the orders of Messrs. Broad & Sons (which were given on their own responsibility, and not as agents for the plaintiff) commenced raising the ship, and on the 20th of that month he succeeded in raising her with all those goods on board of her which had not been discharged before the aforesaid 2nd of December. She was subsequently moved into dock by the orders

and under the superintendence of the master, who had remained at Falmouth since the arrival of the ship in that harbour, notwithstanding that Mr. Amos on his visit to Falmouth had expressly ordered the captain to have nothing to do with the ship, and at the commencement of this action she was lying at Falmouth safely moored.

9. On the 4th of December the captain, by the instructions of Amos, signed and sent by post a notice of abandonment to Davies & Co. of Liverpool, the brokers who had effected the policy of insurance, and who then held the same, and on the 9th of December Davies & Co. gave due notice of abandonment to the defendant as follows :

"Liverpool, 9th Dec. 1863.

"Messrs. Burn & Airley.

"Gentlemen,—On behalf of owners of the *Chebucto* we beg to give you notice that the vessel is abandoned to you in Falmouth harbour.

"Yours very truly,

"D. W. Davies & Co."

10. The value of the cargo which sank in the ship and which was raised in her was when raised, 1,750*l.*; the value of that previously taken out was 7,000*l.* The amount of the whole freight by the charter-party was 475*l.*, and upon the portion of goods sunk 237*l.* 10*s.*; the whole net freight was 75*l.* The questions that were left to the jury were: whether there was a constructive total loss of the vessel, first, at the time when Mr. Amos gave notice to Broad & Sons that the plaintiff abandoned her, or, secondly, at the time she lay moored after being raised, both of which questions were answered in the affirmative. In putting these questions to the jury no account was taken of any liability on the part of the cargo or freight to contribute in a general average towards the expenses of raising the vessel or towards the general average loss at sea; and it is to be taken as a fact that if such liability for either loss ought to have been taken into calculation and the estimate of the cost of raising and repairing ought to have been reduced by the amount of the general average to be so contributed, then that there was not a constructive total loss.

11. The Court or Court of Appeal were to be at liberty to draw inferences of fact in the same way as a jury would be entitled to do.

The questions for the opinion of the Court were: first, whether the plaintiff is under the above circumstances entitled to recover on the policy against the defendant as for an absolute total loss as distinguished from a constructive total loss.

And if the Court should answer the above question in the negative, then

Secondly, whether it was material in determining the question of constructive total loss to take into account the liability, if any such existed, of the cargo and freight to make a general average contribution towards the expenses of raising the ship or towards the general average loss at sea.

Thirdly, whether the notice of abandonment was given too late.

If the Court should be of opinion that the plaintiff was entitled to retain the verdict, then judgment was to be entered for the plaintiff for the amount of the verdict with costs of suit. If otherwise, there was to be judgment for the defendant with costs of suit.

The case was argued (Easter Term, May 2nd) by *E. James*, for the plaintiff, and

Cohen (*Brett* with him), for the defendant.

Watkin Williams, for the plaintiff, was heard in reply.

The following authorities were referred to—

Phillips on Insurance, §§ 1343–4, 1350–1, 1545.

2 *Arnould on Insurance*, pp. 1113, 1021, 2nd ed.

Perant v. National Insurance Company, 15 Wend. 453.

Doyle v. Dallas, 1 Moo. & R. 48.

Knight v. Faith, 15 Q.B. Rep. 649; s.c.

19 Law J. Rep. (N.S.) Q.B. 509.

Cambridge v. Anderton, 2 B. & C. 691.

Lozano v. Janson, 28 Law J. Rep. (N.S.) Q.B. 337; s.c. 2 E. & E. 160.

Reimer v. Ringrose, 6 Exch. Rep. 263; s.c. 20 Law J. Rep. (N.S.) Exch. 175.

Moss v. Smith, 9 Com. B. Rep. 94; s.c. 19 Law J. Rep. (N.S.) C.P. 225.

Castellain v. Thompson, 32 Law J. Rep. (N.S.) C.P. 79; s. c. 13 Com. B. Rep. N.S. 105.

Cur. adv. vult.

The following judgments were delivered on the 13th of June.—

SHEE, J.—Having had the advantage of reading the judgment of my Brother Blackburn, I refer generally for the facts on which our opinion is asked to his statement of them, and to the statement in the case.

In the law laid down by him as the result of a great number of differently worded and variously illustrated decisions—*Irving v. Manning* (1), *Parry v. Aberdeen* (2), *Benson v. Chapman* (3), *Moss v. Smith* (4), *Gardner v. Salvador* (5) and *Rosetto v. Gurney* (6)—on the questions of abandonment and constructive total loss, I so entirely concur, that I think it better to adopt the language which he has used than to attempt any further elucidation of the principle which it establishes.

If my judgment could prevail, the plaintiff would retain his verdict. I differ with my learned Brother rather upon the inferences to be drawn from the facts submitted to us, and upon the application to them of the law, than upon the law itself.

On the first question, viz., whether the plaintiff is entitled to recover as for an absolute total loss as distinguished from a constructive total loss, my answer is, no. It was not impossible to raise, or when raised, to repair the ship. There was a chance of raising her in a condition which might enable her after repairs had been done to her to be used as a ship. Subsisting as she did *in specie* under the control of the assured, and not being in danger of immediate destruction, it would have been inexcusable to have sold her and to have allowed her to be removed in fragments as

a wreck, or to have sold her as a wreck when raised, without giving to the underwriters, by notice of abandonment, the opportunity of electing whether they would incur the expense of raising and repairing her. We can, as it seems to me, consistently with the decisions—*Anderson v. Royal Exchange Assurance Company* (7), *Stewart v. Greenock Marine Insurance Company* (8), *Fleming v. Smith* (9) and *Knight v. Faith* (10)—within the range of which the facts before us lie, give but one answer to this question, viz., that the ship as she lay submerged at Falmouth, and when moored in dock after she had been raised, was not an absolute total loss.

To the second question proposed to us, viz., whether it was material in determining the question of constructive total loss to take into account the liability, if any such existed, of the cargo and freight to make a general average towards the expenses of raising the ship or towards the general average loss at sea, my answer is also in the negative. It is admitted that, regard being had to the cost of raising the ship, the cost of repairing her when raised, and her probable value when repaired, she was constructively a total loss on the 4th of December, when the plaintiff informed the Messrs. Broad that he abandoned her, and also when moored in dock after she had been raised; unless the liability of the freight and cargo to contribute to the general average loss at sea, and of the freight and cargo to contribute in a general average to the cost of raising her, or either of them, were, in determining the question whether she was constructively a total loss, proper items of deduction from the outlay necessary to raise and repair her.

First, as to the general average loss at sea. A voluntary sacrifice of part of the ship and of her apparel having been made for the aversion of the common danger, to which ship, freight, and cargo were exposed, the assured on ship had a claim against his insurers for the share of that loss chargeable to ship, and also for the share, should

(1) 1 H.L. Cas. 287, 306.

(2) 9 B. & C. 411, 417.

(3) 2 H.L. Cas. 720.

(4) 9 Com. B. Rep. 94; s. c. 19 Law J. Rep. (N.S.) C.P. 225.

(5) 1 Moo. & R. 118.

(6) 11 Com. B. Rep. 176; s. c. 20 Law J. Rep.

(7) 7 East, 38.

(8) 2 H.L. Cas. 159.

(9) 1 Id. 513, 526.

(10) 15 Q.B. Rep. 649; s. c. 19 Law J. Rep. (N.S.) Q.B. 509.

it not have been paid to him, chargeable to the cargo, they on payment of this latter share being subrogated to the assured on ship as respects his claim for it upon his co-contributories to the general average—*Pothier, Contrat d'Assurance*, Nos. 52, 164; *Marshall on Insurance*, 5th edit. p. 435.

Such portion of the money value of the assured's share of the general average contribution as had not been expended on the repairs before the final disaster, would, as a claim upon his insurers, merge and be absorbed in the subsequent loss, if total, occasioned by that disaster—*Marshall on Insurance*, 5th edit. 435, *Le Cheminant v. Pearson* (11), *Stewart v. Steele* (12) and *Livie v. Jamson* (13); such portion of it, as had been expended on repairs which had become valueless by reason of fresh damage done by the final disaster to the parts repaired, would have to be expended again, if a resolution to repair had been taken; such portion as had been actually expended on repairs which enured to the benefit of the ship after the final disaster must be taken, on these findings, to have been considered in the estimate of the repairs which would be required for her restoration; so that no portion of the indemnity recoverable by the shipowner from his insurers in respect of his ship's share of the general average loss at sea could come in aid of his liability on contracts for raising or repairing the ship. The same observations apply to such portion of the share of the general average contribution chargeable to the cargo, as before the final disaster had been expended on repairs which had become valueless by reason of fresh damage done to the parts repaired, or which still enuring to the ship's benefit after the final disaster, must be taken to have been considered in the estimate of the required repairs on which the resolution to abandon was based.

Whether the cost of raising the ship, if she had been raised by the plaintiff, would have been the subject of a general average or not, is a question which it is impossible, as I read the statement before us, to answer affirmatively, uninformed as we are of the state of things as respects ship, freight and

cargo, in which, and the intention with which, the cost would have been incurred. Extraordinary expenses, submitted to by the master of a ship, under the urgent pressure of a well-founded fear or moral certainty, should they not be submitted to, of total loss of ship, freight, and cargo—(*Emerigon*, c. 12. s. 39, *Benecke*, pp. 191, 192, *Baily on General Average*, p. 15)—all of them being in equal peril of perishing, may,—so far as such expenses serve to avert a danger threatening the whole concern, and are not incurred to repair or diminish an already existing loss,—as well found a claim for general average contribution, as the jettison of goods or the cutting away of masts and cables (*Benecke*, pp. 214, 215). But the right to contribution by way of general average has no place where there has not been a voluntary sacrifice of property or money for the common safety in a danger imminent and common to the ship and the property in her. The mere circumstance that an outlay, absolutely indispensable to the continued existence of a ship as a ship, and to the earning of her stipulated freight, may incidentally be conducive also to the rescue of cargo remaining in the ship, but not in danger of perishing with the ship, would not impart to it the character of such a sacrifice. Expenses incurred by a shipowner with cargo on board, in keeping his ship afloat, or in restoring her to a condition of navigability, if they be the necessary consequence of an accomplished misfortune and not occasioned by, or the necessary consequence of a voluntary bestowal of his property, or of part of it, for the common safety, are incurred for his own benefit, to preserve his property, to enable him, by fulfilling his contract, to earn his freight, and can no more found a claim for general average contribution than the expense of hiring another ship to carry the cargo to its destination—*Casaregis*, *Disc.* 121, Nos. 16, 17, 18.

The distinction between extraordinary expenses incurred to repair or diminish a particular average loss, and extraordinary expenses incurred for or occasioned by a sacrifice for the common safety at a time when without them it would be morally impossible to avert a total loss of all the interests at risk—as in the case put by *Benecke* (pp. 215, 216), and on his authority and

(11) 4 Taunt. 367.

(12) 5 Scott's N.R. 927.

(13) 12 East, 648.

partly in his words, and with the intention probably of adopting and condensing the qualifications which restrict their meaning, by Mr. Arnould (vol. ii. p. 931, s. 340) of a stranded ship which, having sustained a particular average loss, "is in most cases in danger of being lost, unless speedy measures are taken for her preservation,"—is neatly precised in the words by which the enactment of Article 6, of the *French Ordonnance de la Marine*, liv. 3, tit. 7, 'Des Avaries' (14), is rectified and made conformable to principle in the corresponding Article 400 of the *Code de Commerce*, tit. 11, 'Des Avaries.' In the former "the cost of floating a ship," in the latter "the cost of floating a ship stranded with the intention of averting a total loss," is declared to be general average.

The case before us, though combining a particular average loss to ship, with probably a particular average loss to cargo, does not, unless we import into it intentions on the part of the shipowner, which appear not to have influenced him, and danger to the cargo which does not appear to have been apprehended, differ in the principle of its decision from the case cited in the insurance books from the *Digest*, of the freighted ship, which having sustained a heavy average loss in her voyage to Ostia was compelled to put into Hippo, and there incur expenses which were necessary for her own safety to enable her to reach her destination and deliver her cargo in good condition. It was urged in that case that the owners of the cargo ought to contribute to make good the damage which the ship had sustained, but the decision was against the shipowner, "because the expenses had been incurred rather for the benefit of the ship than the preservation of the cargo." "*Hic enim sumptus instruendæ magis navis quam conservandarum mercium gratiâ factus est*," *Digest*, lib. 14, tit. 2, 'De Leg. Rhod. de Jactu,' Art. 6. The shipowner must raise his ship or hire another, or lose his freight, it is his affair, and his only. The charges in such a misfortune of unloading, housing, drying, and reloading the cargo, fall in like manner upon the owner of it. (*Benecke*, pp. 191—194.)

Were it otherwise, every mishap of this

kind in port would be converted into a general average. The shipper who has a right under his contract to have a sea-borne carriage provided for the conveyance of his goods from the place of their shipment to the place of their destination, would, in addition to the agreed freight, have to bear part of the expense to which by the very nature of the service and of the instrument by which it is rendered, the shipowner is engaged; and as goods contribute to a general average, not according to their weight, but according to their value (a provision perfectly just when all are in equal danger of total loss—*Benecke*, p. 193), merchandise of bulk and weight so small as to offer no impediment to the raising of a ship, or none that would not yield to a small increase of mechanical power, might be burthened with a principal share of the cost of raising her, although, regard being had to her age, class, previous condition, and present employment, it would be madness, on the part of her owner, not to incur the expense of raising her so as to enable her to arrive at her destination, earn her freight, and be afterwards useful as a ship.

In the case before us, the ship, having escaped the dangers which necessitated the sacrifice of part of her apparel at sea, and while moored in safety to the pier at Falmouth, was assailed by a hurricane, during the raging of which she foundered. The damage caused by this disaster to ship and cargo was a particular average to each of them, to be borne separately by the several owners of each. No case for contribution between them could arise, unless some new sacrifice was made to obviate and avert what but for such sacrifice would be the great probability of further disaster to ship and cargo, involving the total loss of both of them.

Whether the cargo was irreparably damaged by its submersion, or not damaged at all—averaged only to the extent of the cost of raising it alone, or of the cost above the value of the ship when raised, of raising the cargo with and in the ship,—in danger of absolute total loss, or certain to be recovered in the early and necessary operation of removing the submerged ship from the pier side,—is not stated, nor to what extent the freight to be earned by the

(14) See Valin, tom. 2, p. 165.

shipowner was imperilled by the loss, should it prove one, of his ship. With the exception of the fact, that the ship had gone down during the sway of exceptionally violent winds over waters usually tranquil,—in itself a strong *prima facie* objection to a claim for general average contribution,—we are informed of no circumstance which might lead us to the conclusion that such motives for incurring the expense of raising the ship could have existed, as might convert what in its nature was a particular average into a general average outlay. *Benecke* says, in the context (p. 216) of the passage interwoven by Mr. Arnould with his statement of the law on this point, that “if the charges of floating a ship exceed the value which is saved by it to the shipowner, and the measure be deliberately adopted to avoid the losses and expenses to which stranded goods are frequently exposed, the surplus of the charges of floating the ship above the value saved to the shipowner ought to be borne by the cargo,” but that “the charge of floating can in no case be the subject of general average.” The latter part of the passage is more roundly worded than on reference to other passages already cited from his chapter on average, it seems probable that he could have intended. I read it as the expression of a general rule, subject to the exceptions which he had before indicated. The rule applies to the facts before us, and there is nothing in them which could in my judgment have brought the cost of raising the ship in question within any admissible exception to it.

The statement, on which we are asked to answer the second question put to us, presents in truth (though the disaster occurred in a place protected from all but extraordinary sea risks, and where appliances for

ships' rescue may be supposed to have been abundant), a case of shipwreck, in the event of which according to *Casaregis* (15),—the highest authority on such questions, and according to other authorities whom he cites (*Van Leewen* and *De Vicq ad Tractatum Quintini Weytsen de Avariis*, par. 45), (16), his and their opinions having been adopted by later writers of nearly equal weight,—there is no room for general average contribution. If we were to come to a different conclusion, our judgment might be cited in support of the position, that the cost of raising a ship submersed in port with cargo of whatever kind on board, is *always* to be made good to the shipowner by a general average, no matter how certain the rescue of the cargo by other means may be, how little damage it will sustain from a short delay, and as respects the ship's freight how practicable and inexpensive to hire another ship in which to carry the cargo to its destination,—that the mere fact, in fine, that the property saved benefits by an act out of the ordinary course of a ship's service is alone sufficient to justify the allowance in general average of the loss caused by the act or by the expense attending it—(*Baily on Average*, p. 10).

Nor does the theory on which such a contention must rest better recommend itself as the story of the disaster proceeds. The ship was raised with the cargo in her, not by the shipowner or the master acting for the common safety of the ship and cargo, but by persons officiously rescuing, as salvors, and possessing themselves of the rescued property in the hope of reward from those whom it might eventually concern. The expenses incurred by them were surely not general average, apportionable between ship, freight, and cargo, of none of which had a sacrifice been made in time

(15) *Casaregis*, *Discursus*, xlv. par. 60-1. “Si navis iter suum agens ventorum vi ad littus aliquod impellatur, et naufragium passa, ut vulgo dicitur, *arenata*, fuerit, tale damnum amissæ navis, vel deterioratæ, cedet domino illius, nec potest ab eo prætendi, ut domini salvatarum mercium prædicto damno contribuant. Et tunc solum contributioni erit locus, si magister navim naufragandam timens, consilio prius in navi accepto, ut merces, et navigantes salvarentur, in littus navim impellere, vulgò *arenare*, fecisset.”

(16) “*Æquitatem contributionis tunc admitti placuit, si vexatam fluctibus navem jactura defendit, cæterum si navis fluctibus quassata submersa fuerit, non est jam amplius locus contributioni: siquidem cum depressa navis, aut dejecta est, quod quisque ex eâ suum servavit, sibi servat, tanquam ex incendio, neque amissæ navis damnum collationis consortio sarcitur per eos, qui merces suas naufragio liberaverunt.*” *De Vicq ad Tract. Quint. Weyts. de Avariis*, par. 45; given in *Casaregis*, vol. 3. p. 17. 2nd edit.

of danger for the common safety, and surely were the subject of distinct and separate claims, secured by separate liens on the ship and on the cargo respectively. If the master in discharge of his duty to keep the ship and cargo water-borne had raised the ship, he would have been entitled to no reward for doing so, and could have charged the cargo for no portion of the expense of which it was not the special and particular cause. The ship and cargo having been raised by strangers, they would be entitled to a reward, and would have a lien for it on each of the subjects saved, redeemable by a payment to be assessed on a fair consideration of the skill, money, time, and labour expended upon, and of the value of, each of these subjects. The ingredients of a salvage service, not contracted for or rendered in time of danger, are not the same as of a general average act. The former cannot, after the service done, be converted into the latter by agreement between the salvors and the owners of one of the subjects saved; nor are the charges which attach to the subjects saved apportionable between them on the principle of a general average.

If I could feel sure, after reading the judgment of my Brother Blackburn, that this view of the second question as respects the point of general average for raising the ship was correct, and that we are not bound to assume a general average intention, if such intention might, though we are not informed of it, have existed, it would be unnecessary to consider, whether supposing the cost of raising the ship were the subject of a general average contribution, the share of it chargeable to the cargo ought to be taken into account, as an item of deduction, in determining whether a constructive total loss had taken place. In my opinion, however, it would not be a proper item of deduction.

The subject of insurance had sustained a particular average loss by perils of the sea, the measure of which loss as between the assured on ship and his insurers was the cost (although the cargo may have accidentally benefited by it—*Watson v. the Marine Insurance Company* (17),) of

raising the ship and of repairing the ship's damage which the accident had occasioned. That loss, whether partial only or constructively total, fell at once upon the underwriters on ship. In the latter case nothing that occurred afterwards (the ship being in fact unworthy of the cost of raising and repairing her, and abandonment being duly made) could, as respects them, alter its character or vary their liability for it.

Supposing, however, that the intention with which the outlay, necessitated by the submersion of the ship was incurred, could transform what was a particular average loss into a general average loss from its inception, or that we were at liberty, regardless of what had already happened (the ship and cargo as they lay submerged being in imminent danger of destruction), to consider the resolution to raise the ship as the starting-point, and the outlay required for that purpose as a sacrifice by the ship-owner for the common safety,—in determining whether as between the assured on ship, not being also owner of the cargo, and his insurers, a loss constructively total had taken place, the liability of the cargo to contribute to the general average would not be an allowable item in diminution of the estimate of expenses, on the amount of which the question of partial only or of constructively total loss would depend. The assured, having sustained a loss of the subject of insurance by the perils insured against, had a right to look for his indemnity from the person who had engaged to indemnify him, without troubling himself with any remedies over against third parties. He was not bound on the occurrence of a misfortune involving a loss of the subject insured, so probably total as this must have been considered by Mr. Amos, and appears from the statement before us to have been, to expend his money on the chance of being reimbursed a part of it by a satisfactory adjustment of general average at Rio de Janeiro, should the cargo be safely delivered there out of the crippled ship. He had paid his premium for the option under such circumstances of calling upon his insurers to bear that risk,—of disentangling his own capital from the disaster, and of surrendering to them (they paying him as for a total loss) his ship, and all the rights and liabilities

attaching to the ownership of it. This seems to me clear on principle and on authority — *Pothier, Traité du Contrat d'Assurance*, No. 52, 164, *Emerigon*, c. 12. s. 44, *Marshall on Insurance*, 5th edit. p. 435, 2 *Phillips on Insurance*, pp. 127, 128, 2nd edit. It has been so decided repeatedly by Judges of the highest eminence, and among them by Kent and Story in the Courts of the United States—*Magrath v. Church* (18), *Vandenheuvel v. United Insurance Company* (19), *Watson v. the Marine Insurance Company* (17), *Jumel v. the Marine Insurance Company* (20), and *Potter v. the Providence Washington Insurance Company* (21). There would be no really useful indemnity for the assured were it otherwise. If a total loss of the subject of insurance has actually taken place, its insurers must pay its real or agreed value; if a total loss of the subject of insurance has constructively taken place, they must pay its real or agreed value and make the most of the salvage ceded to them, and of the rights against third parties which attach to it.

Apart from the question of general average, I cannot think that any share of the cost of raising the ship which the Messrs. Broad or the plaintiff, after the adoption by him of their act, might consider chargeable to the cargo raised in the ship, would be an admissible item of deduction in considering whether a constructive total loss of ship had taken place. Between the owners of the ship and their insurers, the fact that the ship and the cargo might together be worth the cost of raising them and of repairing the ship, could not, in my judgment, operate to make the loss on ship less than total, if the ship separately was not worth the cost of raising and repairing her.

The engagement of the underwriter is, that the thing which he insures shall, with reasonable repairs and expenses for which he undertakes, should they be rendered necessary by the perils insured against, reach its destination capable of being used as the thing which it was when the risk

commenced, or that he will bear the loss of it. His contract is to indemnify the assured against the loss of the subject of insurance, or the damage which it shall sustain by the perils insured against; his liability does not extend to, and is not limited by the loss which the assured shall sustain in consequence of his being the owner of the subject of insurance—*Reimer v. Ringrose* (22) and *Baily on Perils of the Sea*, pp. 33-34.—I see nothing in the case of *Moss v. Smith* (4) inconsistent with this view, but much by implication in support of it. A loss of freight was there claimed from an underwriter on freight, because the ship had sustained damage, the repair of which though it would have cost very much less than the value of the ship when repaired, would have cost more than the freight she was in the course of earning; to which it was properly answered that the loss contended for was a loss of freight as incident to the ship, and that the ship being practically repairable its incident the freight could not be lost. It has none but a remote and distinguishable bearing on a case in which the ship itself by the perils insured against had become unworthy of the cost of raising and repairing her. Apply what Maule, J. and Lord Truro said to ship and cargo instead of ship and freight, and *Moss v. Smith* (4) will be found to fail at every point as an authority governing this case. No doubt, as Lord Mansfield said in *Hamilton v. Mendes* (23), "It is repugnant to a contract of indemnity to recover as for a total loss, when the final event has determined that the damnification is, in truth, an average, or perhaps no loss at all;" but Lord Mansfield was there dealing with the case of a single subject, a ship re-captured and safe before action brought; his words are not applicable to the case of two distinct subjects, the property of different owners damaged by the same disaster, as to one of which the question is, whether, not being at the time of its abandonment, or ever after, reasonably worth the cost of raising and repairing it, it was then constructively a total loss.

On the third question, whether the notice

(18) 1 Caines N. Y. Rep. 196.

(19) 1 Johnson Rep. U.S. 406, 412.

(20) 7 Id. 412.

(21) 4 Mason Rep. U.S. 298.

(22) 6 Exch. Rep. 263; s. c. 20 Law J. Rep. (N.S.) Exch. 175.

(23) 2 Burr. at p. 1210.

of abandonment was given too late, my opinion under all the circumstances of this case is, that the abandonment, on the 9th of December, the date of the notice given by Messrs. Davis to the defendant, was in time. It is enough if notice of abandonment be given within a reasonable delay, and reasonable or not is a question for a jury, and upon this case, for us—*Anderson v. the Royal Exchange Assurance Company* (7) and *Kelly v. Walton* (24).

My judgment, therefore, upon the whole matter would be for the plaintiff; but as it does not agree with the judgment of my Brother Blackburn, I withdraw it, and judgment will be entered for the defendant.

BLACKBURN, J.—It appears from the statement in the case, that the ship *Chebucto* was insured in a valued policy in the ordinary form for 1,500*l*.

She sailed with a general cargo on board, and on her voyage sustained damage such as to require repairs. Part of the damage thus incurred was such as to be the subject of general average. The ship put into Falmouth for repairs, and was moored with part of her cargo on board, the residue being on shore, and the repairs were commenced, but not completed. When in this state, she was, on the 2nd of December, sunk by a peril of the sea, and lay submerged with the portion of the cargo on board. Whilst she lay so submerged the agent of the assured, Mr. Amos, came to the conclusion (as is stated in paragraph 7. of the case) that to raise and repair the ship would cost more than she was worth. The ship's agents, Messrs. Broad & Sons, were of a different opinion, and acting on their own responsibility, and not as agents of the assured, they did, in fact, raise the ship with the portion of cargo on board.

On the 9th of December, after Broad & Sons had commenced raising the ship, but before that operation was completed, the assured gave notice of abandonment. The plaintiffs claimed as for a total loss; the underwriters paid money into court as for a partial loss, and it appears to have been agreed between the parties that the payment was sufficient unless the loss was total. It appears also to have been agreed

between them, that if the fact that there would be a claim for contribution against the cargo on board the submerged vessel, which cargo would be raised by the same operation as raised the hull, and which would be saved along with the hull, was to be taken into account, there was no total loss. And it seems also to have been agreed between the parties, that if the fact that part of the sea damage which necessitated the repairs was the subject of general average was to be taken into account, there was no total loss. But it seems to have been contended by the underwriters, that even if both these facts were to be discarded as immaterial, the circumstances were not such as to constitute what is called a constructive total loss.

The arrangement made at the trial appears to have been that the opinion of the jury should be taken on this disputed question of fact, and that, subject to their finding, the case should be reserved for the Court. The case is by no means clearly stated; but I think that what I have stated above is the effect of the statement in paragraph 10, that the learned Judge left to the jury the question whether there was a constructive total loss at the time when the vessel was submerged, and the assured's agent determined not to raise her, or, after she was raised, and the jury found both these questions in favour of the plaintiff; but in putting these questions to the jury no account was taken of any liability on the part of the cargo or freight to contribute in general average towards the expenses of *raising* the vessel or towards the general average loss at sea; and it is to be taken as a fact that if such liability for *either* loss ought to have been taken into calculation, and the estimate of the cost of *raising* and repairing ought to have been reduced by the amount of general average to be so contributed, then that there was not a constructive total loss.

Some questions are raised as to the effect of the lateness of the notice of abandonment, on which I think it unnecessary to come to any determination, as I come to the conclusion that on this statement there never was such a state of things as could amount to a total loss, whatever notice of abandonment was given. In coming to this

conclusion, I do not regard the general average incurred at sea, but proceed entirely on the ground that, as I understood the statement in the case, the cost of raising the submerged ship and cargo, though it would have been excessive, having regard to the value of the unrepaid ship alone, was reasonable, having regard to the value of the ship and cargo and freight, which were jointly saved by this expenditure from a common jeopardy.

The case contains a statement of the value of the submerged cargo, which in fact was raised by the same operation as raised the hull; but as it states neither the value of the hull itself nor the cost of raising it, this statement is valueless: but I will suppose a state of figures, to illustrate what I understand to be meant by the statement in the case. Let us suppose the expense of raising the ship with the portion of her cargo on board to have been 600*l.*, that the further repairs necessary would be 700*l.*, that the value of the ship when repaired would be 1,200*l.*, and that the value of the portion of the cargo raised and saved along with the ship is 1,500*l.* I leave out the freight, which would only complicate the statement without altering the principle. Now, inasmuch as the value of the portion of cargo saved is, on these figures, three times the value of the unrepaid hull, and the two were saved by the expenditure of 600*l.*, if that 600*l.* is to be charged as general average against the ship and the portion of cargo saved, 150*l.* would be chargeable to the ship and 450*l.* against the portion of cargo saved by this expenditure. Now, it is plain that on this state of figures, if the fact that cargo was on board is disregarded, there was a total loss; for in that view a ship worth 1,200*l.* would cost 600*l.* to raise her and 700*l.* to repair her, together 1,300*l.*, which is more than she is worth; but if the fact that cargo is there, which would be saved and contribute to the expense of raising, is taken into account, there is no total loss, for it would then stand that a ship worth 1,200*l.* and a cargo worth 1,500*l.*, together 2,700*l.*, would be saved by the expenditure of 1,300*l.*, of which 450*l.* would be separately chargeable to the cargo, and 800*l.* separately chargeable to the ship. Whether, therefore, the ship and cargo were considered together or

separately, they would be well worth the expenditure required to rescue them from loss.

It is on construing the statement in the case as submitting one similar in principle to that which would arise on the figures here given that I have come to the conclusion, that the defendant is entitled to judgment; and after having carefully considered my Brother Shee's reasons for the opposite opinion, I still think so for the following reasons.—

It is first necessary to consider whether, if the shipowner had in this case raised the ship and cargo as Messrs. Broad & Son did, they would have been entitled to charge that expense as general average against the portion of cargo raised by its expenditure as well as against the hull.

In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy; but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. It is quite true, that so long as the expenditure by the shipowner is merely such as he should incur in the fulfilment of his ordinary duty as shipowner, it cannot be general average; but the expenditure in raising a submerged vessel with cargo is extraordinary expenditure, and is, if incurred to save the cargo as well as the ship (which *prima facie* is the object of such an expenditure), chargeable against all the subjects in jeopardy saved by this expenditure.

In the last edition of *Arnould on Insurance*, vol. 2, pp. 981–2, section 340, it is said, "A stranded vessel is, in most cases, in danger of being lost, unless speedy steps are taken for her preservation, either by unloading the cargo to lighten her, or by endeavouring to float her by means of buoys, &c., with the cargo in her. The remuneration which the shipowner is obliged to pay for the services thus rendered gives a claim to general average contribution, provided such services shall appear to have

been incurred for the joint benefit of ship and cargo, which will be the case if ship and cargo are both exposed to a common danger, and both saved from it by the exertions employed for their rescue." This, I apprehend, is a perfectly accurate statement of the law.

In the present case, the greater part of the cargo was on shore and safe before the ship was submerged, but the extraordinary expenditure necessary to save the ship and the portion of the cargo on board would have been chargeable as general average as against them, though not as against the part that was safe—see *Moran v. Jones* (25). I do not mean to say that, in every case where a ship with cargo is submerged, and the two are, in fact, raised together by one operation, the expenditure incurred must necessarily be for the common preservation of both. I think it is in every case a question of fact whether it was so; and if the cargo could be easily and cheaply taken out of the ship, and saved by itself, it would not be proper to charge it with any portion of the joint operation which, in that case, would not be incurred for the preservation of the cargo. But it must be rather an exceptional case in which, where a vessel lies under twenty feet of water at low tide, the cargo can be easily, or indeed at all, taken out of her hold without either raising the ship with the cargo, or destroying the hull for the purpose of getting the cargo out. If the contention of the assured at the trial had been that such an exceptional course was, in this case, practicable and the proper one, the question would have been left to the jury, or the facts agreed upon, so that we might draw the proper inference of fact from them. Instead of doing so, the only fact bearing on this question stated, is that Messrs. Broad & Sons did, in fact, raise the ship with the cargo on board. As they could have no interest, except to save the imperilled subjects in the proper way, so that they might be entitled to charge their outlay against them as salvage, I think the inference to be drawn from this fact is, that the mode adopted was the proper one, and I should, if necessary, draw

that inference. But I think, from the way the case is stated, that it appears to have been agreed between the parties, that the expense of raising the ship and cargo was, in fact, general average, and, as such, chargeable, in fact, on the cargo, if in law it could be so.

I shall now proceed to consider the question, whether the circumstance that the expense of raising the ship and cargo would be partly borne by the cargo, ought to have been taken into consideration in determining whether there was what is commonly called a constructive total loss. A contract of marine insurance is a contract to indemnify against loss by certain perils; and if the subject-matter of insurance is totally lost in consequence of those perils, the assured is entitled to recover as for a total loss: if it is only partially lost, the assured is only entitled to recover for a partial loss.

It frequently happens that by the perils insured against, the subject-matter of the insurance is so far damaged that it cannot be preserved without outlay on repairs or other ways, but may be preserved by such outlay; or that it is by perils insured against taken out of the possession of the assured, but that they can recover the possession by exertions and expenditure; or it may be, as in the present case, that both facts exist, the subject-matter is taken out of the possession of the assured, and sunk in a damaged state, but can by expenditure be raised, and then can by further expenditure be repaired. In all such cases the assured may, if he pleases, elect to incur the expenditure, and save the subject-matter, and in that case it will be a partial loss only; or he may offer to abandon the whole to the underwriters, and, if they accept the abandonment, it will be a total loss, the underwriters being subrogated for the assured, and entitled to all salvage and every other right of the assured. Or, lastly, the circumstances may be such that though the underwriters refuse to accept the abandonment, the assured may elect to treat it as a total loss, and force them to indemnify him for it as such; in which case, on principles of equity not confined to marine insurance, they are subrogated for him whom they have indemnified, and have all

(25) 7 H. & B. 523; s. c. 26 Law J. Rep. (N.S.) Q.B. 187.

his rights—*Randal v. Cockran* (26), *Yates v. Whyte* (27).

If it were possible to work out the insurance, so as to make it in practice a perfect indemnity, it would be the same thing in the pecuniary result whether the assured repaired or abandoned the subject-matter; but it is not possible so to work it out, and, in general, it is for the benefit of the assured to treat a loss as total, and this is peculiarly the case where the policy is a valued one. It therefore becomes a very important subject of inquiry, under what circumstances the assured has a right, against the will of the insurers, to treat the loss as total. Up to the present time I believe there is no difference in the principles on which the law of insurance is administered in this and in foreign countries; and the decisions of foreign jurists are entitled to great weight. Many of those authorities cited by my Brother Shee are authorities in support of positions I have laid down. I do not think it necessary to examine or cite them at length, as those principles are not now in controversy between us. But on the part of the case which I am proceeding to argue, there is a fundamental difference between the law of insurance as administered in America and as administered in England.

In America, if the subject-matter of insurance sustain damage to the extent beyond 50 per cent., the assured may abandon and recover as for a total loss. This is an implied part of the American contract; and, unless there be something expressed which excludes this implication, the assured has this right; and that right depends on the state of things when the abandonment was given, and is not altered by any subsequent change in the state of things. But this is not the English law. In 2 *Phillips on Insurance*, § 1536, it is said, "This rule of abandonment on account of loss over 50 per cent. of the value of the subject, makes the most material difference between the American and the English jurisprudence relative to total loss and abandonment, and is to be kept in mind in examining the

decisions of the tribunals of the two countries. It extends equally to ship, cargo, and freight. This rule and that rule in the United States whereby the validity of the abandonment is tested by the circumstances existing at the time of making it, instead of the time of bringing the suit, as in England, give a wider range to the constructive total loss and abandonment in the United States, and consequently an increased liability of underwriters for loss by the agents who have charge of the insured subject." I do not think that any American cases, based on principles so different from ours, are authorities in an English case. I shall therefore, with great deference to my Brother Shee, who relies upon several cases in the United States, refrain from examining them, and rely only on the English decisions.

It is now finally settled in England by the decision of the House of Lords in *Irving v. Manning* (1), "that the question of loss, whether total or not, is to be determined just as if there was no policy at all." If the subject-matter is by the underwriters' perils put in such a situation that, supposing there was no policy, it would be totally lost to its owner, then as between the assured and the underwriter there is a total loss, not otherwise. And the question whether the thing is lost to the owner is to be treated in a practical business-like spirit; and if the owners cannot by any means which they or their representative the captain can reasonably use be saved, then it is totally lost; but if by any reasonable means which were reasonably within their reach they might redeem the subject-matter, and do not do so, the total loss is not attributable to the perils which cast the subject-matter of insurance into that position, but to the neglect of the owners to take those reasonable means. If they do not take those means, "they cannot make the loss total by their own neglect"—*Thornely v. Hebson* (28), as explained by Lord Tenterden in *Parry v. Aberdeen* (2). "The duty of the master in case of damage to the ship is to do all that can be done towards bringing the adventure to a successful termination, to repair the ship, if there be

(26) 1 Ves. sen. 98.

(27) 4 New Cas. 272.

(28) 2 B. & Ald. 513.

a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn the freight if possible"—*Benson v. Chapman* (3). The underwriters do not by their contract engage to indemnify against the consequences of his neglect to perform that duty. The question, however, whether it is possible, must be understood in the sense in which it is explained by Maule, J. in *Moss v. Smith* (29): "In matters of business a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it into deep water, though it may be possible by some very expensive contrivance to recover it." I may add, to complete the illustration, that a diamond of great value would not be totally lost if dropped into water from whence it would cost 10*l.* to recover it, though a shilling in the same position would be totally lost.

When a ship or other subject-matter of insurance is in such a situation that it can be saved, but only by an excessive expenditure, the assured may undoubtedly (at least if they give notice of abandonment in due time) treat it as a total loss and recover for it as such. In *Knight v. Faith* (30) Lord Campbell expressed a strong opinion that it was essential that there should be such a notice, and that the owner of the shilling at the bottom of the well could not, without what would in his case be an idle ceremony, recover as for a total loss. If it were necessary for the decision in this case to determine that point, my doubt would be, whether I was not bound in a Court below to follow that as the latest decision, and to reserve for a Court of Error the question whether he was right in that opinion; but it is unnecessary to come to any determination on this point: for all the English authorities agree that unless the circumstances are such as to make the loss total within the principle expounded by Maule, J., in *Moss v. Smith* (29), no notice of abandon-

ment can make it so; and also that even if the circumstances were such that at the time the notice of abandonment was given it was justified, yet if by subsequent events before an action brought, the plaintiff might by reasonable means obtain the thing, he can only recover for a partial loss. As was stated by Holroyd, J., in *Brotherton v. Barber* (31), "Abandonment has its origin from the contract being a contract of indemnity. But it is apparent that if the assured might abandon at his pleasure, he might be a gainer to a much greater extent than the value of the loss; which is inconsistent with a contract of indemnity." . . . "As events have made it at the time when the action was brought, it is but a partial loss." See also *Naylor v. Taylor* (32).

The question, whether it is practicable to save the subject-matter within the meaning of the phrase as explained by Maule, J., in *Moss v. Smith* (29), has been differently left to the jury. In *Gardner v. Salvador* (5) Bayley J. left it to the jury to say whether "by means within the reach of the captain which he could reasonably use" the ship could be saved. The mode of putting the question generally adopted has been to ask "whether a prudent uninsured owner would have done it." In *Rosetto v. Gurney* (33), the Court, approving of what had been said by Maule, J. in *Moss v. Smith* (29), state the rule thus: "If the damage is reparable the loss is total or partial according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore as between the underwriters and the assured impossible." The three modes of expression all seem to me to convey the same idea. No means which would cost more than the object is worth can be considered reasonable, and a prudent uninsured owner would not adopt them. But if the means within his reach would cost less than the object is worth, a prudent uninsured owner would adopt them rather than suffer the thing to perish; though a prudent insured

(29) 9 Com. B. Rep. at p. 108; s. c. 19 Law J. Rep. (N.S.) C.P. at p. 228.

(30) 16 Q.B. Rep. 649; s. c. 19 Law J. Rep. (N.S.) Q.B. 509.

(31) 5 M. & S. at p. 426.

(32) 9 B. & C. 724.

(33) 11 C.B. at p. 186; s. c. 20 Law J. Rep. (N.S.) C.P. at p. 261.

owner, especially if insured in a valued policy, would probably act otherwise, if the law permitted him by so doing to recover from the underwriters for a total loss.

I should observe that I think, in the present case, the question whether there was a total loss at the time when the ship lay submerged, and that whether there was a total loss when she lay moored at Falmouth in the custody of Messrs. Broad & Sons, are identically the same. Whilst the ship lay submerged, it was a question of calculation what the cost of raising her would be; but before the trial Messrs. Broad & Sons had by experiment ascertained what it was, and the assured could have got their ship by adopting their act, and paying them for what they had done; and then the assured would have been exactly in the same position as if they had themselves originally raised her.

In considering whether it was reasonable to raise the ship and cargo in the present case, I think that every circumstance tending to increase or diminish the necessary outlay, and every circumstance tending to increase or diminish the benefit to be derived from that outlay, ought to be taken into account; and, amongst those, the fact that cargo would be saved by the operation, and would contribute to the expense, seems to me a very important element.

The shipowner is not asked to advance money for the benefit of strangers on the security of their property; he is the authorized agent of the owners of the cargo, having the custody of it, and bound to save it if he can. It was contended on the argument that in considering whether the subject-matter of insurance was totally lost, we were bound to look to it, and to it alone; so that in the conceivable case of a ship, worth say 1,500*l.*, being in peril, with cargo on board also worth 1,500*l.*, which could be saved together by the expenditure of 2,000*l.* on one operation, the assured was entitled to consider both as totally lost, because neither singly was worth the sum which would save the two. If a long series of decisions had established this, we could not help it; but in truth from the time of Lord Mansfield it has been an

established rule in assurance law that "if the thing in truth was safe, no artificial reasoning shall be allowed to set up a total loss"—*Hamilton v. Mendes* (34); and the only case in which a point like this was ever attempted to be set up was *Moss v. Smith* (29). In that case, the attempt totally failed. Maule, J. explained the law in a manner to me perfectly satisfactory, and what I have written is in truth but an attempt to adapt his reasoning to the present case. Lord Truro, in the same case, said (35), "We are asked—would any man in his senses spend 1,000*l.* on the repair of a ship for the mere purpose of earning 500*l.* freight? To this I answer, certainly not. But this is not the true question. If by expending 1,000*l.* on repairs he gets not only 500*l.* but also a ship worth 3,000*l.*, who will for a moment question the prudence of the outlay?" This is an authority, as it seems to me, precisely in point, and agreeing with it as I do in principle, I think our judgment should be for the defendant.

I need hardly say that I should not adhere to this opinion against that of my Brother Shee, unless on consideration I entertained it decidedly; but I should regret much if my decision were to be final. That, however, is fortunately not so.

This Court being equally divided, there would be no judgment, unless one of the Judges withdrew his opinion in order that the case might go into error. It is the practice for the junior Judge in such a case to withdraw his judgment, and owing to the accident of my Brother Shee being junior to myself, the judgment will be entered for the defendant, leaving the plaintiff to appeal.

Judgment for the defendant.

(34) 2 Burr. at p. 1212.

(35) 9 Com. B. Rep. at p. 108; 19 Law J. Rep. (N.S.) C.P. at p. 231.

1865.
May 31. }

COWLES v. POTTS.

Slander—Privileged Communication—Malice.

In an action of slander, laying special damage, it was proved that the plaintiff, a trustee of a charity, asked C, by whom he was employed as bailiff, to obtain signatures to a protest against his being turned out of the trusteeship. C. asked the defendant for his signature, which the defendant refused; and on being pressed to give his reasons, said that he would not keep a big rogue like the plaintiff in the trust; and he explained the reasons for his opinion, which were that the plaintiff had left the parish under discreditable circumstances and without settling with his creditors, including the defendant. He also added, that he was surprised that C. kept such a man on with his son. The whole of what was said about the plaintiff's character was said with reference to the discussion whether it was proper that he should be continued as a trustee of the charity. In consequence of what the defendant said, C. dismissed the plaintiff from his employment. The jury found that the defendant had not acted with malice:—Held, that, assuming the words were bona fide spoken with reference to the propriety of taking steps to retain the plaintiff in the trusteeship, as they were pertinent to the question whether he was fit to be trusted or not, they were to be regarded as a privileged communication, and therefore that the defendant was entitled to have the verdict entered for him.

The declaration alleged that the defendant falsely and maliciously spoke of the plaintiff the words following, that is to say, "I will never sign to keep a big rogue like Robert Cowles in the trust," (meaning a certain trust called Buckman's Charity, in the parish of, &c., whereof the plaintiff at the time the defendant spoke and published the above false and defamatory words was a trustee,) "as he has robbed me of two pounds. I will not vote to keep such a rogue and swindling thief like Robert Cowles in the trust" (meaning the said trust). "You will find him to be a big rogue before long." Whereby the

plaintiff lost his situation as farm-bailiff in the employ of Charles Cooper, &c.

Plea, not guilty.

At the trial, at the Suffolk Summer Assizes, 1864, before Channell, B., it appeared, from the evidence on the part of the plaintiff, that the plaintiff was a trustee of a charity, called Buckman's Charity, and was also farm-bailiff to Mr. Cooper, a farmer at Kessingland. Some attempts had been made to remove the plaintiff from the trust, and as he was unwilling to resign he requested Mr. Cooper to obtain signatures from the inhabitants to a protest against his being turned out. In consequence of this request of the plaintiff, Mr. Cooper applied to the defendant to sign the protest. This the defendant refused to do, whereupon Cooper asked for his reasons for so refusing, when he said that he would not keep a big rogue like the plaintiff in the trust. Cooper further pressed him to explain the reason for his opinion, and he then said that the plaintiff had left the parish under discreditable circumstances, and without settling with his creditors, including the defendant. Cooper further stated that in consequence of what the defendant told him he dismissed the plaintiff. The defendant gave much the same account of the above conversation, but added, that, towards the end of it, he told Cooper that he was surprised that he kept such a man on with his son.

The learned Judge asked the jury whether the special damage resulted from the words spoken; what was the amount of damages to be given to the plaintiff; and also whether there was malice. He reserved for the Court the question whether the words were privileged or not. The jury found that the dismissal was in consequence of what the defendant said, and assessed the damages at 10*l.*; but they also found that there was no malice. The verdict was thereupon entered for the plaintiff.

A rule nisi was subsequently obtained, calling upon the plaintiff to shew cause why the verdict entered for him should not be set aside, and a verdict entered for the defendant, on the ground that the Judge ought to have held that the words were privileged.

O'Malley and *Bulwer* shewed cause against the rule (Easter Term, May 10).—

The Court cannot come to the conclusion that the learned Judge was wrong; the finding of the jury that the defendant acted without malice is unimportant, when it is considered that he said so much more than he was justified in saying under the circumstances, and that the jury have estimated the damages at 10*l.*, the dismissal of the plaintiff having resulted from the speaking of the words. *Fryer v. Kinnerley* (1) is an example of the class of cases which shew that though a simple statement may be privileged, the person who utters it may be liable to an action if he goes further and does not confine himself to a mere simple statement. There is no doubt that the jury intended to find for the plaintiff, and that their finding that there was no malice was a compromise. In *Milne v. Marwood* (2) the jury returned a verdict for the plaintiffs in an action for a false and fraudulent representation as to the value of a ship, but added that they acquitted the defendants of any fraudulent intention. A rule was obtained to enter the verdict for the defendants on that ground, but the Court refused to do so, and Maule, J. said, "I think it is quite clear that the jury meant to find a verdict for the plaintiffs; but they thought fit to add something to make it go down easily with the defendants." A man may be quite justified in stating facts, and in drawing a *bond fide* conclusion from them, but he must confine himself to doing so; instead of which the defendant, after stating that he would not keep a big rogue like the plaintiff in the trust, and giving his reasons for saying so, goes on to say that he was surprised that Cooper kept such a man on with his son. (They also referred to *Martin v. Strong* (3), *Fairman v. Ives* (4), *Robertson v. M'Dougall* (5), *Godson v. Home* (6), *Somervill v.*

Hawkins (7), *Wenman v. Ash* (8), *Wright v. Woodgate* (9), *Tuson v. Evans* (10) and *Starkie on Libel*, Preliminary Discourse, 87.

Keane and *Markby*, in support of the rule.—The jury have negatived malice, and there is nothing in what the defendant has said which can be considered as removing the case from the operation of the rule with regard to privileged communications. The fact of what the defendant said can only be used as evidence of malice subsequently—*George v. Goddard* (11), and the plaintiff cannot now contend that the finding of the jury is wrong upon that point. The inference to be drawn by the Court ought to be in favour of the defendant. He thought that the plaintiff was dishonest, and it is not pretended that what he said was not in confirmation of his original statement. The only questions in such a case are, first, is the occasion privileged? secondly, was the defendant abusing the privilege? Whether the defendant has acted maliciously or not is a question for the jury—*Cooke v. Wildes* (12); where the defendant, who was deputy clerk of the peace for the county of Kent, had written a letter to the finance committee of the county giving reasons why he had taken away from the plaintiff the business of printing the register of voters for the county; the letter contained libellous matter, and Lord Campbell, C.J., who tried the cause, thought that the occasion was privileged, but that the defendant had exceeded his privilege; but inasmuch as he did not leave the question of malice to the jury, the Court made a rule absolute for a new trial. The same rule was laid down in *Toogood v. Spyring* (13). It is difficult to understand the case of *Fryer v. Kinnerley* (1).

[BLACKBURN, J.—I do not quite understand the *ratio decidendi*.]

(1) 33 Law J. Rep. (N.S.) C.P. 96; s. c. 15 Com. B. Rep. N.S. 422.

(2) 15 Com. B. Rep. 778; s. c. 24 Law J. Rep. (N.S.) C.P. 36.

(3) 5 Ad. & E. 535; s. c. 6 Law J. Rep. (N.S.) K.B. 48.

(4) 5 B. & Ald. 643.

(5) 4 Bing. 670.

(6) 1 B. & B. 7.

(7) 10 Com. B. Rep. 588; s. c. 20 Law J. Rep. (N.S.) C.P. 131.

(8) 13 Com. B. Rep. 636; s. c. 22 Law J. Rep. (N.S.) C.P. 190.

(9) 2 Cr. M. & R. 573.

(10) 12 Ad. & E. 733.

(11) 2 F. & F. 689.

(12) 5 El. & B. 328; s. c. 24 Law J. Rep. (N.S.) Q.B. 367.

(13) 1 Cr. M. & R. 181; s. c. 3 Law J. Rep. (N.S.) Exch. 347.

They also referred to *Whiteley v. Adams* (14).

[BLACKBURN, J.—Before we give our judgment, we will consult my Brother Channell; but we think that the parties had better consider whether they might not do well in consenting to a *stet processus*.]

Cur. adv. vult.

The judgment of the COURT (15) was now (May 13) delivered by

BLACKBURN, J.—In this case the action was for words spoken to one Charles Cooper, imputing to the plaintiff that he was a rogue, in consequence of which the plaintiff lost his situation as servant to Cooper. Plea, not guilty. On the trial, before my Brother Channell, it appeared that the plaintiff was a trustee of some local charity; that it had been proposed to remove him from that trust, and that Cooper, to whom the plaintiff was then farm-bailiff, at the request and instance of the plaintiff, was canvassing for signatures to a protest against his being turned out of the trust; Cooper requested the defendant to sign this protest; and he, having refused to do so, was pressed to give his reasons, and gave them, namely, that he would not keep a big rogue like the plaintiff in the trust; being further pressed, he explained the reasons for this opinion, which were that the plaintiff had left the parish under discreditable circumstances, and without settling with his creditors, including the defendant, so that it was plain that the words were used in a sense disparaging to the plaintiff, but not actionable without special damage. Cooper gave evidence that he in consequence of these words dismissed the plaintiff, not wishing as he said to have him near his son, a boy of about 18. At the close of the plaintiff's case, the defendant's counsel submitted that there was no case, as the words were privileged by the occasion. The learned Judge said that he should reserve the question for the Court above, and in the meantime leave to the jury the two questions whether the special damage did result from the words spoken, and the amount of damages, and also (in case the Court should

think the words privileged by the occasion) whether there was malice. The defendant's counsel then called witnesses, and amongst others the defendant himself, whose account of the conversation with Cooper did not materially differ from that given by the plaintiff's witnesses, except the defendant stated that towards the end of the conversation, he told Cooper that he (the defendant) was surprised that he kept such a man as the plaintiff on with his son. The jury found that the dismissal was in consequence of the slander uttered by the defendant, and assessed the damage at 10*l.*; but they negatived malice. The verdict was then entered for the plaintiff, with leave to move to enter a verdict for the defendant if the Judge ought to have held that the words were privileged. A rule nisi was obtained accordingly, which was argued before my Brothers Mellor and Shee and myself, during last term.

During the argument a doubt occurred to some of us whether the words, which, according to the defendant's own account, he had spoken as to his surprise that Cooper should keep the plaintiff near his son, were not so disjoined from the discussion about the trusteeship as not to be privileged, whatever might be the case with regard to the other words; but on reference to the learned Judge, we are informed that the whole of what was said about the plaintiff's character, was said with reference to the discussion whether it was proper that he should be continued as a trustee of the charity; and that the question reserved to the Court was whether, that being the case, words imputing roguery to the plaintiff were *prima facie* privileged or not. The intemperance of the defendant's expressions, and the assertion on his part that the roguery of the plaintiff was so great that he was not fit to be near young Cooper, were left to the jury as evidence of malice; but that being negatived, the question reserved is, whether the occasion excused language, strongly disparaging the plaintiff's character for honesty, but *bona fide* spoken with reference to the discussion whether it was proper to take steps to retain him as a trustee of the charity. No motion has been made to set aside the finding as to malice as against evidence, nor would the Court, according to its usual practice, have granted a rule on

(14) 33 Law J. Rep. (N.S.) C.P. 89; s.c. 15 Com. B. Rep. N.S. 392.

(15) Blackburn, J., Mellor, J. and Shee, J.

NEW SERIES, 34.—Q.B.

that ground where the damages were so small.

We are, therefore, now to take it as decided that the words were *bona fide* spoken with reference to the propriety of taking steps to retain the plaintiff in his trusteeship, that discussion having been brought on by the plaintiff himself causing the defendant to be canvassed for that purpose. The principle on which it depends whether words or writing *prima facie* actionable are justified by the occasion on which they are published, so as to put the plaintiff on proof of actual malice, has been laid down in *Toogood v. Spyring* (13), by Parke, B., in the following terms: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his own interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from the unauthorized communication, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." This exposition of the law has always been approved of, the difficulty felt being in the application of the rule to the particular case; and in the more recent decisions, such as *Whiteley v. Adams* (14), the tendency has been to extend the limits of the moral duty or reasonable exigency which authorizes the publication of defamatory matter. But we think that the present case falls strictly within the limits as laid down in *Toogood v. Spyring* (13). When the defendant was requested to join in taking steps to retain the plaintiff in his trusteeship, or to state the reasons why he so refused, we think that there was a duty towards those who were concerned in the trusteeship, and an interest of his own, making it a reasonable occasion warranting his statement of that which he believed, so far as it was pertinent to the fitness of the plaintiff for that office. And this was still more clearly the case when we find that the defendant was canvassed at the instance of the plaintiff himself. Under such circum-

stances the plaintiff cannot, as we think, complain of any statement honestly made, if pertinent to the question whether the plaintiff was fit to be trusted, and every statement relating to his honesty and previous conduct in business was pertinent to such a question. If the defendant had made statements injurious to the plaintiff's character, on some matter not in any way connected with the subject of his fitness to be a trustee, as if, for instance, there had been a statement made that he had beaten his wife, that would have been wholly unwarranted by the occasion, and would consequently not have been privileged. But all the words of which evidence was given in this case, were relevant to the question whether the plaintiff was fit to be trusted or not; and that being so, we think that, according to the decision of this Court in *Cook v. Wildes* (12), of which we approve, the intemperance of the defendant's language and the unnecessary force of his expressions formed evidence of malice which it was proper to leave to the jury, but did not take away the privilege, the jury having negatived malice.

We think, therefore, that the rule must be absolute to enter the verdict for the defendant.

Rule absolute.

1865.
June 7.

THE QUEEN v. THE GOVERNOR
OF THE DEBTORS' PRISON
FOR LONDON AND MIDDLE-
SEX, IN WHITECROSS STREET,
IN THE CITY OF LONDON.

Gaol—Whitecross Street Prison—Commitment—Civil Process—Poor Rate—52 Geo. 3. c. ccix.—12 & 13 Vict. c. 14. s. 2.—4 Geo. 4. c. 64.

A commitment by Justices for non-payment of poor-rates is in the nature of civil process, and the proper prison for a person so committed by the Justices of Middlesex is the prison in Whitecross Street.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 193.]

1865. } REYNOLDS AND ANOTHER v.
June 16. } JEX.

Ship and Shipping—Charter-Party—Master's Authority to make Bills of Lading with Freight payable to third Persons.

The master of a ship has no power, under his general authority, to draw bills of lading making the freight payable to other than his owner.

A ship was chartered out and home at a lump sum, bills of lading to be signed by the shipowner or agent at any rate of freight without prejudice to the charter. At an outward port, the agents of the charterers advanced money to the master for the ship's use, on condition of the ship taking goods on the return voyage under bills of lading making the freight payable to them (the agents), or their assigns, at the port of delivery; goods were put on board, and bills of lading given accordingly by the master:—Held, that the master had no authority to make such bills of lading, and that the shipowner retained his lien on the goods for freight.

This was an interpleader issue to try whether or not the plaintiffs were entitled to the 350*l.* paid into court under an interpleader summons; and was tried, before Shee, J., at Liverpool, at the Spring Assizes, 1865, when the following were the undisputed facts:

The defendant, living at New York, is owner of the British ship *De Jex*, and entered into the following charter-party, on the 11th of September 1863, with James C. Jewett & Co., of New York.

"This charter-party, made and concluded upon in the city of New York, this 11th day of September in the year 1863, between Josiah Jex, of New York, agent of the British bark *De Jex*, of Jamaica, B.W.I. of the burden of 398 (U.S. measurement) tons or thereabouts, now lying in the harbour of New York, of the first part, and James C. Jewett & Co., of New York, of the second part, witnesseth that the said part of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said part of the second part, do covenant and agree on the freighting and

chartering of the said vessel unto the said part of the second part, for a voyage from the port of New York to Hong Kong and Whampoa, and thence to Shanghai (China), and from thence to an Atlantic port in the United States, and not south of the Chesapeake, or to a port in Great Britain, not beyond London, on the east coast, or to a port on the continent of Europe, between Havre and Hamburg inclusive, calling at Queenstown or Falmouth for orders, with liberty to use on returning to the United States or Great Britain, &c. &c., as named, one other port in China, or to use Manila or Singapore, on the terms following, that is to say: First, the said part of the first part do engage that the said vessel, in and during the said voyage, shall be kept tight, staunch, well-fitted, tackled, and provided with every requisite, and with men and provisions necessary for such voyage. Secondly, the said part of the first part do further engage that the whole of the vessel (with the exception of the cabin, the deck, and the necessary room for the accommodation of the crew and of the sails, cables and provisions,) shall be at the sole use and disposal of the said part of the second part, during the voyage aforesaid, and that no goods or merchandise whatever shall be laden on board, otherwise than from the said part of the second part, or agent, without consent, on pain of forfeiture of freight agreed upon for the same. Thirdly, the said part of the first part do further engage to take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as the said part of the second part, or agent, may think proper to ship. And the said part of the second part, for and in consideration of the covenants and agreements to be kept and performed by the said part of the first part, do covenant and agree with the said part of the first part to charter and hire the said vessel as aforesaid, on the terms following, that is to say: First, the said part of the second part do engage to provide and furnish the said vessel with cargoes of lawful merchandise, or at least sufficient for ballast, during the voyage, to include from New York two steam boilers, which are to be taken

under deck, by part of the first part, to be put on board free of expense to said vessel, and to be discharged in like manner; captain assisting with his crew, the masts, purchases, blocks, &c. Secondly, the said part of the second part do further engage to pay to the said part of the first part, or agent, for the charter or freight of said vessel during the voyage aforesaid in manner following, that is to say, the sum of 3,000*l.* British sterling, with its equivalent, payable as follows: 1,500*l.* at Shanghai, on correct discharge of the cargoes at Hong Kong and Shanghai, less the advance hereinafter provided for, payable in approved bank bill on London as customary, or in cash equivalent thereto, at the captain's option, and 1,500*l.* on correct discharge of return cargo in the United States, or in the United Kingdom, or on the continent as named, payable in satisfactory bill on London, or in cash equivalent thereto. 1,000*l.* or its equivalent in currency at current rate of exchange, optional with the part of the first part, to be advanced in New York by part of the second part on this charter on the signing of the charter-parties, and subject to the payment by part of the first part and by said vessel, with the premium of insurance to Hong Kong and Shanghai and four months' interest to be deducted therefrom."—(Then followed clauses as to loading, &c.)—"Privilege to part of the second part of passengers in the cabin at 200 dollars for each adult, payable before sailing of the ship, also the privilege of such deck-freight as the ship can safely carry. Stevedore of part of the second part to be employed in loading the vessel, part of first part paying customary rates therefor, provided he does not charge more than any one else. *Bills of lading to be signed by part of first part or agent, at any rate of freight, without prejudice to this charter.* Draft of water subject to New York Board of Underwriters. Vessel to be consigned at port of discharge to charterer's agent, and subject only to a commission of 2*l.* 10*s.* per cent., payable to the said agent on the amount earned by the vessel up to arrival at Shanghai to agent there, and on the amount due on final discharge of cargo in United States or United Kingdom, &c. to agent there. Vessel if moved a second time in New

York in loading to be done at expense of part of second part. To the true and faithful performance of all the foregoing covenants and agreements, the said parties, each to the other, do hereby bind themselves, their executors, administrators and assigns, and also the said vessel, freight, tackle and appurtenances, and the merchandise to be laden on board each to the other in the penal sum of the amount of this charter."

The sum of 1,000*l.* was paid at New York according to the terms of the contract, and on the charter-party was indorsed a receipt by the shipowner's agent in these terms: "New York, Sept. 15, 1863.—Received on the within charter (of the bark *De Jex*) the sum of 1,000*l.*, therein specified as the advance to be made on the signing of the same. The said 1,000*l.* is to be deducted by Messrs. Frazar & Co., of Shanghai, to whom this vessel is consigned in China, from the amount of the charter-money due as specified, or correct discharge of cargo at Hong Kong and Shanghai," &c., "and this 1,000*l.* is to be held by Messrs. Frazar & Co. subject to the order of Messrs. Dehon, Clark & Bridges, of New York."

The vessel proceeded from New York to China, and there discharged her outward cargo; and Messrs. Frazar & Co., the charterers' agents at Shanghai, then paid the balance of 500*l.* on the 1,500*l.* payable there. The master, however, requiring further funds for the purposes of the ship, Messrs. Frazar & Co. refused to advance any further sum on account of the freight; but agreed to advance him 459*l.*, on condition that the ship should take home for them a certain amount of cotton, under bills of lading making freight payable to them or their agent at the port of discharge. Accordingly, cotton was shipped on board the *De Jex*, for which the master, on the 21st of May 1864, gave the following bills of lading:—

"Shipped by Frazar & Co. on board, &c., 691 bales of cotton, to be delivered, &c., at the port of Liverpool, unto order, or his or their assigns, he or they paying freight for the said goods, to Messrs. Reynolds, Mann & Co., Liverpool (the plaintiffs), as per margin: 691 bales, at 3*l.* 15*s.* per ton of 50 cubic feet."

The following receipt was signed by the master on the 28th of May 1864 :

"Received from Messrs. Frazer & Co., on account of the charter of the barque *De Jex*, 959l. 8s. 3d., charter-party dated at New York, the 11th of September 1863."

Messrs. Reynolds, the plaintiffs, received the charter-party, and at the same time the bills of lading, the freight on which amounted to 981l. 9s.

On the arrival of the ship at Liverpool, in November 1864, the balance due on the charter freight was 1,040l. 11s. 9d.; and the plaintiffs, to whom it was consigned, docked the ship, and disbursed between 300l. and 400l. on her account. They then claimed the goods consigned to them, and as the freight, per bills of lading, was payable to themselves, they insisted on a delivery of the goods freight free.

The defendant's solicitors, acting under the 194th section of the Mersey Docks Consolidation Act, 1858, served the following notice on the harbour board :

"To the Mersey Dock and Harbour Board.

"Stanley Dock.

"On behalf of Josiah Jex, ship's husband of the barque *D. Jex*, now discharging in the Stanley Dock.—We hereby give you notice to detain and keep the cargo brought by the said vessel in the warehouses belonging to the said board until the freight and charges for the same are paid and satisfied, of which we will give you due notice, or until a sufficient deposit is made to cover such freight and charges; and we hereby give you notice not to pay over to any person or persons the said freight or deposit without our consent on behalf of the said Josiah Jex."

The plaintiffs deposited with the dock board 1,100l., being the sum insisted upon by the board, though more than the amount of the bill of lading freight on the 691 bales of cotton consigned to them, and then commenced an action against the dock board to recover the 1,100l.

An interpleader summons was taken out, and the defendant substituted for the dock board as defendant. Owing to the disbursements made by the plaintiffs as consignees of the ship, and by subsequent arrangement, 750l. was paid to the plaintiffs, and 350l. only was retained in court.

On the above facts, a verdict was entered for the plaintiffs, with leave to the defendant to move to enter it for him.

A rule nisi having been obtained accordingly, on the ground that the defendant had a lien upon the cargo,

E. James and *Holker* shewed cause.—

The agents of the charterers at Shanghai, Messrs. Frazer & Co., were bound to advance 500l., but they were not bound to advance more. They then, as independent merchants, made an independent contract with the master, whereby they agree to advance a further sum on condition that the master shall take goods for them to the home port, freight being made payable to agents of their own. They had notice of the charter-party, and the question is whether the master, in taking advances from them for the purposes of the ship, had not power to bind the owners to the extent of the advance? The master had a right to receive the money, and he was authorized, under this charter-party, to give these bills of lading, assigning the cargo by way of security.

[BLACKBURN, J.—It is an unusual proceeding. I never heard of a bill of lading being made payable to a third person. I do not say it cannot be done.]

In *Shand v. Sanderson* (1), Pollock, C.B., in delivering judgment, says, "What is the meaning of the expression 'without prejudice to this charter-party'? It means, not that a right of lien must be presumed, but that the charter-party is not to be considered as waived, and that all rights created by it are to exist as a matter of contract, though they do not attach on the goods by way of lien." There is no reason why freight should not be assigned.

[CROMPTON, J.—You make the whole freight payable to A. and B, and say that they are trustees for the difference when they may be insolvent persons.]

The case already cited and *Foster v. Colby* (2) seem to shew that bills of lading may be signed for nominal freight, and they appear to authorize the borrowing of money for the ship in this manner without compelling the master to have recourse to the more expensive course of bottomry.

(1) 4 Hurl. & N. 381, 389; s. c. 28 Law J. Rep. (N.S.) Exch. 278.

[SHEE, J.—In *Foster v. Colby* (2) Watson, B. explains why on certain cargoes bills of lading are given as nominal freight, or no freight at all.]

In *Pearson v. Göschel* (3), it was held that, under the circumstances there stated, the master had authority to enter into a new contract binding on the shipowner.

[BLACKBURN, J. — The plaintiffs' case would be advanced, if it could be shewn that the captain can in any way pledge the freight, except by maritime contracts well known in Courts of Admiralty.]

This is not the case of a pledge. The charter-party must be looked at to ascertain the extent of authority given to the master; and it is submitted that here, where the contract was for a lump sum, it was the intention of the parties that the captain should take goods on board free of the shipowner's lien.

[BLACKBURN, J.—In *Maude and Pollock on Shipping*, p. 104, it is stated, "Although the immediate control of the ship as to her employment is vested in the master, he has no power to alter the voyage, or to vary the rate of freight at which goods are to be shipped, in contravention of the agreement made between his owner and the freighter, or to make freight payable beforehand, or to any person other than the owner;" and reference is made to the case — *The Sir Henry Webb* (4). The charter in that case was different from the present, and there, as well as in *Dewell v. Moxon* (5), all that appears is, that the freight cannot be pledged for a debt, and that goods cannot be taken on board freight free. But here the ship is let to the charterer for a lump sum, and it was the intention of the parties that the shipowner's right to freight should be confined to the 2,000*l.*, and that the right to freight on the other goods should be to secure the balance of the lump sum only, so that if the whole amount of the lump sum were paid no claim should be made for freight on the 491 bales.

(2) 3 Hurl. & N. 705; s. c. 23 Law J. Rep. (N.S.) Exch. 81.

(3) 17 Com. B. Rep. N.S. 352; s. c. 33 Law J. Rep. (N.S.) C.P. 265.

(4) 13 Jur. 639.

(5) 1 Taunt. 391.

Temple, in support of the rule, was proceeding to shew that the present case was decided by *Pearson v. Göschel* (3), when he was stopped by the Court.

CROMPTON, J.—The question in this case is, whether the master could give bills of lading whereby, for an advance of about 500*l.*, he bound the owners to carry certain goods, with the stipulation that the lender's nominees should receive the whole of the freight. In the first place, I am not aware that there is any authority for such a proposition, and it is admitted that there is none; and in the next place it is against the principle by which all such cases are governed. The shipowner is entitled to his lien for the freight; but by such a contract as the present it would be possible for the owner to be deprived of all right of lien whatever. The charter freight may be, as here, for a lump sum, or for freight at a higher rate than the bills of lading freight. But the result of the present contract would be that the shipowner would lose his lien for the charter freight due to him at Liverpool, and receive instead the bill of lading freight only, these bills of lading being given for a much smaller amount. The master, however, cannot deprive the owner both of the charter freight and his lien for it by substituting bills of lading, giving a remedy of a different character. The shipowner is entitled to the 1,100*l.*, and it cannot be made payable to A. B. Under these bills of lading the money could only be sued for by A. B. or by parties claiming under them, and if A. B. proved insolvent, the result would be loss of the lien to the shipowner. This is not like the case of hypothecation or bottomry, where the party lending is entitled to his money on arrival of the ship. The law maritime makes such a transaction a remedy for the advance only, and it does not give it the effect which the present case would have. There is, therefore, no difficulty in such a case, but in the present there is a loss cast upon the owner: the loss of his freight or of the lien which is to secure it. No case being cited to shew that this can be done, we are not prepared to hold now for the first time that it can be done. Not only is there no authority for this proposition, but the case of *Walshe v.*

Proves (6) is a direct authority the other way. There it was held, that it was not competent to the defendants to procure the master to execute a charter-party which excluded the right of the owners to freight, which is incident to the vessel. It would be, indeed, difficult for us to say that in addition to the known methods by which security for advances may be given, this novel mode could also be allowed. I am of opinion, therefore, that this rule should be made absolute.

BLACKBURN, J.—I am of the same opinion. In this case, the defendant had entered into a charter-party by which freight was to be a lump sum. Had this stood alone, the captain would have had a lien for the whole of the freight. But a power is inserted, as usual, that the captain may enter into contracts limiting the owner's right to freight. Mr. Holker's argument is that the master has thereby power to make what contracts he pleases. There is nothing to shew that such extensive authority is thereby conferred. The captain has entered into a contract making freight payable to Messrs. Reynolds. So that bills of lading are given for goods by which the freight is made payable to third persons. What power has the captain to make such a contract? In *Grant v. Norway* (7), it is stated by the Court,—“The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment of the ship, but is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made. He may take up money in foreign parts, and under certain circumstances at home, for the necessary disbursements for repairs, and bind the owners for repayment. But his authority is limited by the necessity of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may pretend that it is. He may make contracts to carry goods on freight, but cannot bind his owners to carry freight free.” The judgment also cites with approval a passage from *Smith's Mercantile Law*, to

the effect that “the authority of the master is to perform all things usual in the line of business in which he is employed.” The question is there put by the Court: Is it usual in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board, as had been done in that case? So the question here is, whether it is usual in the management of such a ship, to make freight payable to third persons? There has never been found such a case; it is an entire novelty. The captain in my opinion has gone quite beyond his authority as master; he had no right to do as he has done, and our judgment is therefore in favour of the shipowner.

SHER, J.—I am of the same opinion. In the case of *Dewell v. Moxon* (5), Mansfield, C.J. inquires whether, the plaintiff having obtained the use of the owner's ship without his consent, the owner is not entitled to a *quantum meruit* for freight; and Lawrence, J. adds, “As to the extent of the captain's authority, suppose a butcher's servant should give away his owner's mutton to persons who dress it and eat it, would not the butcher be entitled to payment?” This case is commented on in *Abbott on Shipping*, 9th ed. p. 106, where it is stated, that an engagement to carry goods free of freight will not be within the scope of the captain's authority; and the same may be said of the present case.

Rule absolute.

1865.
June 3.

{ HARTER, *appellant*, v. THE
OVERSEERS OF THE TOWN-
SHIP OF SALFORD, *respon-*
dents.

Poor-Rate—Rateability—Beneficial Occupation—Unused Mill rateable as Warehouse.

The owner of a silk-mill, having given up working it himself, but retaining possession of it in statu quo, intending to let it with the machinery as a silk-mill, is rateable in respect of his occupation of the mill as a warehouse for his machinery and plant.

(6) 8 Exch. Rep. 843; s. c. 22 Law J. Rep. (N.S.) Exch. 355.

(7) 10 Com. B. Rep. at pp. 687-8; s. c. 20 Law J. Rep. (N.S.) C.P. at p. 98.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 206.]

BAIL COURT. }

1865. }

Jan. 31. }

EVANS v. PROSSER.

Award—Rule to pay Money—Attorney accepting Service of Rule Nisi—Personal Service.

The Court will not make absolute a rule nisi on a defendant to pay money pursuant to an award unless there has been personal service, or unless it be shewn that personal service cannot be effected because the party is keeping out of the way to avoid service. An acceptance by the attorney of the defendant of the service of the rule nisi, and a consent by him to the rule being made absolute, are not for this purpose equivalent to personal service.

In this case a rule nisi had been obtained, calling on the defendant to pay the plaintiff money pursuant to an award.

The clerk to the plaintiff's attorney went to the defendant's abode to serve the rule nisi, but finding that the defendant had gone to a place thirty miles off, he followed there, but when he reached the place the defendant had gone away to some other place, where the agent was unable to follow him at the time. The defendant was not keeping out of the way to avoid service. The plaintiff's clerk, not being able to find the defendant, saw the defendant's attorney, who stated that he was perfectly willing to accept service of the rule nisi for the defendant, and he indorsed on the original rule produced to him an acceptance of service of the rule for the defendant, and a consent that the rule might be made absolute.

R. G. Williams on these facts moved to make the rule absolute.

BLACKBURN, J.—The practice is that there must be personal service of the rule nisi to pay the money, or it must be shewn that every effort has been made to effect personal service, and that the party is keeping out of the way to avoid service. Here the defendant is not served personally, nor is he evading service. There may be some hardship, on both sides, not to make the rule absolute, as it may put them to some additional expense. But to make this rule absolute on the consent of the defendant's attorney would, I fear, be

establishing a bad precedent. The rule cannot be made absolute, but may be enlarged to chambers.

Rule enlarged.

1865. }

June 3. }

HOSSACK, appellant, v. GRAY, respondent.

Ship and Shipping — Licensing Pilots — Corporations of the London and Leith Trinity Houses.

The power to license pilots granted to the Corporation of the Trinity House of Leith by their charter and statute 1 Geo. 4. c. xxxvii. s. 32. only extends to the navigating ships along the coast of Scotland, and does not empower the corporation to grant a licence to navigate a ship south of Orfordness to or from the Nore, for which a London Trinity House licence is necessary.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 209.]

1865. }

June 14. }

THE QUEEN v. THE LOCAL BOARD OF HEALTH OF WORKSOP.

Public Health Act, 1848 (11 & 12 Vict. c. 63.) ss. 89. and 149.—General District Rate, Signing and Sealing of—Validity of —Past and Future Expenses.

The Public Health Act, 1848, (11 & 12 Vict. c. 63.) s. 149, enacts that whenever the consent, sanction, approval, or authority of the Local Board of Health is required by the provisions of the act, the same shall (in the case of a non-corporate district) be in writing under their seal and the hands of five or more of them :—Held, that this enactment applied to a general district rate made by the board, and that the want of the seal and signatures was fatal to the validity of the rate.

Semble, that one general district rate may be made under section 89. to include both past and future expenses, if the amount of each is distinguished in the estimate.

Quære—What is the consequence of an insufficient compliance in the estimate with the requirements of section 98?

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 220.]

[IN THE EXCHEQUEUR CHAMBER.]
 (*Error from the Court of Queen's Bench.*)
 1865. } RICKETS v. THE METROPOLITAN
 Feb. 3. } TAN RAILWAY COMPANY.*

*Lands Clauses Consolidation Act —
 Lands injuriously affected by Railway Works —
 Temporary Obstruction of Highway —
 Loss of Trade — Compensation.*

If a railway company during the execution of their works under their special act place a bridge on a highway, up and down and over which bridge passengers must pass, instead of along the level highway, and so render the access to a public-house more difficult, and passengers are thereby deterred from going that way, and there is in consequence a loss of trade to the public-house, the tenant of the public-house cannot sustain a demand for compensation, under section 68. of the Lands Clauses Consolidation Act, 1845, on the ground that his land has been injuriously affected by the works; for no action would have lain against the company had they not been authorized by their special act; and even if an action might have been supported, still no compensation is claimable, since the damage, if any, is of a personal character, and not an injury to the land.

So held in the Exchequer Chamber (reversing the judgment of the Court of Queen's Bench) by Erie, C.J., Pollock, C.B., Channell, B. and Pigott, B.; dissentientibus Byles, J. and Keating, J.

Senior v. the Metropolitan Railway Company (1) and Cameron v. the Charing Cross Railway Company (2) overruled.

Error was brought in this case by the defendants, to reverse the judgment of the Court of Queen's Bench, in favour of the plaintiff, on a special case.

The following were the material facts. The plaintiff was the lessee of a public-house situate in Crawford Passage. Along Crawford Passage and across Coppice Row was a public footway. The defendants, for

the purpose of their works, placed a hoarding in Coppice Row, and placed steps to enable the foot-passengers to pass up on one side and down on the other side of a bridge over the hoarding, and they did this in accordance with their duty under their statutes, and after twenty months restored the premises to their original state. After this bridge had been so erected, the number of passengers passing to and fro along Crawford Passage diminished; the refreshments sold by the plaintiff were diminished in proportion; and the jury must be taken to have found that the bridge and steps formed the motive which turned the passengers in another direction and prevented the sale of refreshments which would otherwise have been bought by them, and so caused the loss of profit.

Hawkins (G. Rockfort Clarke with him), (Nov. 28, 1864,) for the appellants, the railway company.—The plaintiff is not entitled to any compensation. The obstruction was authorized by the act, and as soon as the tunnel was made, the obstruction, such as it was, was removed. The company, pursuant to the act, made a substituted road before commencing the works. No road was stopped up here, for the public could pass by a bridge. The only loss alleged is the loss of custom by foot-passengers. The first objection to this inquisition is, that if the plaintiff has any right to compensation, it is by action under section 55. of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, which gives an action to a party who suffers special damage by obstruction of a public way. Secondly, there is no legal injury, and therefore no ground for compensation, for the house or land of the plaintiff has not been injured, only his trade. In all the cases which can be cited, it has been found that the house had been injured. Thirdly, the injury is too remote; it is common to all the Queen's subjects. Every one may claim, if the plaintiff may claim. His injury is not of a different character from that of others. The test is whether an action would have lain supposing the obstruction had been made without the sanction of parliament. Here no action would have lain. There is, in fact, no obstruction for foot-passengers. No action would lie because the road was made muddy or cut up by contractors' carts. No action lies for the plaintiff merely

* Decided in the Sittings after Hilary Term, *coram* Erie, C.J., Pollock, C.B., Channell, B., Byles, J., Keating, J. and Pigott, B.

(1) 2 H. & C. 258; s. c. 32 Law J. Rep. (N.S.) Exch. 225.

(2) 16 Com. B. Rep. N.S. 447; s. c. 33 Law J. Rep. (N.S.) C.P. 318.

because a customer dislikes passing over a bridge to him.

D. D. Keane, for the respondent, the claimant.—The plaintiff was entitled to compensation. Loss of profits of land forms a ground of compensation. This house was depreciated by the injury to the trade. There was evidence of it, and the jury must be deemed to have found it. In *Senior v. the Metropolitan Railway Company* (1) Pollock, C.B. says, that loss of profits by loss of business is a loss to the goodwill of the business, and that the goodwill is part of the value of the property; therefore loss to the goodwill is an injury to the property. If a company take a man's lease and freehold, and he carries on a business, the company must give him compensation for the land, for the lease and for the loss of business. If, then, the company do not want the freehold nor the lease, that is, the whole occupation of the tenant, but take his business away, they ought to give him compensation for that. If a man's land is taken, inquiry is always made whether the business can be carried on equally well at some neighbouring place. If so, the loss of business comes to nothing. To diminish a man's trade by obstructing access to his house is injuriously affecting the land which he uses for the purposes of trade. The damage is not too remote. In an action for slander, loss of casual customers by reason of the slander would be special damage, as well as loss of regular customers. There is no distinction in principle between a permanent and a temporary obstruction as a ground of compensation. The words of the statute 8 & 9 Vict. c. 18. s. 68. contain no limitation. In *Rose v. Groves* (3) it was decided that an innkeeper could maintain an action for the special injury of his waterway being obstructed by some timber in the river Thames, which was an obstacle to the river and also an indictable nuisance. In *Gatke's case* (4) it was held, that injury from a temporary nuisance by putting up a hoard was a ground of action. *Wilkes v. the Hungerford Market Company* (5) shews

that an action lies for keeping thoroughfares improperly closed, and so diminishing the amount of business done in the shop. The improper obstruction of the footway was a nuisance, an indictable nuisance, but also actionable on account of the special damage by reason of the temporary obstruction of the business and loss of customers. In *The Caledonian Railway Company v. Ogilvy* (6) the obstruction caused by the railway was held only a personal inconvenience, and one that was common to the owner and the rest of the Queen's subjects. But had the complainant been a trader, and had there been an injury to his trade, the decision would have been different. The house is an essential thing to carrying on the business of a trader, and therefore the injury to the business is an injury to the house. The Railways Act, section 55, does not apply, for it only gives an action if another sufficient road is not made. Here another sufficient road was made, but the injury was not compensated for by the making the new road.

Hawkins replied.

Many other cases were cited and commented on in the argument, but all of them are noticed in the judgment.

Cur. adv. vult.

On the 3rd of February the following judgments were delivered.—

ERLE, C.J.—The judgment I am about to read is the judgment of the Lord Chief Baron, Mr. Baron Channell, Mr. Baron Pigott, and myself. — [His Lordship stated the facts as above set forth.]—These being the facts, a question was raised whether the plaintiff is shewn to be entitled to compensation in respect of land, or any interest therein, which has been injuriously affected by the execution of the defendants' works. The plaintiff contended that the house was injuriously affected within the statute by that which caused a loss in the trade carried on in the house; and he further argued that a damage to the goodwill of the trade carried on in his house ought to be held to be an injurious affection of the house within the statute, because, if the house had been taken by the defendants under the statute, the goodwill of the trade carried on in it at

(3) 5 Man. & G. 613; s. c. 12 Law J. Rep. (N.S.) C.P. 251.

(4) 3 Mac. & G. 155; s. c. 20 Law J. Rep. (N.S.) Chanc. 217.

(5) 2 Bing. N.C. 281; s. c. 5 Law J. Rep. (N.S.) C.P. 23.

(6) 2 Macqueen, 229.

the time would have been a subject for compensation according to usual practice, and he cited *Chamberlain's case* (7), and two cases founded thereon—*Senior v. the Metropolitan Railway Company* (1) and *Cameron v. the Charing Cross Railway Company* (2).

For the defendants, it was contended, that upon these facts, if there had been no statutes for the defendants, the plaintiff would have had no cause of action against them for special damage caused by the obstruction of a highway, and if there would have been no cause of action there was not a right to compensation: and, secondly, that even if upon these facts an action could have been maintained for such a special damage if there had been no statute, still the plaintiff is not entitled to compensation, because the special damage is to his personal interest in his stock in trade, and not to his estate in land, no compensation being given unless land, or an interest therein, has been injuriously affected.

As to the first point, namely, that upon these facts, if there had been no statute for the defendants, the plaintiff would have had no cause of action against them for special damage caused by the obstruction of a highway, we assume it to be clear that there is no title to compensation under the statutes for an obstruction of a highway, unless without the statute an action would have lain for the obstruction and the special damage, according to *In re Penny v. the South-Eastern Railway Company* (8). We assume, further, that although an action would lie, it does not follow that there would be title to compensation, because an action would lie for a special damage to a personal interest, yet no compensation is given under the statute unless land has been injuriously affected—see Lord Cranworth's judgment in *The Caledonian Railway Company v. Ogilvy* (6).

Then, first, do these facts shew that an action would have lain? An action lies where the exercise of the right of way by or on behalf of the plaintiff has been obstructed, and a greater damage has been

caused to him thereby than is caused to the Queen's subjects in general by obstructing them in the exercise of their right. This position is not disputed, but the following cases exemplify its application. In *Iveson v. Moore* (9) the plaintiff was prevented, by the defendant's obstruction of the highway, from using the way for carting coals from his colliery, which coals were deteriorated by the delay. In this case the law on actions for obstructions of highways is well discussed. In *Maynell v. Saltmarsh* (10) the plaintiff was prevented by the defendant's obstruction from carrying his corn, and so the corn became damaged by rain. In *Hart v. Basset* (11) the plaintiff, a farmer of tithes, was prevented by the defendant's obstruction from carrying them home, and several grounds of special damage are suggested by Lord Holt in *Iveson v. Moore* (9). In *Fineux v. Hovenden* (12) the special damage mentioned as an example is damage caused directly by the obstruction of the plaintiff in the use of the way. In *Greasley v. Codling* (13) the plaintiff was prevented by the defendant's obstruction from carrying his coals. In *Paine v. Patrick* (14) the plaintiff's damage was not actionable, and the example of actionable damage is put thus: "A particular damage to maintain the action ought to be direct, and not consequential, as, for instance, the loss of his horse, or by some corporeal hurt by falling into a trench on the highway." In *Chichester v. Lethbridge* (15) the obstruction was held actionable, because the plaintiff was personally opposed by the defendant in an attempt to abate the obstruction and use the way. In *Rose v. Miles* (16) the plaintiff was obstructed in his use of the navigable water, and was damaged by being obliged to unload his barge and carry the goods over land. In all these cases the plaintiff was exercising his right of way, and the defendant obstructed that exercise, and caused particular damage thereby, directly and immediately, to the plaintiff. Here there has been no

(9) 1 Ld. Raym. 486; s. c. Carth. 451.

(10) 1 Keb. 847.

(11) T. Jones, 156.

(12) Cro. Eliz. 664.

(13) 2 Bing. 263.

(14) Carth. 191, 194.

(15) Willes, 71.

(16) 4 M. & S. 101.

(7) 2 B. & S. 605; s. c. 32 Law J. Rep. (N.S.) Q.B. 173.

(8) 7 El. & B. 660; s. c. 26 Law J. Rep. (N.S.) Q.B. 225.

obstruction to the exercise of the right of way by or on behalf of the plaintiff; neither he himself, nor any one standing in a legal relation to him, such as servant, agent, tenant, or any other legal relation which gave to the plaintiff a legal interest in their use of the way, has been obstructed; but some unknown travellers, having a free option to pass from north to south either by Crawford Passage or any other pass, have chosen some other pass, because they did not like the steps at Coppice Row. The plaintiff has no cause of action against the defendants by reason of any obstruction direct to himself. The travellers who have chosen to turn out of their path to avoid the steps have no cause of action against the defendants in respect of the obstruction; and it seems unreasonable that an obstruction which created no cause of action either for the plaintiff or the travellers separately should, by indirect consequence, become a cause of action to the plaintiff, because the travellers exercised their choice as to their path and as to their refreshment, a choice in which the plaintiff had no manner of legal right. The plaintiff relied on *Wilkes v. the Hungerford Market Company* (5) as an authority in his favour. The case was argued, and the judgment is on the point that the action lay for the loss of custom to a shop caused by the obstruction of a highway at some distance therefrom. But it must be observed that the case is peculiar. The obstruction complained of in the declaration was lawful by the special statute of the defendants; but this defence was overruled, because a substituted way had not been opened before the stoppage, and, ultimately, the action was sustained on the ground that there had been unreasonable delay in removing a hoarding, which was lawful in its inception, but was continued too long, in respect of which it is not clear that an indictment would lie; and although the damage appears to be indirect, and the cases above cited were referred to, leading, as it seems to us, to a decision in the defendants' favour, the Court gave judgment for the plaintiff, and held the loss of profit to be the "direct, natural, necessary and immediate consequence of the obstruction." We have found no other precedent of an action being maintained for an obstruction of a highway,

where the plaintiff was not obstructed in the exercise of any right vested in him, and the damage was not a more direct, necessary, natural and immediate consequence of the obstruction than appeared in *Wilkes's case* (5). If the same question were raised in an action now, we think it probable that the action would fail, both from the effect of the cases which precede *Wilkes's case* (5), and also from the reasoning in the judgment in *The Caledonian Railway Company v. Ogilvy* (6). There a railway crossed a highway on a level, and the highway was stopped, by two gates, for trains to pass, and the plaintiff lived near those gates, and suffered frequent inconvenience; but the judgment is, that he could maintain no action for this inconvenience, as it was the delay common to all who were exercising their right at that time; and although from his proximity the inconvenience to the plaintiff was frequently repeated, yet it was always the same in kind, and was not actionable special damage; and because an action would not have lain, therefore the plaintiff had no right to compensation from the railway. And Lord Cranworth adds the limitation above suggested, that even if an action lay, still, that compensation would not be due, unless injury was to the land. These are our reasons that an action would not have lain, and so the claim for compensation fails.

But, secondly, even if the action would have lain for this obstruction, whereby the plaintiff was damaged in his trade, still such damage did not accrue to the plaintiff in his capacity of owner of an estate in land, and the title to compensation to which the statute relates is only in respect of land, or an interest therein, which has been injuriously affected. Here the plaintiff has a term in the house, and the point is, whether the house is shewn to be injuriously affected because the profits of the plaintiff's trade carried on therein are diminished by reason of the obstruction. The trading carried on in the house is entirely distinct from the estate in the house. The procuring of refreshment and the sale thereof, and the profit thereon, may either continue or cease, without affecting the plaintiff's interest in the house. If his licence was taken away, the business would cease, but the house and the estate therein would be the same as before; and it is clear,

that an estate in the house is not essential to the sale of refreshments, as many kinds are sold in the street by persons having no interest in the land where they sell. The statute limited the liability to compensation in respect of injuries to definite rights of a permanent nature, that is, to rights in land. The public has a valuable interest in, and derives much advantage from the works of public companies. The capital invested in them is therefore protected, within certain limits, and we are to see that those limits are not exceeded; and in support of this view we refer again to Lord Cranworth's words in *Ogilvy's case* (6) above cited. As to the argument, that compensation is in practice allowed for the profits of the trade where land is taken, the distinction is obvious. The company claiming to take land by compulsory process, expel the owner from his property, and are bound to compensate him for all the loss caused by the expulsion; and the principle of compensation, then, is the same as in trespass for expulsion; and so it has been decided in *Jubb v. the Hull Dock Company* (17). There a brewery had been taken by the defendants, and the plaintiff claimed to be compensated for the loss of his business as a brewer; and the Court held that he was so entitled, expressly on the ground that the premises had been taken; and distinguished that case from *The King v. the London Dock Company* (18), where compensation for loss of custom to a public-house was held to have been properly refused, upon the ground that in the latter case no part of the premises of the claimant had been taken or touched by the company. But the present claim under section 68. of the Lands Clauses Consolidation Act, 1845, is made in respect of lands injuriously affected, where no land has been taken, and if it was held that a claim could be sustained against a company for the loss of profit which a jury could attribute to an obstruction of a highway in the execution of their works, the liabilities in a dense population would be innumerable. The common law limited the remedy for obstructions of public rights to indictment,

unless there was special damage, to prevent innumerable actions, and the same reason applies in full force to prevent innumerable claims on account of an alleged loss of profits caused by obstructing a thoroughfare.

We consider that the authorities support this conclusion, notwithstanding the recent cases in the three Courts to the contrary, viz., *Senior v. the Metropolitan Railway Company* (1) in the Exchequer, *Cameron v. the Charing Cross Railway Company* (2) in the Common Pleas, and this case in the Court below; for these cases are all founded on the supposed effect of the judgment in the Exchequer Chamber, in *Chamberlain's case*; and if that judgment has been misunderstood, these cases, so far as they are founded on that misconception, are to be corrected. In *Chamberlain's case* (7) the damages were given by the arbitrator on account of the damage done to the plaintiff's house by the railway works; and there was no claim, and there could be none, in respect of loss of actual profits by the obstruction, because the houses had never been inhabited, and some of them were not completed. It is true that the arbitrator gave as a reason for the damage that the number of passers along by the houses in question would be diminished, and that therefore they were less fit to be let for shops; and this reason is referred to in the judgment. But it is certain, if the case is examined, that the houses themselves of the then plaintiffs were found to be injuriously affected, and for that injury alone the compensation was awarded. The same principle of compensation which prevailed in that case has been often sustained, and is totally distinct from the loss of profits of a trade by an obstruction of a thoroughfare. The principle is, that the value of a house is affected by the relation of its situation to the adjoining highway, that is, by the convenience of the private rights of ingress and egress from the one to the other, and by the circumstances of the highway itself tending to make it useful and agreeable to the occupier of the house. If a house on a level with a commodious, beautiful, well-frequented street either be lifted or sunk by the railway twenty feet above or below the level of that street, the house would be injuriously affected, both for pleasure and profit, by reason of the change

(17) 9 Q.B. Rep. 443; s.c. 15 Law J. Rep. (N.S.) Q.B. 403.

(18) 5 Ad. & E. 163; s.c. 5 Law J. Rep. (N.S.) 195.

in the access to and from the house; or if a house fronting to a street of that description should be turned round so as to front to a dark back alley, the house would be injuriously affected—the site of the house would be altered for the worse. In these cases here suggested, the house is supposed to be removed to make the meaning more clear. But if, instead of lifting or sinking the house, or turning its front from a grand street to a bad alley, the street is lifted or sunk or changed in its character, the relation of the house to its highway is affected precisely to the same degree as it would be by altering the relative position of the house itself in respect of that highway. Such is the principle of *Chamberlain's case* (7). The frontage had been to a wide, well-frequented road, leading direct to and from important towns. By the execution of the railway works, it was made to front a dumb alley sunk below the level of the substituted thoroughfare over the railway bridge, along which the stream of passengers would be compelled to flow. Frontage gives the value to building ground. There the railway company took away valuable frontage, and substituted that which was very inferior; and therefore it was held that they had injuriously affected the house, both in its frontage and in its access to and from the effective thoroughfare of the locality. This principle has been acted on in other cases where compensation had been awarded to claimants in respect of their access to the highway being affected. Thus, in *The Queen v. the Eastern Counties Railway Company* (19), the compensation was held to be due to the claimant, because his land adjoined the road, which had been lowered by the railway, so that his private right of access to the highway had been injured. To the same effect are the Irish cases, *Moore v. the Great Southern and Western Railway Company* (20) and *Tuohey v. the Great Southern and Western Railway Company* (21). Upon this principle also the case of *Baker v. Moore* (22), cited by Mr. Justice Gould in *Iveson v. Moore* (9),

would have stood if the plaintiff had succeeded. There the defendant built a wall, obstructing the access from a street to the Thames, and the plaintiff sued for the damage to his houses in the street from the loss of that access; but as he failed to shew that he had the houses in the street, he failed in his action. So also, in *The Queen v. the Great Northern Railway Company* (23), a ferry, belonging, by prescription, to the plaintiffs' land, was taken away by the railway works, and compensation was granted because the ferry and the access thereto were a private right, and the loss thereof was an injury to the land. We do not think it useful to make further citation of cases where compensation was granted, and to point out that in each there was injury to an estate in land. The general conclusion which we draw from this review is, that there is no precedent of compensation for an injury to goodwill, or for a loss of profit in the business carried on upon the land, where no land has been taken; that the compensation for the goodwill of business carried on upon land actually taken is granted expressly on the ground that the occupier is expelled therefrom, and is distinguished thereby from a claim by an occupier from whom nothing has been taken. So far the authorities for the negative proposition are clear, namely, that there is no precedent for supporting such a claim as the plaintiff makes. Then *The King v. the London Dock Company* (18) is a direct affirmative decision on the very point now in question, namely, that a claimant is not entitled to compensation for loss of profit in his business by reason of the obstruction of the highways in the neighbourhood of his house, whereby the passengers that would have come and purchased refreshment but for the obstruction, were prevented from so doing. The decision is, that there was no injurious affection of an interest in land, although the highways were permanently obstructed without substitution. In that case, *Wilkes v. the Hungerford Market Company* (5) was distinguished from the case before the Court, because Wilkes maintained an action

(19) 2 Q.B. Rep. 347; s. c. 11 Law J. Rep. (N.S.) Q.B. 66.

(20) 10 Ir. Com. Law Rep. 46.

(21) Ibid. 98.

(22) Hil. (8 Will. 3.) C.B.

(23) 14 Q.B. Rep. 25: sub nom. *Re Cooling v. the Great Northern Railway*; s. c. 19 Law J. Rep. (N.S.) Q.B. 25.

for the damage done to his trade, and an action is not confined to an injurious affection of an interest in land, but will lie for an injury to the person or personal property caused by the obstruction of a highway. The case of *The King v. the London Dock Company* (18) has been often cited in all the Courts, and uniformly as a binding decision standing on sound grounds. We would also refer again to *The Caledonian Railway Company v. Ogilvy* (6), for a judgment on the point, that the land is not injuriously affected, because a highway leading to the land is obstructed, and thereby inconvenience is caused to the owner, and others resorting to the land. We would also refer to *The King v. the Bristol Dock Company* (24), as supporting the principle that compensation should not be given for a damage common to the inhabitants of the neighbourhood generally. These are the affirmative authorities against maintaining the present claim. The words of the statute seem to us to accord with these authorities, limiting the right to compensation to an injurious affection of an interest in land, contradistinguished from injuries to the person or personal property; and expediency seems strongly on the side of the view we take, namely, that companies making works which the legislature has sanctioned on account of their public convenience should be relieved within certain limits from liability to action, as well as indictment in respect of their works. On these grounds, even if there was no statute for the defendants, and if an action would lie for a loss of the profit to a business, still no compensation is due for such loss of profit as an injurious affection of an interest in land, because such loss does not affect that interest. The result is, that the judgment will be reversed on each of the two grounds above mentioned.

KEATING, J. — I am of opinion that the judgment of the Court of Queen's Bench should be affirmed. The defendants, in the execution of the works authorized by their act, interfered with certain approaches to the public-house of the plaintiff, rendering the same less convenient, and thereby causing such a diminution in the number of his customers as to cause him in his business

of licensed victualler damage which the jury estimated at 100*l.*; and the question is, whether such loss of customers, under the circumstances stated in the case, can form the subject of compensation within the 68th section of the Lands Clauses Act. That an action would have lain against the defendants by the plaintiff in respect of the injury to his public-house, by the withdrawal of the customers, if the company had not been protected by their act, I cannot bring myself to doubt. The case of *Wilkes v. the Hungerford Market Company* (5) has never, that I am aware of, been at all shaken, and appears to me to decide the point; for there is no real difference between that case and the present. So likewise in the case of *Senior v. the Metropolitan Railway Company* (1), which is almost identical in its facts with the present, the Court of Exchequer necessarily held that an action would have lain, as they decided it to be a case for compensation; see also the judgment of Mr. Justice Willes in *Cameron v. the Charing Cross Railway Company* (2). Indeed, the case of *Chamberlain v. the West London, &c. Company* (7) seems to conclude the matter; for although in that case the obstruction was permanent, yet that could only be a question of degree, and immaterial upon the point whether an action would lie. In none of these cases were the houses themselves injured, but in all the complaint was of an obstruction interfering with the trade carried on, or which might be carried on therein, and so causing damage by the injuriously affecting an interest in the land. If, then, the injury found by the jury to have been inflicted upon the plaintiff in this case by the acts of the defendants was an injury to his interest in or occupation of land for which an action might have been maintained against them if they were not protected by their act, then all the authorities, beginning at least as far back as *Glover v. the North Staffordshire Railway Company* (25), shew that the case is one for compensation. Indeed, the application of such a test to the construction of the statute is in itself so just and reasonable, that it would require strong

(24) 12 East, 429.

(25) 16 Q.B. Rep. 912; s.c. 20 Law J. Rep. (N.S.) Q.B. 376.

authorities to displace those in its favour. It was suggested that the observations of Lord Cranworth, in the case of *The Caledonian Railway Company v. Ogilvy* (25), were opposed to this view, but when the case is looked at it will be found that his Lordship was referring to cases of personal inconvenience and injury not affecting land or any interest therein. So, also, the case of *The King v. the London Dock Company* (18) was decided upon the ground that the injury there complained of was not such an injury as the statute then under discussion contemplated—and see the observations of Crompton, J. in *Chamberlain's case* (7) as to the large words now to be found in the compensation clause of the more recent acts. An injury to the trade carried on, or, as it may be called, the goodwill of a house is an injury to that which is inseparable from it, and forms part of its nature, as was said by Willes, J. in *Cameron v. the Charing Cross Railway Company* (2), "Damage to a man's interest in land necessarily includes damage to the business which he carries on upon the land by diverting it from its accustomed channel. Such an interest is not merely personal, it is an interest which a man enjoys in respect of the land—a reasonable expectation of profit from the exercise of his abilities in some particular place by carrying on business there. That reasonable expectation of profit is commonly called 'goodwill,' and is a marketable thing." And in none of the numerous cases which have been decided upon this subject, and in which compensation has been held to be payable in respect of the land being injuriously affected, has the subject-matter of the injury more directly and immediately affected the value of the land than the goodwill of a public-house. Indeed, the case of *Chamberlain v. the West End, &c. Railway Company* (7), before referred to, seems to conclude the present case, for there the arbitrator had awarded compensation (amongst other things) in consequence of the company's having, by interfering with the access of the plaintiff's houses, rendered them less suitable for shops, as from the obstruction fewer persons would pass that way, and so the value was lessened. It is true that the obstruction in that case was permanent. Here it was not so.

But that can, I apprehend, make no real difference in principle between the two cases; for if the injury were direct to the situation of the house itself, its being caused by the temporary works of the company would not render it less the subject of compensation than if caused by works of a permanent character. Upon the whole, looking to the authorities and words of the statute, I am of opinion that the Judges of the Court of Queen's Bench, in the present case, have rightly construed them, and that their decision ought to be affirmed.

BYLES, J. concurred in the judgment delivered by Keating, J.

Judgment reversed.

1865.
June 12.

{ THE BOARD OF GUARDIANS OF
THE KETTERING UNION, ap-
pellants, v. THE COMMITTEE
AND DIRECTORS OF THE NORTH-
AMPTON GENERAL LUNATIC
ASYLUM, respondents.

Pauper Lunatic—Order for Maintenance—Appeal—16 & 17 Vict. c. 97. ss. 96, 108, 128.

A lunatic pauper was sent from a parish into a lunatic asylum, and an order was subsequently made by Justices, under section 96. of 16 & 17 Vict. c. 97, directing the guardians of the union comprising such parish to pay the costs of maintenance to the treasurer, &c. of the asylum:—Held, by Cockburn, C.J., Mellor, J. and Shreeve, J., that the guardians upon whom the order was made could not appeal against such order, as it was a mere interim order necessary for the support of the lunatic until his settlement was adjudged to be in some particular parish, or until, by reason of its being impossible to ascertain the parish of settlement, the costs of maintenance were thrown upon the county.

Held, by Blackburn, J. (sedes vacante), that the guardians might appeal against the order.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 198.]

[IN THE EXCHEQUER CHAMBER.]
 (Appeal from the Court of Queen's Bench.)
 1864. } GRAY AND WIFE v. PULLEN
 Nov. 29. } AND HUBBLE.*

Nuisance—Negligence—Principal and Contractor—Statutable Duty—Metropolis Local Management Act, ss. 77, 110, 111.

The defendant, the owner of a house in the metropolis, employed a contractor to make a drain from his house to the main sewer, under the powers given by the Metropolis Local Management Act (19 & 20 Vict. c. 120). The contractor made the drain, but filled up the ground so negligently where it crossed a public footway, that it subsided and left a hole, into which the plaintiff fell and was injured:—Held, by the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, that the defendant was liable for the injury; that the statutable power given, by sections 77. and 110. of the act, for making the drain also imposed on the defendant the duty of filling up the cutting across the footway properly, and that he was not excused by reason of his having employed to perform the work a contractor who omitted to do his duty.

This was an appeal, by the plaintiff, against the decision of the Court of Queen's Bench, refusing the plaintiff leave to enter a verdict against the defendant Pullen.

The action was for an injury to the female plaintiff.

The defendant Pullen, the owner of a house in Deptford, within the limits of the Metropolis Local Management Act (19 & 20 Vict. c. 120), being desirous of making a drain from his house, under the powers of the act, employed the defendant Hubble to do the work. The latter carried the drain, by a deep cutting, across a public footpath and part of the roadway in front of the house into the main sewer. After the drain had been completed, the earth was reinstated in so insufficient a manner that a subsidence took place, leaving an open trench across the footway. Into this the

female plaintiff, walking along the footway, fell and was injured.

The pleadings are set out in the report below (1). The first count charged the defendants with wrongfully digging a hole in the public highway; the second, admitting that the defendants were lawfully entitled to break open the highway for the purpose of making the drain, charged that they did not use due diligence in causing the surface to be made good, and in the mean time put up fences or lights to prevent accidents. Both counts alleged the injury to the female plaintiff through falling into the opening.

The defendant pleaded not guilty; and a second plea, to part of the first count, justifying the making the drain and hole, under the statute.

Under the direction of the learned Judge who tried the case, a verdict was found for the defendant Pullen. The jury found a verdict for the plaintiffs, with damages against the defendant Hubble.

J. Brown, for the plaintiffs, the appellants (Nov. 26, 1864).—The defendant Pullen, the owner of the premises, is liable as well as Hubble the contractor. It may be admitted that Pullen could not be liable at common law for the negligence of the contractor; but the Metropolis Local Management Act (18 & 19 Vict. c. 120), under which the works were done, imposes the liability on the defendant Pullen as the owner. Now Pullen could have had no right to open a trench in a public highway, were it not for section 77, which empowers him to carry his drain into the sewer. But if he acts on this power, given him under section 77, he becomes, by section 110, responsible for the due reparation of the pavement. That section imposes a duty on him, and section 111. adds a penalty in case that duty be neglected. But that is not the only remedy. Any one damaged may sue. No part of the penalty goes to the party grieved—section 234; therefore the action remains when damage arises from disobedience to an act of parliament—*Couch v. Steel* (2). If a privilege is given and a duty imposed on the owner by statute,

* Decided in Michaelmas Term, 1864, coram Erie, C.J., Pollock, C.B., Bramwell, B., Channell, B., Byles, J., Keating, J. and Pigott, B.

NEW SERIES, 34.—Q.B.

(1) 32 Law J. Rep. (N.S.) Q.B. 169.

(2) 3 El. & B. 402; s.c. 23 Law J. Rep. (N.S.) Q.B. 121.

he cannot relieve himself by employing a contractor to do it—*Hole v. the Sittingbourne and Sheerness Railway Company* (3), and *Pickard v. Smith* (4).

H. James, contra.—The defendant Pullen is not liable for the default of Hubble. It is immaterial whether a man is entitled to do an act by force of the statute or of the general law—*Overton v. Freeman* (5). In *Hole v. the Sittingbourne and Sheerness Railway Company* (3) it does not appear that the bridge which the contractor built was not the very bridge which the company required him to build. He built a bridge that would not open, and the act required that it should open. If the person authorized to do the act employs a contractor to do a thing contrary to the statute, then the principal would be liable—*Ellis v. the Sheffield Gas Company* (6). Here the defendant Pullen employed Hubble to do only that which the act authorized. Pullen supposed that the contractor Hubble would perform his contract and fill up the hole properly. He was ignorant that it was not filled up. Hubble's negligence had nothing to do with the contract. In *Pickard v. Smith* (4) there is nothing to shew that the defendant contracted with the coal-merchant to watch the hole. It was there the duty of the defendant Smith to have the hole duly watched and guarded.

J. Brown, in reply.—The liability of a person at common law rests on negligence either of himself or of his servant. But here the liability rests not on negligence, but on statutory obligation. It is not contended that the statute has not imposed the duty under section 110, nor that Pullen would not be liable to a penalty under section 111. Had Pullen contracted to do the act, and had he employed some one else to do it, the negligence of the sub-contractor would be no answer for Pullen in an action against him. A parliamentary obligation is as great as the obligation of a contract.

Cur. adv. vult.

The judgment of the Court was now (Nov. 29) delivered by—

ERLE, C.J.—In this case the plaintiff declared for damage to his wife from falling into a drain, made in the highway by the defendant. The defendant justified making the drain under a power given by the Metropolis Local Management Act, to make a drain from his premises to a sewer. Upon the trial it appeared that the defendant had lawfully made the drain under that act, that is to say, a trench across the highway, which was the cause of the damage, and had employed a contractor both to make it and fill it up properly, and by the negligence of the contractor the drain was filled up improperly and so the damage was caused. At the trial the verdict was entered against the contractor and for the employer, on the ground that the employer was not responsible for the negligence of the contractor; and so it was decided in the Court below. This is an appeal from that judgment.

The appellant has contended that a duty was imposed on the defendant Pullen, as the owner of the premises, who caused the drain to be made across the highway, to fill up that drain in a proper manner. Section 77, authorizing the making of the drain, implies that the duty to fill it up was also imposed; and section 110. commands that the person who makes it shall fill it up properly. And the appellant contended that the person making the drain is responsible if the duty imposed on him by the statute is not performed, and damage is caused thereby, and that the complaint is of an omission to perform a duty imposed by statute, not of a wrongful act of commission by a contractor beyond the scope of his employment. He relied on *Hole v. the Sittingbourne and Sheerness Railway Company* (3), where the duty imposed on the defendants by statute was to make a bridge that would open, and they employed a contractor who made a bridge that would not open as the statute required; and the defendants were held liable, on the ground of their omission to perform the duty imposed by statute. There the Chief Baron says, in effect, that a party who undertakes that a work shall be done is not released from liability for breach of his undertaking because he employs a

(3) 6 Hurl. & N. 488; s. c. 30 Law J. Rep. (N.S.) Exch. 81.

(4) 10 Com. B. Rep. N.S. 470.

(5) 11 Com. B. Rep. 871; s. c. 21 Law J. Rep. (N.S.) C.P. 52.

(6) 2 EL. & B. 767; s. c. 23 Law J. Rep. (N.S.) Q.B. 42.

contractor to do it, and the contractor's neglect causes the breach. The obligation imposed by statute is analogous to that created by an undertaking. The omission to perform it is not excused by reason that the party employed a third person as contractor to do it for him, who failed; and he distinguished the case where a contractor in the performance of his contract does a wrongful act not according to his contract, and causes damage thereby: in that case the employer is not responsible. The distinction is also taken by Williams, J. in *Pickard v. Smith* (4) deciding that the employer allowing a coal-merchant to make an opening in a way for coal is responsible for the negligence of the coal-merchant's men in omitting to close the opening; for the employer was bound to see that the opening should be properly closed, and his omission to perform his duty is not excused by the omission of the agent whom the defendant had employed to act for him. For these reasons it appears to us that the defendant Pullen is not excused from liability for the omission to fill up the drain properly, on the ground that he had employed a contractor to do that duty for him, and that the contractor was negligent and left that duty unperformed. We think that the duty was implied in the grant of the power to open the drain in a highway in section 77, and was expressed in section 110, and that this statutable duty is created absolutely, and is not a duty created by section 111, imposing a

penalty to be enforced solely by enforcing the penalty. The penalty imposed by section 111. appears to us to be a cumulative remedy. The question is, whether the verdict should be entered against the defendant Pullen, and we answer that question in the affirmative.

Judgment reversed.

BAIL COURT. } THE QUEEN v. THE JUSTICES
1865. } OF THE WEST RIDING OF
June 13. } YORKSHIRE.

Highway Act, 1862, 25 & 26 Vict. c. 61.
—Order forming Highway District—Number of Waywardens for each Place.

A provisional order for forming a highway district under the Highway Act of 1862 constituted the township of E. and other parishes and places named therein a highway district, and directed that one waywarden should be elected for each of the said parishes, townships and places. E. was divided into three hamlets, each of which maintained its own highways. The separate hamlets were not named in the order:—Held, that the provisional order, and the final order based on it, were bad, as the provisional order did not state whether any or what waywardens were to be elected for the three hamlets.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 227.]

The case of *FEATHER v. THE QUEEN* will be published in the Volume for 1866.

CASES
ARGUED AND DETERMINED
IN THE
Court of Common Pleas,

REPORTED BY
WILLIAM PATERSON, Esq. AND GILMORE EVANS, Esq.
BARRISTERS-AT-LAW.

AND IN THE
Exchequer Chamber,
ON ERROR AND ON APPEAL FROM THE COMMON PLEAS,

REPORTED BY
FRANCIS RUSSELL, Esq. BARRISTER-AT-LAW.

28 & 29 VICTORIÆ.

MICHAELMAS TERM	1
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CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF COMMON PLEAS.

MICHAELMAS TERM, 28 VICTORIÆ.

1864. } HELPS AND ANOTHER v. CLAY-
Nov. 10. } TON AND WIFE.

Solicitor and Client—Retainer—Husband and Wife—Costs of Marriage Settlement—Infant—Necessaries.

On the occasion of settling personal property upon a marriage, it is the professional usage for the lady's solicitor to draw the settlement and for the husband to pay for it, although the only property settled is the husband's. And where nothing has taken place to exclude such usage the husband is legally liable, in the event of the marriage taking place, to pay the lady's solicitor his costs of the settlement if the retainer was by the lady, or else to indemnify whoever on her part properly incurred expense by retaining a solicitor to prepare such settlement.

An infant, who has no property of her own to settle, may contract with a solicitor for the preparation of a marriage settlement by her intended husband, under which proper provision is made for her benefit, as such may be considered a necessary suitable to her estate and condition.

This was an action brought by the plaintiffs for money payable by the defendant Charlotte Mary Henrietta, whilst she was

sole and unmarried, to the plaintiffs for work done and materials provided by the plaintiffs for the said Charlotte Mary Henrietta whilst she was sole and unmarried, at her request, for fees due and of right payable from the said Charlotte Mary Henrietta, whilst she was sole and unmarried, to the plaintiffs in respect thereof, and for money paid by the plaintiffs for the said Charlotte Mary Henrietta, whilst she was sole and unmarried, at her request.

The defendants pleaded, first, never indebted. Secondly, that at the time of contracting the alleged debt the defendant Charlotte Mary Henrietta was an infant. Thirdly, payment.

The plaintiffs replied to the plea of infancy that the debt was in respect of necessities, and upon this replication and the other pleas issue was joined.

The action came on to be tried, before Erle, C.J., on the 12th of February 1864, when by the consent of parties the jury found a verdict for the plaintiffs for 73*l.* 5*s.* 6*d.*, subject to the following

CASE.

The plaintiffs are attornies and solicitors practising at Gloucester. The defendant Capt. J. W. Clayton was, in the summer of 1862, engaged to be married to his present

wife, then about eighteen years of age, and residing at Gloucester with her father, Col. Somerset, with whom she had always resided since her birth. On the 14th of August 1862, Col. Somerset called at the office of the plaintiffs, who had occasionally previously acted as his, Col. Somerset's, solicitors, with a letter from the defendant J. W. Clayton, containing proposals for a settlement in the terms following :

"11, Portman Square.

"Dear Col. Somerset,—I am not a rich man, but am able to settle on your daughter the sum of 10,000*l.* on my marriage. As all the rest of my property is entailed, provision is made under my father's will for my wife and children. I shall be much obliged if you will nominate a trustee, and I refer you to my solicitor, Mr. Charles Barnard, 4, Gray's Inn Place, Gray's Inn. I can also allow the young lady 100*l.* per annum for pin-money. I am, most respectfully yours,
J. W. Clayton."

Col. Somerset instructed the plaintiffs to take the necessary steps in the matter for the lady, his daughter, and named his cousin, Mr. Granville Somerset, as trustee on behalf of the lady, and requested Messrs. Helps to put themselves in communication with him. The plaintiffs acted accordingly, and Mr. Granville Somerset, on behalf of the lady, corresponded with them upon the requirements of the settlement. On the 14th of August 1862 the plaintiffs wrote as follows to Mr. Barnard, the then attorney for Capt. Clayton :

"1, Barton Street, Gloucester,

"August 14, 1862.

"Dear Sir,—We are instructed by our client, Col. Somerset, to prepare the settlement on the approaching marriage of his daughter with Capt. Clayton. We understand Capt. Clayton's father proposes to settle 10,000*l.* on the young people, and to allow the lady 100*l.* a year for pin-money. Col. Somerset has been asked to name a trustee, and we are instructed to name his relative, Granville Somerset, of 3, Tanfield Court, Temple, barrister-at-law. Will you kindly at once prepare proposals for the settlement and supply us with an abstract of any will or family settlement, if any such abstract should be required, to shew the title to the money? We understand the marriage is to take place very

shortly, we shall therefore be glad to see you as soon as possible. We are, dear sir, yours very faithfully,

"Richard Helps & Son."

"Charles Barnard, Esq.,

"4, Gray's Inn Place, Gray's Inn, London."

To this letter Mr. Barnard replied as follows :

"4, Gray's Inn Place, Gray's Inn,

"August 18, 1862.

"Gentlemen,—I have to acknowledge the receipt of your letter of the 14th inst., and I would have answered it before, but that I was out of town. Capt. Clayton some time since instructed me as to the settlement, the draft of which I have already prepared and it is now before conveyancing counsel for settlement. I would submit, independently of the fact of my having prepared the draft, the doing so would devolve on me as representing the intended husband, whose money is to be settled,—from my instructions I did not understand the lady would bring anything into settlement. I will with the draft settlement forward you an abstract of the will of Capt. Clayton's father, under which the Captain takes an estate for life in certain freehold and leasehold estates, with trusts afterwards for the children of the Captain's marriage, and a power is also given to the Captain to appoint a life interest to his wife. You will also be furnished with an abstract of a settlement already made by Capt. Clayton in 1854 on his attaining his majority. This settlement he has the power of revoking on his contemplating marriage. I am, gentlemen, yours faithfully,

"Charles Barnard."

"Messrs. Helps & Son."

To this the plaintiff Richard Helps replied as follows :

"Somerset—Clayton.

"1, Barton Street, Gloucester,

"August 20, 1862.

"Dear Sir,—After I left you I discussed the question raised as to whose duty it was to prepare the settlement with my friend and agent, Mr. Charles Rose Lucas, of 8, New Square, Lincoln's Inn. He states that the lady's solicitor always prepares the settlement. Unless there are two, a personalty settlement and a settlement of the husband's real estate, the settlement on the intended wife is always prepared by her soli-

citor or the solicitor of her family, and her intended husband has the privilege of paying for her settlement. I am quite satisfied that this is the rule; but if you are not convinced, I shall be happy to leave the question to the President or Council of the Incorporated Law Society, and Mr. Lucas will arrange the matter with you to ask the question personally or by letter. I ought to have mentioned to you that Mr. Granville Somerset, the intended trustee for the lady, has serious objections to trust funds being invested in ordinary shares or stock in any railway, but would not object to Indian railway stock guaranteed by the Indian Government. Yours, very faithfully,

"Richard Helps."

"Charles Barnard, Esq."

The matter was accordingly referred to Mr. Cookson, and that gentleman decided that beyond all doubt the practice in the profession is, that the lady's solicitor should draw up the settlements and that the gentleman has the privilege of paying for them. In this decision Mr. Barnard acquiesced, and the plaintiffs prepared the settlements, and at the request of Mr. Barnard sent their bill to the defendant Capt. Clayton. Mr. Barnard did not, however, at any time previously to the plaintiffs sending in their bill as hereinafter stated, inform the defendant Capt. Clayton thereof, nor did he obtain his concurrence therein or assent thereto.

On the 1st of September 1862, the plaintiff Richard Summer Helps attended Miss Somerset at her father's house to make an appointment with her for the execution by her of the settlements, and on the 3rd of the same month the plaintiff Richard Helps attended with the defendant J. W. Clayton's then attorney, Mr. Barnard, at Tanfield Court, where Miss Somerset and her father, Col. Somerset, signed the settlements, after Mr. Richard Helps had explained to the defendant, Charlotte M. H. Clayton, that they had been approved by her relative and trustee, Mr. Granville Somerset. The agents for the plaintiffs had upon the same day attended upon Capt. Clayton at Mr. Barnard's office, and attested his execution of the settlement in duplicate. Save as above, the plaintiffs had no communication with the defendant Charlotte

M. H. Clayton on the subject of the said settlement.

The marriage took place on the 4th of September 1862.

In the month of April following the plaintiffs sent to the defendant Capt. Clayton their bill for the settlements, when it was returned to them accompanied by the following letter:

"April 24, 1863.

"Gentlemen,—I beg to return you the inclosed account: as I did not retain you to act for me I must decline paying it. I remain, gentlemen, your obedient,

"J. W. Clayton."

"Messrs. Helps & Son."

In consequence of this letter the plaintiffs took advice as to enforcing their claim against Capt. Clayton, and were advised that, although the defendant was liable to pay for his settlement, yet inasmuch as there was no privity between the plaintiffs and Capt. Clayton, that Col. Somerset should pay the amount claimed and that Capt. Clayton should be sued in the name of Col. Somerset as for money paid for his use. The defendant Richard Helps communicated this opinion to Col. Somerset, and requested him to pay the amount. Col. Somerset then gave to the plaintiffs a cheque for 73*l.* 5*s.* 6*d.*, the amount of the bill, and instructed the plaintiffs to sue the defendant J. W. Clayton for money paid to his use; but the plaintiffs in no other way than as above mentioned claimed the money from Col. Somerset, or from any person other than the defendant. An action was commenced accordingly, but before it came on for trial a case was submitted to counsel, who advised that the action as brought by Col. Somerset was not maintainable, and that Col. Somerset's daughter, the defendant Charlotte M. H. Clayton, was in point of law the employer of the plaintiffs, and that the money should be refunded to Col. Somerset. Acting upon this advice the plaintiffs returned the said money to Col. Somerset and brought the present action. The Court is to be at liberty to draw any inferences which a jury would be warranted in arriving at from the facts above stated.

On behalf of the plaintiffs it is contended, that the plaintiffs were retained by and on behalf of the defendant, Char-

lotte M. H. Clayton, and that the charge for the settlements was as for a necessary supplied to her, suited to her degree and condition, and so was a debt due from her at the time when she intermarried with the defendant J. W. Clayton, and for which the said J. W. Clayton is therefore liable as her husband.

On behalf of the defendants it is contended, that the plaintiffs were not retained by or on behalf of the defendant Charlotte M. H. Clayton, as alleged, and that the charges sought to be recovered by the plaintiffs are not for necessities supplied to the said defendant Charlotte M. H. Clayton, as alleged.

If the Court shall be of opinion that the defendants are liable, the verdict is to stand for the plaintiffs for 73*l.* 5*s.* 6*d.*; if otherwise, the verdict is to be set aside and a verdict entered for the defendants.

Gray, for the plaintiffs (June 25).—The first question is, whether the retainer of the plaintiffs to prepare the marriage settlement was made by Mrs. Clayton or by her father, Col. Somerset, as acting on his own account and not as her agent. The correspondence between the solicitors and the facts stated in the case shew that the plaintiffs acted in the matter as the solicitors for the lady, according to the usage and known rule in the profession, by which the intended husband is liable for the expense of preparing the settlement. The plaintiffs did not look to Col. Somerset as their debtor, nor did he ever make himself personally liable for such expense; but the work was done by the plaintiffs for Mrs. Clayton, and she is clearly shewn to have been privy to what was being done for settling the property on her marriage, and to have sanctioned the same by executing the deed of settlement. The law will imply from this that the work was done for her at her request. The only case bearing on this subject is *Hayward v. Fiott* (1). There, however, the husband had paid the expenses of his marriage settlement, and the amount in dispute was the expense of a deed of appointment executed by the father of the intended wife, by which he appointed the money to his daughter, which formed the subject-matter of the settlement; and Lord Denman left

it to the jury to say whether the preparing such deed of appointment was done by the solicitor on the credit of the father, or of his daughter, who was the defendant's wife. The next question is, as to the plea of payment. There is no evidence to support such plea; what Col. Somerset did was merely to lend himself to an arrangement under which the plaintiffs might, as it was then thought, be better able to recover the amount from the defendant Capt. Clayton, but it was not money paid by him at the request of such defendant or of his wife.

[WILLES, J.—You need not now argue that question.]

[*Huddleston*, for the defendants, said he would not rely on the plea of payment.]

Then the only remaining question is, whether the settlement was such a necessary as would make Mrs. Clayton, although an infant, liable for the cost of preparing it. The case of *Chapple v. Cooper* (2) shews that the test whether the matter is one in respect of which an infant may make a binding contract is whether the infant derives any personal advantage from it. This was clearly a proper settlement and for the benefit of the infant, and she could therefore at law make a binding contract for preparing it.

[WILLIAMS, J. (3) referred to *Rainsford v. Fenwick* (4).]

Huddleston, for the defendants.—The question is one of fact, namely, to whom did the plaintiffs give credit? The presumption would certainly be that they gave credit either to Capt. Clayton or Col. Somerset rather than to the young lady. Now there is nothing to shew that the retainer was by any one else than Col. Somerset. The plaintiffs had previously acted for him as his solicitors, and he was the person who gave them the instructions for the settlement.

[WILLES, J.—This resembles the case of granting a lease, the custom being for the landlord's solicitor to draw the lease and for the tenant to pay for it. The case of *Grissell v. Robinson* (5) shews that where

(2) 13 *Mee. & W.* 252; *s.c.* 13 *Law J. Rep.* (N.S.) *Exch.* 286.

(3) Williams, J. then left the court to go to chambers.

(4) Carter, 215.

(5) 3 *Bing. N.C.* 10; *s.c.* 5 *Law J. Rep.* (N.S.) *C.P.* 313.

the landlord has paid his solicitor his charges for drawing the lease he may recover the amount from the tenant in an action for money paid to his use. It was probably on the authority of that case that the action was first brought by Col. Somerset against Capt. Clayton.]

It certainly was not until after that action that it was alleged that the plaintiffs had given credit to Col. Somerset's daughter. If the marriage had not taken place, would there have been any evidence of liability for these costs with which to have fixed the daughter? It is clear that had the plaintiffs in that event sued her for them, they would have been nonsuited. Then, if she was not liable for these costs before her marriage, her husband cannot be made responsible, as he never retained the plaintiffs or promised in fact to pay them their bill for preparing the settlement. Lastly, Mrs. Clayton being an infant at the time could not make any binding contract for the settlement. The settlement would be of no use to her until she married, and therefore it was no contract for her benefit for which previously to her marriage she could have been liable. In *Com. Dig.* 'Enfant,' (B. 5), it is said, "necessaries for an infant's wife are necessaries for him, but not if provided in order for the marriage," citing *Strange*, 168. In *Smith v. Gibson* (6), it appeared the plaintiff had paid a sum of money as a premium for taking his sister as an apprentice, and she had afterwards, but when still under age, expressed a hope that she would be able to pay him soon. She subsequently married, and in an action against the husband and wife to recover this money as money paid to the use of the wife before coverture, Lord Kenyon declared that this money could not be considered as necessaries, and that therefore the payment of it could not be enforced in such action.

Gray replied.

Cur. adv. vult.

The judgment of the Court was delivered on the 10th of November by—

WILLES, J.—This case was well argued at the Sittings after Trinity Term, by Mr. Gray, for the plaintiffs, and Mr. Huddleston, for the defendants, before my Brothers

(6) Peake Ad. C. 52: cited in Chitty on Contracts, 7th ed. p. 138.

Byles and Keating and myself, when we took time to consider. It was an action brought by solicitors to recover the costs of preparing a settlement upon the marriage of the defendants, claimed as a debt payable by the defendant Mrs. Clayton, her husband being made a defendant for conformity only. The pleadings raise two questions, first, whether there was any debt incurred by Mrs. Clayton in respect of these costs; secondly, whether, if it was incurred by her, infancy is a bar. The plea of payment was properly abandoned. These are the only questions; and they affect the liability of the wife alone. No question as to who is liable, if she be not, is directly in issue. The marriage took place in September 1862. At that time Mrs. Clayton was about eighteen, and up to that time she had from her childhood lived in her father's house as one of his family, and, as must be presumed in the absence of any statement to the contrary, upon the same terms as an unmarried daughter without property of her own usually lives under her father's roof, that is to say, at his expense.

The settlement was altogether of personal property of the husband, viz. 10,000*l.*, and 100*l.* a year for pin-money. It must be taken to have been a proper settlement, and such as was beneficial to the lady as well as the gentleman; and we should therefore feel little difficulty in dealing with the question of infancy, assuming that of retainer to be decided in favour of the plaintiffs.

The instructions for the settlement were given to the plaintiffs by the lady's father, who had occasionally previously employed them as his solicitors. At the time, he handed them the letter of the intended husband proposing the settlement, and referring to his solicitor.

A correspondence ensued between the plaintiffs and the solicitor named by the husband, in which each claimed the right to prepare the settlement. In the end, they agreed to refer the matter to Mr. Cookson, who decided that beyond all doubt the practice in the profession is,—the lady's solicitor should draw the settlements, adding that the gentleman should have the privilege of paying for them. Of the correctness of this opinion, as to settlements of personal property, such as that under

consideration, no doubt was, or properly could be, suggested. Accordingly, the husband's solicitor gave way, and the settlement was prepared by the plaintiffs, under the direction of the trustee named by the father on behalf of the lady; and it was executed by both the defendants previously to their marriage. In allowing the settlement to be prepared by the plaintiffs, the husband's solicitor acted, it is true, without any positive or express authority from his client; but he did so in the exercise of a just discretion, and acting within the scope, as it appears to us, of his retainer to act for the intended husband, which involved an authority to do what was right and usual on his behalf in the business.

We think the reference by Capt. Clayton to his solicitor cannot properly be construed as excluding the ordinary usage. Indeed, his employing a solicitor of his own in the first instance, if he thought the settlement was to be prepared by that gentleman, shews that he knew the expense was in some shape to fall upon himself. He might naturally employ a solicitor to see that the settlement, by whomsoever it was prepared, was properly expressed. His reference to his "solicitor, Mr. Charles Barnard," in his letter proposing the settlement, moreover, was of itself a warrant for the lady's friends to deal with Mr. Barnard as having authority, acting on his behalf, to do and consent to all that was right and usual in such a transaction; and no secret instructions could affect that *prima facie* authority. That Capt. Clayton ought to pay the plaintiffs, therefore, we entertain no doubt. And we further consider that the duty to do so is not merely an honorary obligation on his part, but also a legal liability arising out of the ordinary course of business, by which in such a case the solicitor employed on the part of the lady is to prepare the settlement, and the gentleman is to pay the bill.

In order to determine the present case, it will be necessary to consider, in the first place, the origin of this liability, whether as upon an original liability of the husband to the solicitor, who is to be considered his for this purpose, or only as a liability to reimburse the expenses of the settlement which the lady or her father, or person standing in the place of a parent, may have

incurred. We think the latter to be the correct view. The employment of the lady's solicitor to prepare the settlement is not a mere compliment or matter of patronage; it has also the substantial object of satisfying the lady's friends that all proper care has been exercised on her behalf by some person in whom they confide, and of giving a remedy for negligence by action against the solicitor. He does not the less act as the solicitor of the lady or her parent, because the intended husband is to be ultimately liable, in the event of the marriage taking place.

The proper conclusion, therefore, is, that the retainer is to be considered as that of the lady or her parent, as the case may be, but that usage makes the husband liable to indemnify whoever on the part of the wife has properly incurred expense by retaining the solicitor to prepare a settlement in the propriety of which the latter has so large an interest. This precise question is, as might be expected, bare of authority: but the ordinary case of a lease, which in practice is prepared by the landlord's solicitor, and paid for by the tenant, furnishes an analogy. In such a case, if the landlord pays, upon the default of the tenant, the former may upon the usage maintain an action against the latter for the money paid — *Grissell v. Robinson* (5). Such was the nature of the action brought by Col. Somerset in this case, to which there was no answer, if the retainer was by him on his own account, and not as agent on the behalf of his daughter. That action was abandoned, upon the notion that in point of law the retainer was by Mrs. Clayton before her marriage, and that the claim therefore should be made in the present form.

From the above it follows that either the defendant was liable in the abandoned action, or that the defendants are liable in this. It further follows that the liability turns upon the question whether the work was done upon the retainer of Col. Somerset as acting for himself or as agent for and on behalf of his daughter. In the former case, judgment for the defendants, upon the ground that Mrs. Clayton is not liable, though Capt. Clayton is. In the latter, judgment for the plaintiffs, upon the ground that Mrs. Clayton is liable.

The question upon which the decision of

the case thus turns is one of fact, which a jury, upon ascertaining that Capt. Clayton was at all events ultimately liable, would probably make short work of. The parties, however, have substituted the Court for the jury; and we are bound to give a verdict upon that question of fact in accordance, so far as the form of the question allows, with the merits of the case, and such as, if given by a jury, we should not have felt dissatisfied with or set aside as being contrary to the weight of evidence.

Now, the evidence to make out that Col. Somerset was the proper and only client of the plaintiffs, was, his instructing them in person in the first instance, and naming the trustee, taken in connexion with the fact that the young lady was a minor and a member of her father's family, living as to all ordinary wants at his expense.

The evidence to prove Mrs. Clayton liable, on the other hand, was, that the instructions were given by her father and by the trustee on her behalf, that, knowing, as she must have done, that a settlement was being prepared, she authorized and ratified those instructions by signing the settlement when prepared, and that after all she was the person most and principally interested. The expense thus incurred was not part of the ordinary continuous outgoings for clothing, food, and such like, for which the paterfamilias would have the bills sent in to him as a matter of course. It was an occasion of a single and, though not extraordinary, exceptional character, in which it was not unreasonable or improbable that the person to be chiefly benefited should incur a liability which the fact of the marriage would transfer to the shoulders of the person who ultimately ought to bear it.

In these circumstances, we think it may justly be concluded that there was a retainer by Mrs. Clayton as a principal, through her father, who acted on her behalf as her agent, and disclosed his principal at the time.

Upon the remaining question, that of infancy, we have already stated our opinion. The principal contract of marriage was one which it was competent for an infant to enter upon. She had no property to settle, and would have had no certain provision without the settlement, and the preparation of the settlement was therefore beneficial, as securing to her, at her election, a proper

provision, which may justly be considered a necessary suitable to her estate and condition.

It would be a perversion of the law for the protection of infants, to hold that under these circumstances an infant could not contract for the preparation of such a settlement. Whether the provisions in the settlement may be said absolutely to bind her, it is unnecessary to consider; because, so far as all other parties are concerned, she is thereby secured against want. For these reasons, our judgment is for the plaintiffs.

Judgment for the plaintiffs.

1864.

Nov. 3.

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LINDLEY v. LACEY.

Evidence — Written Agreement — Parol Agreement.

The plaintiff agreed in writing to purchase certain furniture of the defendant, and by that agreement the defendant was authorized to settle an action of C. v. L. In an action, by the plaintiff, against the defendant, for not settling the action of C. v. L., evidence was offered and received of a distinct oral agreement to settle that action, made on the same occasion as, and immediately before the written agreement. The jury found that such an oral agreement was made:—Held, that the evidence was admissible, and that on the finding of the jury the plaintiff was entitled to a verdict.

This was an action tried, before Erle, C.J., at the Sittings at Westminster after last Easter Term.

The plaintiff was the keeper of a refreshment-house at No. 3, Agar Street, West Strand. The defendant had formerly occupied the same premises, and he underlet them to the plaintiff, and sold him the furniture therein.

Previously to the making of the agreement hereinafter mentioned the plaintiff had accepted a bill of exchange for 25*l.*, which became due on the 16th of June 1863; the plaintiff was sued on this bill by Chase, the holder of it, and thereupon the defendant said he would find the money to meet this bill if the plaintiff would persuade the landlord to forbear pressing for

the rent of the premises, for which the defendant was still liable. The plaintiff did this, whereupon a further arrangement was discussed for the plaintiff giving up the premises to the defendant and a re-sale of the furniture. Ultimately, a memorandum of agreement was drawn up, but before signing it the plaintiff said, "Am I to understand Chase's bill is to be settled, because that is the groundwork of the whole?" The defendant replied that it should be settled, and the plaintiff then signed the agreement.

The agreement was as follows: "It is agreed by and between the parties hereto that Lindley shall sell, and Lacey shall purchase of Lindley, all the furniture, fittings, fixtures, utensils and other things now on the premises No. 3, Agar Street, aforesaid, for the sum of 145*l.*, to be paid for on Lacey finding a customer and being paid for the property, or on his receiving the amount of life policy, whichever event first happened, the said goods not to be considered as Lacey's property until the said sum of 145*l.* be paid to Lindley, but remain vested in Lindley until such sum of 145*l.* be paid, and be merely in Lacey's care on Lindley's behalf until paid for as aforesaid. In the mean time Lindley authorizes Lacey to settle the action *Chase v. Lindley*, and also to pay the rent now due to Mr. Phythian, such payments to be on account of the 145*l.* and form part of the same, but the whole of the goods to continue absolutely the property of Lindley until the sum of 145*l.* be satisfied. Lacey hereby releases Lindley from the tenancy of the premises from this day, and Lindley gives up to Lacey possession thereof. And it is declared by Lindley that he has full power and right to dispose of the goods to Lacey as aforesaid, that he has no judgment or incumbrance thereon which may vitiate the sale to Lacey, so that on the amount of 145*l.* being satisfied the goods shall then be the property of Lacey absolutely."

The defendant immediately took possession of the house and furniture under the agreement, but he did not settle the action of *Chase v. Lindley*, and soon after the sheriff seized the furniture under a *fiat facias* issued in that action, and sold it.

The plaintiff thereupon brought this action, and one count in the declaration

alleged the breach of an agreement to settle the action of *Chase v. Lindley*. The defendant at the trial objected that the memorandum of agreement above set out did not contain any undertaking by the defendant to settle that action, and that parol evidence of any previous conversation to shew such an undertaking was inadmissible.

The plaintiff contended that evidence was admissible to shew a distinct preliminary agreement, and that whether or not there was such an agreement was a question for the jury.

The learned Judge so ruled, and asked the jury whether there was an agreement to the effect relied on by the plaintiff; and they found that there was such an agreement.

Leave was reserved to the defendant to move to enter the verdict for him, if evidence of the oral bargain was inadmissible (1).

Joyce having obtained a rule accordingly,—

Hayes, Serj. and *Grantham* shewed cause.—This evidence was admissible. The rule which excludes oral evidence to vary a written contract is not in question. The parties here made two distinct agreements: one relating to the action of *Chase v. Lindley*, the other relating to the sale of the furniture. This is like the cases of *White v. Parkins* (2), *Harris v. Rickett* (3) and *Green v. Saddington* (4).

[KEATING, J.—It is not unlike the case of *Wallis v. Littell* (5) in this court.]

The principle is the same. The question is concluded by the finding of the jury.

Joyce, in support of the rule.—The question is not concluded by the finding of the jury. It is a question of law whether the evidence is admissible. If such evidence is admitted, the entire rule which excludes oral evidence must fall to the ground. The written agreement is not silent on the subject of the action of *Chase v. Lindley*; it defines the intention of the parties in

(1) Other points of law were raised at the trial, and were mentioned in the rule; but they were not alluded to in the argument.

(2) 12 East, 578.

(3) 4 Hurl. & N. 1; s. c. 28 Law J. Rep. (n.s.) Exch. 197.

(4) 7 El. & B. 503.

(5) 31 Law J. Rep. (n.s.) C.P. 100.

reference thereto; namely, that the defendant shall be authorized to settle it. That is inconsistent with his being under an obligation to settle it.

ERLE, C.J.—I am of opinion that this rule ought to be discharged. The plaintiff and the defendant had considerable negotiation about a treaty for the sale of certain goods. The whole matter originated in the action brought by Chase against the plaintiff, on the acceptance of the latter. If this action had been allowed to proceed, in all probability the goods, which are the subject of the present action, would have been taken by the sheriff under a writ of *fiery facias*, and the good-will of the business would have been destroyed. To prevent this, the defendant proposed that the plaintiff should let him have these goods on credit, and it was ultimately agreed that this should be done. There was also a distinct agreement between the parties that Lacey should take up the acceptance held by Chase, and so stay the action of *Chase v. Lindley*. If that action had gone on, the furniture would have been seized, and the whole intention of the parties would have been frustrated. The jury believed the plaintiff; and his version of the transaction was, that there was a distinct collateral agreement that the defendant should take up the bill. The plaintiff asked the defendant, "Am I to understand that Chase's bill is to be settled?" and added, "that is the groundwork of the whole." The defendant answered that it should be settled. Afterwards the agreement was signed. It is clear that taking up Chase's bill was a distinct preliminary matter, which was to be done *quamprius*. I take the case to be, in effect, the same as if there was a written agreement ready to be signed, and that one of the parties said to the other, "If you will put your name to that, I will do so and so."

It is not necessary to go through the numerous cases. The question is, does it appear from the written instrument that it was meant to contain the whole that was intended to be binding between the parties? If so, nothing can be added to it. If this does not appear, then an agreement upon a distinct matter may be shewn to have been made orally, and may be enforced. In *Harris v. Rickett* (3) such an oral agreement was

made before the written agreement. In *Davis v. Jones* (6) and *Wallis v. Littell* (5) the oral agreement and the written agreement were contemporaneous. Whether the oral agreement precede or be contemporaneous with the agreement is of no consequence, provided it be on a distinct collateral matter. What the plaintiff here said amounted to this: "I will not enter into any contract with you until Chase's matter is settled;" and the defendant thereupon promised that Chase's matter should be settled. I think that is a promise which, though oral, and though followed by a written agreement, the plaintiff is able to enforce.

BYLES, J.—I am of the same opinion. There is here a prior agreement relating to a bill of exchange, with which the subsequent written agreement did not, in any way, interfere. The jury have found that the defendant bound himself by a distinct oral agreement to take up Chase's bill, and upon this the written contract is wholly silent. *Harris v. Ricketts* (3) is therefore precisely in point. But, independently of that case, there is a series of cases, beginning with *Davis v. Jones* (6) and *Pym v. Campbell* (7), and followed very recently in *Wallis v. Littell* (5) in this court, which shew that evidence may be given of an oral agreement which constitutes a condition on which the performance of the written agreement is to depend; and if evidence may be given of an oral agreement which affects the performance of the written one, surely evidence may be given of a distinct oral agreement upon a matter on which the written contract is silent.

KEATING, J.—I am of the same opinion. The question is, whether the facts shew that it was the intention of the parties to make a distinct preliminary agreement. I think the facts do shew that such was the intention. In effect, the transaction appeared to be this: the plaintiff was about to call his creditors together; that did not suit the defendant, and he proposed an arrangement for preventing this. The plaintiff, however, refused to enter into any arrangement un-

(6) 17 Com. B. Rep. 625; s. c. 25 Law J. Rep. (N.S.) C.P. 91.

(7) 6 E. & B. 370; s. c. 25 Law J. Rep. (N.S.) Q.B. 277.

less Chase's bill was paid, and the action stopped. This the defendant agreed to by a separate and distinct oral agreement, and the negotiation which ended in the written agreement then proceeded. This is a distinct agreement, which the plaintiff is entitled to enforce.

Rule discharged.

1864. }
June 23, 24, 25.* } RUSSELL AND OTHERS
v. NIEMANN.

Shipping — Bill of Lading — Charter-Party—King's Enemies.

The defendant by his bill of lading, signed at Odessa, undertook to convey a cargo from thence to the United Kingdom, to call at Cork or Falmouth for orders, for the plaintiffs, merchants residing at Odessa. The ship was a Mecklenburg ship, and the bill of lading contained the following clause, "the act of God, the king's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of what nature and kind soever excepted, unto order and assigns, paying freight for the said goods and all other conditions as per charter-party." In the charter-party the exception was for "the act of God, enemies, fire, restraint of princes, and all and every dangers and accidents of the seas, rivers and navigation of what nature or kind soever during the said voyage":—Held, that the words "the king's enemies" in the bill of lading must be understood to include at least the enemies of the sovereign of the carrier, namely, the Duke of Mecklenburg.

Held also, that, if the defendant required any further protection, he was not entitled to rely on the words "restraint of princes" in the charter-party, for that these words were not incorporated in the bill of lading, by reason of the reference to the charter-party therein contained.

The declaration stated, that the plaintiffs sued the defendant, for that, after the 14th of August 1855, certain persons in parts beyond the seas, to wit, Messrs. George Kellner & Co., at Odessa, delivered to the defendant certain goods, to wit,

3,325 chetverts fine Polish wheat, in bulk, and 850 dunnage mats, to be by the defendant carried and conveyed in a certain ship of the defendant's, from Odessa to Cork or Falmouth, for orders, and thence to one of certain ports as ordered, under a certain bill of lading signed for the same by the defendant, whereby the defendant agreed to carry the said goods, and deliver the same at the port of destination, (the act of God, *the king's enemies*, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of what nature and kind soever excepted,) to the order of the said persons, or to their assigns, paying freight for the said goods and all other conditions as per charter-party, dated Odessa, the 13/25th of October 1863, with average accustomed. That afterwards, and after the said 14th of August 1855, the said persons indorsed the said bill of lading to the plaintiffs, in order to pass the property in such goods to the plaintiffs; and that thereupon, and by reason of such indorsement, the property in the said goods passed to the plaintiffs. That the said ship proceeded with the said goods on board to Falmouth for orders, and was there duly ordered by the plaintiffs to proceed with the cargo to Limerick, and there deliver the said cargo, the same being a port to which the said ship was bound to proceed, agreeably to the terms of the said bill of lading and charter-party. General averment of performance of conditions precedent. Breach, that the defendant, although not prevented by any of the excepted perils, made default in obeying the said orders and proceeding with the said cargo to Limerick, in pursuance of the terms of the said bill of lading and charter-party, whereby the plaintiffs have lost the profits they would have gained if the defendant had proceeded to Limerick with the said cargo, agreeably to the said orders and the terms of the said bill of lading; and the plaintiffs have also thereby sustained great risk of the cargo heating and deteriorating in value.

Fifth plea, that the said charter-party was in the words, letters and figures following, that is to say, "Odessa, the 13/25th October 1863. It is this day mutually agreed between Captain H. F. Niemann, of the good ship or vessel *Vorwarts*, 3/3 French

* Decided in the Sittings after Trinity Term.

Veritas, of 3,500 chetverts wheat or thereabouts, under Mecklenburg colours, now in this port discharging her cargo of coals, and Messrs. George Kellner & Co., merchants and charterers of said vessel, that the said ship, being tight, staunch and strong, and in every way fitted for the voyage, shall receive from the said merchants a full and complete cargo of tallow, wheat, seed, or other stowage goods or grain, oats excepted, all or either at the option of the charterers, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions and furniture; and being so loaded, shall therewith proceed to a safe port in the United Kingdom of Great Britain and Ireland, north-west coast of Ireland excepted, or on the continent, between Havre and Hamburg, both inclusive, Belgium excepted, or so near thereto as she may safely get, where the ship can always lay afloat, calling at Cork or Falmouth at the master's option for orders, (which are to be given by return of post in reply to the master's letter to the charterer's agents in London, or lay days to commence,) unless ordered direct at port of loading, and deliver the same, on being paid freight as follows: viz., from Odessa to the United Kingdom, 41s. 6d., to the ports between Havre and Hamburg, with 10% per cent. additional sterling money for tallow per ton of 20 cwt. gross delivered, stowage goods, seed or grain in proportion, according to the London and Baltic printed rates, being in full of all port charges and pilotages as customary. The freight to be paid on unloading and right delivery of the cargo, all in cash, free of interest, discount and commission. The cargo is to be brought to and to be taken from alongside the ship at merchant's risk and expense, the captain rendering the usual assistance with his boats and crew (the act of God, enemies, fire, restraint of princes, and all and every dangers and accidents of the seas, rivers and navigation of what nature or kind soever during the said voyage, always mutually excepted). Indian corn pays same freight as wheat; mats for dunnage, if any required, to be furnished by charterers, wood, &c. by ship. Forty running days are to be allowed the said freighters (if the ship be not sooner despatched) for loading and

unloading, and if one-third or more of the cargo consists of wool, ten additional lay days to be allowed, to commence in each case when in every respect ready and by the local authorities permitted to load or discharge, of which notice is to be given in writing to the charterer or his agent, and after the expiration of the said lay days, ten days on demurrage to be allowed, at the rate of 7% sterling per day, and payable day by day, detention by frost or quarantine not to be reckoned as lay days; cash for ship's use at Odessa, not exceeding 200% sterling, to be advanced to the master free of interest and commission, subject to insurance, and to be deducted from the freight upon payment thereof. It is further agreed that should the whole or any part of the cargo consist of grain or seed, and any part of it be delivered in a damaged condition, the freight shall be payable on the invoice quantity taken on board as per bill of lading, or half freight on the damaged portion, at captain's option. The charterer's liability to cease as soon as the cargo is shipped (provided it be of sufficient value to cover the freight at port of discharge), the master and owners having an absolute lien upon the cargo, for all freight, dead freight and demurrage. The ship is to be free of commission at port of discharge. Penalty for non-performance of this agreement, half amount of freight."

And the defendant says, that the said bill of lading was and is in the words, letters and figures following, that is to say: "Shipped in good order and well conditioned, by George Kellner & Co., to, in and upon the good ship called the *Vorwarts*, whereof is master for this present voyage H. F. Niemann, and now riding at anchor in the port of Odessa, bound for Cork or Falmouth for orders, 3,325 (three thousand, three hundred and twenty-five) chetverts fine Polish wheat in bulk, and 850 mats for dunnage, being marked and numbered as in the margin, and are to be delivered in the like good order, and well conditioned, at the aforesaid port of destination (the act of God, the king's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation, of what nature and kind soever, excepted), unto order and assigns; paying freight for the said goods, and all other conditions as per charter-party. Dated Odessa,

the 13/25th of October 1863, with average accustomed." Averment, that the owners of the said ship and the defendant were respectively subjects of the Duke of Mecklenburg-Schwerin, and the said ship was a Mecklenburg ship sailing under Mecklenburg colours, and that the default complained of was caused by the act of the enemies of the said Duke of Mecklenburg-Schwerin, being the king's enemies, within the true intent and meaning of the said bill of lading.

Sixth plea, that the said charter-party and bill of lading were respectively as in the fifth plea set out, and that the default complained of was caused by the act of enemies during the voyage, within the true meaning of the said charter-party.

Seventh plea, that the said charter-party and bill of lading were respectively as in the fifth plea set out, and that the default complained of was caused by the restraint of princes, during the voyage, within the true meaning of the said charter-party.

Second replication to the fifth plea, that the said charter-party and bill of lading were respectively made and signed at Odessa, in the empire of Russia, and that the said Messrs. George Kellner & Co. were not, nor were, nor was any or either of them a subject or subjects of the said Duke of Mecklenburg-Schwerin.

The declaration, the pleas, and the replication were demurred to.

The plaintiffs' points were :

1. That the bill of lading expressly states that the goods are to be carried to the port of destination; and it appears by the declaration that the port of destination was to be determined by orders at Cork or Falmouth.

2. That the declaration shews that the ship was duly ordered by the plaintiffs, at Falmouth, to proceed to Limerick, and the plaintiffs, as the holders of the bill of lading, were the proper persons to give the orders.

3. That the declaration avers general performance of all conditions precedent, and consequently if any orders from a third party were necessary, they must be considered as having been given.

That the fifth plea is bad, for the following reasons :

1. That the enemies of the Duke of

Mecklenburg are not the king's enemies within the meaning of the bill of lading, merely because the ship was sailing under Mecklenburg colours.

2. That the fact of one party to the contract being a Mecklenburg subject is no ground for putting a construction upon the words "king's enemies" other than that which *prima facie* belongs to them.

3. That the fifth plea, if good, is sufficiently answered by the second replication, which shews that the shippers were not Mecklenburg subjects, and that the contract was made in another country, *videlicet*, in Russia.

That the sixth and seventh pleas are bad, for the following reasons :

1. That the bill of lading itself specifies the perils from which the carrier is to be free, and the question of liability or non-liability of the shipowner is to be determined by reference to the bill of lading only.

2. That the words contained in the bill of lading, "other conditions as per charter-party," only apply to matters not expressly provided for by the bill of lading, and consequently, the exception of certain perils contained in the charter-party is not incorporated in the bill of lading.

The defendant's points were :

1. That the only orders which the defendant undertook to obey at Cork or Falmouth were the orders of the charterers, Messrs. Kellner & Co., and not the orders of the plaintiffs, or of the holder of any bill of lading.

2. That it does not appear that the said charterers or their agents gave the defendant any orders, or that the defendant disobeyed any orders given by them.

3. That the defendant did not, by the bill of lading, undertake to deliver at any port as ordered by the plaintiffs; and that if the plaintiffs rely on the charter-party imposing on the defendant any such obligation, the declaration does not shew that it contained any such stipulation.

4. That the plaintiffs are not entitled, as assignees of the bill of lading, to sue on a contract not contained in it. On the argument of the demurrer to the sixth and seventh pleas respectively, the defendant will contend that the same are good, on the ground that if the charter-party and bill of

lading are to be construed together for any purpose, they must be so for all, and therefore, that the excepted perils mentioned in the charter-party, so far as they are not inconsistent with those in the bill of lading, must be given effect to. On the argument of the demurrer to the second replication to the fifth plea the defendant will contend that the same is bad, on the ground, amongst others, that it is immaterial of what country the charterers were, inasmuch as the exceptions of perils in the charter-party and bill of lading are inserted for the protection of the shipowner, and that, therefore, the exception of king's enemies must be read as meaning either any enemies whatever, or enemies of the sovereign of the country to which the ship and owner belong.

Honyman (*Lush* with him), for the plaintiffs.

Mellish, for the defendant.

Honyman, in reply.

WILLES, J.—This is an action on a bill of lading upon a ship bound from Odessa to the United Kingdom, to call at Cork or Falmouth for orders, and the declaration states that the order was given (we must now assume properly given) and that that order was disobeyed.

The defendant relies upon two points: first of all, he says, he was prevented from obeying the order given him by the act of the enemies of his sovereign the Duke of Mecklenburg-Schwerin, and he says that the bill of lading contains an exception which includes the acts of such enemies. That is the first point. The other point on which he relies, failing the first, is this: that the bill of lading was given to convey goods upon a voyage in respect of which there was a charter-party, and by the terms of the bill of lading the charter-party is incorporated therewith, so that the defendant is entitled to rely on the larger exception in the charter-party, which he says includes the act of the enemies of his sovereign, and also includes certain other acts by which in a subsequent plea he says he was prevented from obeying the order which otherwise would have been lawful.

As to the first point, we agree with the argument which has been addressed to the Court on the part of the defendant. It turns

on the construction to be put on the words in the bill of lading "the king's enemies." It is necessary to take into consideration the circumstances under which the bill of lading was signed in order properly to apply those words. It appears that a bill of lading was signed at Odessa in the empire of Russia, and the shippers appear to be merchants there; otherwise, we have no account of their nationality. There is no reason for coming to the conclusion that they were either English, or Russians, or Germans; the ship was a Mecklenburg ship; her owners were Mecklenburg people. The destination of the vessel was English. You are to choose between three persons who will equally satisfy the word "king" in the document. You have the Emperor of Russia, who strictly would not be called a king; you have the Queen of England, who strictly would not be called a king, although I believe that Queen Elizabeth in much more formal documents was more than once spoken of as a king; and you have the Duke of Mecklenburg-Schwerin, who in strictness may also be said not to be a king. But the word "king" in these documents frequently denotes a sovereign capable of making war, or upon whom war could be made, and each of the three persons I have mentioned was equally a king in that sense. Taking into consideration the persons who made the contract, and the place where it was made, Odessa, is that any reason for saying that it is the enemies of the Emperor of Russia? Then you have the destination—England: are you, therefore, to say it must mean the Queen's enemies, although neither of the parties appears to have been an English subject? The person who signed this document and made this stipulation for himself, was a subject of the Duke of Mecklenburg-Schwerin, and that appears to be an abundantly sufficient reason why he was stipulating against dangers which might happen to him, from his own enemies rather than the enemies of other people. It expresses that by saying my king's enemies, my sovereign's enemies, the enemies of the Duke of Mecklenburg-Schwerin. I own therefore it appears to me that the good sense of the case is that "the king's enemies" at least includes the enemies of the sovereign of the person who made this

stipulation in the bill of lading. Accordingly, if it was owing to the enemies of that sovereign prince that the order was not obeyed, and we must take it to be so on this record, judgment ought to be for the defendant.

The other question turns on the meaning of the expression in the bill of lading, "paying freight for the said goods and all other conditions as per charter-party." Now, if that means that they are to be bound by all other conditions as per charter-party, of course the exception in the charter-party would be introduced; but if it only means paying freight for the said goods, and fulfilling all other conditions as per charter-party, then it would only incorporate such matters as would be fulfilled by the shipper, and not an exception which was at variance with the exception in the bill of lading. That is the question upon the second set of pleas, and if it should be necessary for us to give our judgment upon that, I shall be prepared to state my opinion in the morning. Counsel will then be good enough to say whether, upon this point, they require the formal judgment of the Court.

BYLES, J.—I am of the same opinion. I think the word "enemies," at least, includes the enemies of the carrier. If it is not specially directed to the enemies of the carrier, at all events it includes them. The "king's enemies" means the enemies of the carrier's sovereign, whatever title he may enjoy, whether queen, emperor, president, duke, doge, or aristocratic assembly; and lest there should be anything left out, "restraint of princes," I should conceive, comprehends every case of interruption by lawful authority, leaving, as has been observed in the course of the argument, the case of pirates to be provided for under the other exception. It has been settled by the highest authority that pirates are to be reckoned amongst the dangers of the seas. In a case of *Pickering v. Barkley*, in the 24th of Charles the First, before Rolle, Chief Justice of the Queen's Bench, the question arose in an action on a charter-party, under seal, and Hale contended that to be robbed by pirates is a danger of the sea, even as tempestuous winds and shelves and rocks are; and Rolle said, "I suppose that pirates are perils of the sea," and the report continues thus:—and to this

purpose a certificate of merchants was read in court that they were so esteemed amongst merchants. Yet the Court desired to have Granly, the Master of the Trinity House, and other sufficient merchants, to be brought into court, to satisfy the Court *visâ voce* Friday next following. Judgment was given this term *nil capiat per billam*, because the taking by pirates are accounted perils of the sea; and the same law is laid down in *Barton v. Walliford*, in *Comberbach's Reports*, p. 57, in the 3rd of James the Second. So that those three exceptions, the king's enemies, restraint of princes, and perils of the sea, seem to include every species of *vis major*; and by the technical rules of our law it is necessary to guard against incidents of this nature by express words.

KEATING, J.—I am of the same opinion. The exception being introduced in favour of the carrier, the contract appears to be simply this: I will carry your goods safely in my ship, if I am not prevented from doing so by the enemies of my sovereign.

On the 25th of June the following judgment was delivered:—

WILLES, J.—We disposed of the first question yesterday. The other question is, whether the exception in the bill of lading is to be considered as expanded by the exception in the charter-party. That depends on whether the words "all other conditions as per charter-party" are to be taken as introducing into the contract by the bill of lading all the provisions of the charter-party; or whether, looking to the preceding words, "paying freight for the said goods, and all other conditions, as per charter-party," they are not to be taken as limited by the context to conditions *ejusdem generis* with that for the payment of the freight, namely, conditions to be performed by the person who receives the goods at the port of discharge. It is merely a question of construction; and it is enough to say that the latter is the construction which, upon consideration, we adopt. With reference to the convenience of trying this cause, and, if necessary, to enable Mr. Mellish's clients to take the opinion of a Court of error upon the point whether the words in the charter-party were or were not incorporated in the bill of lading, it is better to

keep these pleas together, and to give judgment on those two for the plaintiff. Mr. Mellish's client will keep the judgment that was given for him yesterday upon the fifth plea.

The other members of the COURT concurred.

Judgment accordingly.

1864. { INCHBALD v. THE WESTERN
Nov. 10. { NEILGHERRY COFFEE, TEA
AND CINCHONA COMPANY
(LIMITED).

Contract—Performance.

*The defendants, a public company, employed the plaintiff, a broker, to dispose of their shares on the terms, that he should be paid 100*l.* down, and 400*l.* in addition, upon the allotment of the whole of the shares of the company. The plaintiff disposed of a considerable number of shares, when the defendants wound up the company:—Held, by the Court, which had power to draw inferences of fact, that the plaintiff was prevented earning the 400*l.* by the act of the company, and was therefore entitled to recover a proportion of the 400*l.**

This was an action tried, before Williams, J., at the Sittings in London after Easter Term.

The declaration contained the common counts for work, labour and commission as a broker; and also a special count alleging that it was agreed between the plaintiff and the defendants that the plaintiff should become stockbroker to the defendants in and about the selling and disposing of shares in the said company for reward to the plaintiff in that behalf, to be paid by the defendants, that is to say, 100*l.* to be paid down, and 400*l.* in addition on the allotment of the whole of the shares of the said company; and thereupon, in consideration of the premises and that the plaintiff then promised the defendants to fulfil the said agreement on his behalf, the defendants then promised the plaintiff to permit and suffer him to act as such broker, and to sell and dispose of the said shares for the defendants as aforesaid. General averment of conditions precedent. Breach, that the defendants, without any

reasonable cause or reason, wrongfully refused to permit the plaintiff to act as such broker, or to sell and dispose of the said shares for the defendants as aforesaid, whereby the plaintiff was prevented from earning the said sum of 400*l.* so to be paid to him in addition as aforesaid.

The defendants pleaded to the first count never indebted and payment, and to the second count, non assumpsit and a traverse of the breach.

The plaintiff was a stockbroker, and the defendants were a company formed for the purpose of acquiring property and carrying on the operations which their name indicated in the East Indies.

Towards the end of the year 1862, after communication with the plaintiff, the board of directors passed a resolution that the plaintiff should be appointed stockbroker to the company on the following terms, namely, 100*l.* to be paid down and 400*l.* in addition on the allotment of the whole of the shares of the company.

The plaintiff accepted the appointment, and was paid the 100*l.* He immediately proceeded to take measures for disposing of the shares of the company. The capital consisted of 50,000*l.* in 10,000 shares. An arrangement was made for the purchase of the property, by which the vendor was to take 2,000 shares in part payment, leaving 8,000 shares to be disposed of in the market.

A considerable number of these shares had been applied for previously to the month of January 1863, when, at a meeting of the directors, at which the plaintiff was present, some of the directors expressed an intention of taking up the remainder of the shares amongst themselves.

In the month of May following, in consequence of the authority of the person with whom the directors had dealt for the purchase of the estates not having been ratified, the directors sent a circular to the shareholders informing them that the company would be wound up and the deposits returned in full with interest.

The directors had been for some time aware of the difficulty about the purchase, but neither then nor at any other time had any communication with the plaintiff on the subject.

The plaintiff, however, having heard

that the company was wound up from another quarter, demanded payment of the 400*l.*, but the defendants refused to pay him anything; he, thereupon, brought this action for a breach of the agreement contained in the resolution. The defendants relied for their defence on the fact, that all the shares had not been allotted, which was the event upon which the 400*l.* was to become payable.

It was agreed that the verdict should be entered for the plaintiff, and that the whole question of whether the plaintiff was entitled to recover, and what amount, should be reserved for the opinion of the Court, with power to draw inferences of fact.

E. James, in Trinity Term, obtained a rule calling upon the plaintiff to shew cause why the verdict should not be entered for the defendant, on the ground that the plaintiff was not entitled to recover.

Karslake and *H. James* shewed cause.—The plaintiff is entitled to recover on the principle of *Planché v. Colburn* (1) and *Prickett v. Badger* (2). That principle is, that if A. contracts with B. to do something for the benefit of B, for reward to be paid by B, and B. himself prevents the execution of the contract, the result is the same as if the contract had been executed. The payment which was to have been due upon the execution of the contract may be enforced, and the non-performance cannot be set up as a defence.

[*WILLES, J.*—In *Moffatt v. Laurie* (3) the plaintiff agreed to perform certain services as an architect for the defendants, the owners of certain land, for which no charge was to be made; but in the event of the land being disposed of for building purposes, the plaintiff was to be appointed architect. There it was held, that the plaintiff could not recover from the defendants, although they had themselves put it out of their power to dispose of the land for building purposes by disposing of it in some other way.]

It is a question of construction; there, taking the contract with the surrounding circumstances, the Court thought that the intention was to leave the defendants per-

fectly free as to the mode in which the property was to be disposed of. It would be unreasonable that a man should be bound to dispose of a large estate in a particular manner merely to enable an architect to earn his commission. Here the reasonable construction is, that the company when they appointed the broker impliedly undertook to give him an opportunity of earning the reward for his trouble in placing the shares.

Prentice, in support of the rule.—Taking this as a question of construction, the defendants are entitled to succeed. The money is payable on the allotment of the whole of the shares of the company. That is not done. Then, how can the plaintiff recover? Not on the special contract, for that is not performed. Not on the implied contract which generally arises from the performance of a service at the request of another, because the circumstances of this case shew that no such contract was intended by either of the parties. It must, therefore, be upon some contract which is supposed to arise out of the wrongful act of the defendants in winding up the company. But in doing this they were bound to consider the interests of the shareholders as well as of the plaintiff. It cannot be supposed that the directors when they made this contract intended to bind themselves to carry on the concern at all events, and at any sacrifice. He referred to *Simpson v. Lamb* (4) and *Story on Agency*, s. 324.

ERLE, C.J.—This action was brought to recover the sum of 400*l.* on a contract with the defendants, which is contained in a resolution of the board of directors, that the plaintiff should be appointed stockbroker to the company, on the terms of receiving 100*l.* down, and 400*l.* in addition on the allotment of the whole of the shares of the company. It is admitted that all the shares were never allotted, and therefore according to the terms of the contract the plaintiff is not entitled to recover. But ever since the case of *Planché v. Colburn* (1) it has been held, that the plaintiff may recover, if the other party to the contract has by his own act prevented the plaintiff from fulfilling the

(1) 8 Bing. 14.

(2) 1 Com. B. Rep. N.S. 296; s. c. 26 Law J. Rep. (N.S.) C.P. 33.

(3) 15 Com. B. Rep. 588; s. c. 24 Law J. Rep. (N.S.) C.P. 56.

(4) 17 Com. B. Rep. 603; s. c. 25 Law J. Rep. (N.S.) C.P. 113.

requirements of it. I am of opinion that in this case the defendants by winding up the company rendered it impossible for the plaintiff to become entitled under the contract, and that, therefore, according to the rule of law I have mentioned, he is entitled to recover something.

The question remains to be considered, to what damages the plaintiff is entitled. This is a question left to us by arrangement; and I do not, for this purpose, take any notice of the form of the declaration, but apply the universal rule, and give the plaintiff as near as I can what he has lost by the wrongful act of the defendants.—[The learned Judge then stated the facts of the case as bearing on the question of damages, and continued:—] Making the best estimate we can, we think that 250*l.* is a proper compensation, and the verdict will, therefore, be entered for that sum.

WILLES, J.—I am of the same opinion. A party who enters into a contract is bound to perform it, not in the sense of a merely literal performance of it, but so as to permit the other party to have the full benefit which it was intended he should have. This may be illustrated by the case in *Bulstrode*, where a man sold a horse, which he poisoned before delivery; that was held to be no performance, because one party had done that which had deprived the other of the benefit of his contract. I apprehend that wherever money is to be paid by one person to another on a given event, the party under an obligation to pay is liable to the party who has a right to receive the money, if he does that which effectually prevents the latter from receiving the money; and that it makes no difference whether, independently of this prevention, it was certain that the given event would happen or not. To the extent of the value of the chance of the event happening before the prevention, the party who was to receive the money is injured by the party who was to pay it, and to this extent the former has a right to recover. This is a clear proposition both of good sense and of law. The case is not governed by any peculiar principles of agency, but upon the more general principle that each party is entitled to the full benefit of his contract without hindrance from the other.—[The learned

Judge then stated the facts of the case as bearing on the question of damages, and said:—] I agree that 250*l.* would be a proper sum.

BYLES, J.—I am of the same opinion. In the course of the argument I asked Mr. Prentice what he considered to be the obligation of the defendants, and he said that it was not that all the shares should be allotted, but that they should commit no act and make no default on their part which should prevent their being allotted. Now, the cause of their shares not being allotted was the winding up of the company, which was clearly the act of the company, and so would fall within Mr. Prentice's proposition. I do not, however, say that the defendants may not go behind that cause, and shew, if they can, that that act was imposed upon them by some necessity, which relieves them from the responsibility which they *prima facie* incur with regard to the plaintiff. But when they attempt to do so, I find that all is uncertain and doubtful. We are compelled, therefore, to fall back on the proximate cause, the winding-up, and say that that was the act which prevented the plaintiff from earning his money, for which the defendants are responsible.

The question remains, to what damages the plaintiff is entitled? He is clearly entitled to something more than nominal damages and to something less than 400*l.* The observations I have made shew that it is impossible to ascertain with arithmetical accuracy what that intermediate sum is, but we must perform as well as we can the functions of a jury, and I agree that the sum which has been mentioned is a proper sum.

KEATING, J.—This is a peculiar case in some respects. The plaintiff has not done what he contracted to do. That is not contested, but it is said that he was prevented by the defendants. As my Brother Byles has pointed out, that is unquestionable in its literal sense. But the act of prevention was itself caused by an event which would very materially have affected the chance of the plaintiff ever earning this money. On the whole, I think the Court has a right to deal with this question according to the justice of the case, and on this ground I concur in the judgment of the Court.

Rule to enter verdict accordingly.

1864. }
Nov. 9. } ROBINSON v. COLLINGWOOD.

Bills of Sale—17 & 18 Vict. c. 36.
ss. 2, 3.—*Declaration of Trust.*

Under the Bills of Sale Act (17 & 18 Vict. c. 36.) ss. 2. and 3, it is not necessary that the vendee should state on the bill of sale the name of the person who really advances the money, unless there be some trust in favour of the vendor, although the circumstances be such that a Court of equity would hold the vendee to be a trustee only.

This was an interpleader issue, tried, before Williams, J., at the Sittings in London after last Easter Term.

The issue was whether certain furniture and other goods, which had been seized by the sheriff of Middlesex, were the property of the plaintiffs so as to prevent their being taken under a *fiery facias* at the suit of the defendant.

In the year 1861, judgment was obtained in an action against one Berkeley, upon which a writ of *fiery facias* was issued to the sheriff of Middlesex. The sheriff accordingly took possession of certain furniture and other effects at Berkeley's residence; Robinson, the plaintiff in this action, thereupon paid the sheriff 138*l.* 14*s.*, the amount for which he had levied, and the sheriff executed a bill of sale to Robinson. Shortly afterwards Berkeley in consideration of the sum of 32*l.* assigned to Robinson, the plaintiff in this action, all the residue of the furniture and effects at his residence. Both these sums of money were advanced by one Montague, and though Robinson had the bills executed in his own name, he was, in fact, acting as the solicitor of Montague in the transaction. In the year 1863, Collingwood, the defendant in this action, obtained judgment in a second action against Berkeley, upon which a writ of *fiery facias* was likewise issued to the sheriff of Middlesex. Under this writ the sheriff took possession of the furniture and effects at Berkeley's residence, but the plaintiff claiming them under the two bills of sale above mentioned, the sheriff interpleaded; whereupon this issue was directed.

The only question was, whether the bills of sale were valid.

The defendant objected that they were not so, because the provisions of the 17 & 18 Vict. c. 36. s. 2. were not complied with.

That section requires that if a bill of sale be made or given subject to any defeasance, condition, or declaration of trust, not contained in the body thereof, such defeasance, condition, or declaration of trust shall, for the purposes of this act, be taken as part of the bill of sale, and written on the same paper as the bill of sale before a copy is filed; and the defendant objected that under this provision it ought to have been shewn on the bill of sale that the plaintiff was only a trustee for Montague, as in equity he would have been held to be.

The jury found a verdict for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him, if the Court should be of opinion that the objection to the bills of sale was valid.

Bovill having obtained a rule accordingly,

Henry James shewed cause.—It is not denied that, as between Montague and the plaintiff, the plaintiff was only a trustee for Montague. But the 2nd section of the Bills of Sale Act does not relate to such an implied trust. It relates to trusts between the vendor and vendee under the bill of sale. This is neither a defeasance nor a condition, nor is it a declaration of trust. No trust was declared; all that could be stated was, that Montague advanced the money. What interest could the creditors of the vendor have in knowing that?

Bovill and *Keane*, in support of the rule.

—The intention of the legislature was to insure the true nature of the transaction appearing on the register. It would very often be most important to the creditors to know who really advanced the money. If it was a stranger, it might be *bona fide*; but if it was a relation or near friend, there would be a suspicion that the vendor retained some hold on the property. The 3rd section requires the name, addition, and description of the person to whom or in whose favour the bill of sale is given to be stated. This bill of sale was really given in favour of Montague.

[*Henry James*.—That provision only applies to bills of sale executed by the sheriff.

ERLE, C.J.—No, it applies to all bills of sale.]

ERLE, C.J.—I am of opinion that these bills of sale were valid, notwithstanding the provisions which have been relied on contained in the 17 & 18 Vict. c. 36. That statute requires that, if a bill of sale be given subject to any defeasance, condition, or declaration of trust, such defeasance, condition, or declaration shall be registered together with the bill of sale. The object of this provision was to prevent creditors being defrauded by sham bills of sale, by which the whole interest of the grantor is apparently transferred, whereas in reality he retains some interest in the subject of the transfer. But provided the grantor retains no interest, it does not make any difference to a creditor whether the grantee under the bill of sale holds the property for himself, or in trust for some one else. The relation in which Robinson stood to Montague is of no importance to the defendant or any other creditor. This is not a matter which in my opinion is required to be mentioned on the bill of sale by reason of the provisions contained in this act of parliament. I, therefore, think that this rule ought to be discharged.

BYLES, J.—I am of the same opinion. The argument of Mr. James clearly shews that the trusts intended by section 2. of the 17 & 18 Vict. c. 36, are trusts in favour of the grantor of the bill of sale. If it were otherwise, it would be highly inconvenient; because if a number of persons chose to advance money on a bill of sale and were desirous of taking the security in the name of one only, who was to hold as trustee for the rest, it would be necessary to explain all this on the registered bill of sale. I think the words "any defeasance, condition, or declaration of trust," refer to such defeasances, conditions, or declarations as are usually found appended to bills of sale, and which affect its operation as between the grantor and grantee. These alone are within the mischief aimed at; and these it is which in my opinion the act requires to be registered. I agree with the opinion expressed by my Lord in the course of the argument, that when the third section requires the name of "the person to whom or in whose favour" the bill of sale shall have been given to be mentioned, that includes all bills of sale by whomsoever given, and not only bills of sale given by the sheriff

executing process. But I do not think that affects this case, because I think this bill of sale was given in favour of Robinson, within the meaning of those words. I do not think there was any necessity for the transaction between Robinson and Montague to appear.

KEATING, J.—I am of the same opinion. It is clear that the object of the statute is accomplished by putting on the register all declarations of trust as between the grantor and grantee. To require the grantee to state where he got the money to purchase the goods might enable a creditor to make some useful inquiries; but I do not think that that was what was intended by the statute. In truth, there was here no declaration of trust; all you could state would be the facts from which it is provable that a Court of equity might infer a trust.

Rule discharged.

1864. } MAUGHAN v. SHARPE AND
June 1. } ANOTHER.

Mortgage of Goods—Rights of Mortgagee as Owner—Action by subsequent against a prior Mortgagee for Misconduct in Sale of Goods—Deed—Description of Grantee.

B, in consideration of a sum of money lent to him by the defendants, who carried on business under the name of "The City Investment and Advance Company," assigned by deed certain goods of his to the said company to hold as their own proper goods; nevertheless, by way of mortgage for securing the repayment of the said loan, with full power to the mortgagees to sell the goods, and out of the proceeds to reimburse themselves the said loan and costs of sale, and to pay the residue, if any, to B:—Held, that the property in the goods passed by such deed to the mortgagees, and that the plaintiff, who claimed the same goods under a subsequent assignment to him from B, could not maintain an action against them for selling the goods without taking reasonable care to obtain the best prices for them.

Held, also, that the defendants need not be described in the deed by their christian names or surnames, and that the conveyance of the property to the company as above mentioned, operated as a conveyance to the defendants on its being ascertained that they

* Decided in Trinity Term.

were the persons described under the name of such company.

The third count of the declaration stated that, by indenture, bearing date the 2nd of February 1864, made between one William Dolby of the one part, and the plaintiff of the other part, and duly registered under the Bills of Sale Act, the said William Dolby did grant, bargain, sell and assign to the plaintiff all the goods, farming stock, growing crops, agricultural implements, live and dead stock, and every other article which then were in or about a certain farm called the Horse Grove, at Rotherfield, and more fully set forth in the schedule to the said indenture, for the purpose of securing to the plaintiff the repayment of the sum of 650*l.* then advanced by him to the said William Dolby, which said sum was at the time of the committing of the grievances hereinafter mentioned, and still is due and unpaid, of all which the defendants had notice. That the defendants claimed to have a charge or lien upon the said goods, chattels and effects, as a security for an alleged debt due to them from the said William Dolby, and to have a power to sell the said goods, chattels and effects to satisfy their said debt; and thereupon, and whilst the said indenture continued in full force and effect, and the said sum of 650*l.* so advanced as aforesaid remained due and unpaid, the defendants proceeded to sell and dispose of the said goods, chattels and effects granted and assigned to the plaintiff as aforesaid, on pretence of satisfying the said alleged debt due to them from the said William Dolby as aforesaid, whereupon it became and was the duty of the defendants to use all reasonable care and diligence in and about selling and disposing of the said goods, chattels and effects, and in and about preventing a sale thereof at an undervalue. Yet the defendants did not use reasonable or any care or diligence in and about selling and disposing of the said goods and effects, or in and about preventing a sale thereof at an undervalue, but so carelessly and negligently conducted themselves in the premises, that the said goods, chattels and effects were sold at an undervalue and for prices grossly insufficient and inadequate, and not more than sufficient to satisfy the defendant's said debt, although the defen-

dants ought to and might have obtained for the same a much larger sum, and sufficient not only to satisfy the said alleged debt, but also to leave a large balance towards the satisfaction of the sum of 650*l.* so due and owing to the plaintiff as aforesaid; whereby and by reason of the premises the plaintiff was altogether deprived of the benefit of his said security and of the said indenture.

Pleas, *inter alia*, fourthly, to the third count, a traverse of the assignment of the goods by William Dolby to the plaintiff. Fifthly, to the same count, that before and at the time of the making of the said indenture, and thence until and at the time of the alleged sale and disposal of the said goods, farming stock, growing crops, agricultural implements, live and dead stock, and other articles, the same respectively were the goods of and belonging to the defendants, and at the time of the said indenture the same were not, nor were any of them the goods of, nor did they, or any of them, belong to the said William Dolby, nor had the said William Dolby at that time the power to grant, bargain, sell or assign the same, or any of them, and that the defendants sold and disposed of the same as in the third count mentioned in their own right.

The following are the facts of this case as they were proved at the trial, before Erie, C.J., at the Surrey Spring Assizes, in 1864.—

The defendants carried on business in London, under the name of "The City Investment and Advance Company," the defendant Sharpe describing himself as the secretary. They were in fact the only members of the company. On the 10th of December 1863, one William Dolby, a farmer at Rotherfield, in Sussex, borrowed a sum of 400*l.* of the defendants, and as security for its repayment the said William Dolby assigned his farming stock and effects to the defendants by a bill of sale of that date. This bill of sale was an indenture made between the said William Dolby of the one part, and the City Investment and Advance Company of the other part, by which, in consideration of 400*l.* lent by the said company to the said William Dolby, the said William Dolby bargained, sold, assigned and transferred unto the said company,

their executors, administrators and assigns, all and singular the household furniture, books, plate, linen, live stock, implements, crops, goods, chattels, effects and things of him the said William Dolby, then being in or upon the house, premises, and lands, situate at Horse Grove, Rotherfield, aforesaid, then occupied by him the said William Dolby, and all other goods, chattels and effects of the said William Dolby in and about the aforesaid house and premises, or which might thereafter come into and upon any part of the aforesaid house and premises, either in substitution or otherwise, during the time any money might be due from the said William Dolby, his executors, administrators or assigns, under or by virtue of the said indenture, to hold the said goods, chattels and effects thereby assigned unto the said company as their own proper goods and effects; nevertheless by way of mortgage for securing the repayment of the said loan by instalments as therein mentioned (the first of such instalments being payable on the 10th of January 1864). The indenture contained a power of sale, by which it was declared to be lawful for the said mortgagees, either immediately or whenever they should think fit, to sell and dispose of the said goods, &c., in the house or on the premises where the same then were or to remove and sell the same whenever and wheresoever they should think proper, either by private contract or by public auction, together or in parcels, for such price or prices as could be reasonably had or gotten for the same, or to have the said goods, &c. valued by a competent person and to purchase them at such valuation, and out of the proceeds in the first place to retain to and reimburse themselves the said loan or so much thereof as should then remain due, together with all costs of sale, &c., and to pay over the residue or surplus thereof (if any) to the mortgagor, his executors, administrators or assigns.

This bill of sale was not registered under the Bills of Sale Act (17 & 18 Vict. c. 36); but default having been made in payment of the first instalment, the defendants, on the 3rd of February 1864, took possession thereunder of the stock and effects on Dolby's said farm. On the 6th of February the landlord of the farm dis-

trained for 350*l.* rent then due, and caused the goods distrained on to be advertised for sale by auction on the 12th of the same month, and the defendants engaged the auctioneer to continue to sell for them after enough had been realized to pay off the distress. Dolby, unknown to the defendants, had, on the 2nd of the same month of February, executed a bill of sale of the same goods and chattels to the plaintiff as security for a loan of 650*l.*, which bill of sale was afterwards duly registered; and on the 8th of February the plaintiff sent a man to take possession, and afterwards, on the 11th of February, he paid off the distress for rent and the auctioneer's charges for preparing for the sale, such charges with the rent amounting to 382*l.* On the evening of that same day the defendants instructed fresh auctioneers (as the landlord's auctioneer declined to sell for them), and, availing themselves of the previous advertisement for sale, sold the property by public auction on the 12th and 13th of February, by which they realized the sum of 388*l.* 16*s.* 2*d.*, after deducting expenses of sale and also a sum of 167*l.* 15*s.* 6*d.* paid to the sheriff in satisfaction of the claim of an execution creditor. This sum of 167*l.* 15*s.* 6*d.*, having been paid into court to abide the event of an interpleader issue between the plaintiff and such execution creditor, formed no part of the dispute in the present action. One of the lots which had been bought in at the sale was afterwards disposed of for 18*l.*, which made the nett proceeds received by the defendants from the sale amount to 406*l.* 16*s.* 2*d.*

At the trial, the plaintiff contended that the fifth plea was not proved, because the bill of sale relied on by the defendants assigned the goods to them only *quâ* an incorporated company, and this point was reserved to the plaintiff in the event of his not obtaining the verdict.

The plaintiff under a count for money paid to the defendants' use, sought to be repaid what he had expended in paying out the landlord's distress for rent; but the learned Judge ruled that he was not entitled to recover this.

The plaintiff also claimed damages of the defendants for not conducting the sale in a proper manner or taking reasonable care in the sale. The learned Judge

left it to the jury to say whether the defendants had exercised reasonable discretion in not putting off the sale and in the mode in which they conducted it. The jury found a verdict for the plaintiff for 582*l*.

A rule nisi was afterwards obtained by *Lush* to enter a verdict for the defendants or a nonsuit, pursuant to leave reserved, upon the ground that the verdict was against the weight of the evidence, and also that the damages were excessive. On shewing cause against this rule, the plaintiff was to be at liberty to argue the point reserved to him on the trial.

Hawkins, Joyce and Morgan Lloyd now shewed cause against the rule.—The plaintiff has a right to maintain this action, at all events as to the third count, and to complain of the reckless manner in which the property was sold.

[ERLE, C.J.—The difficulty in your way is, whether there was any duty which the defendants were under to the plaintiff, the holder of the second bill of sale.]

The defendants were aware of the advances which had been made by the plaintiff, and that he had paid out the landlord's distress for rent. The bill of sale of the goods to the defendants did not prevent Dolby from afterwards disposing of his equity of redemption. The power of sale stipulates that the defendants are to pay over the residue which may remain after satisfying the loan to Dolby or his assigns, and this dealing with the residue shews that the bill of sale was never intended to pass all Dolby's interest in the goods to the defendants. It was in fact only a pledge or security for the repayment of the loan, and never gave the defendants any other right than that of pawnees with a power of sale. The authorities shew that there is a difference between a mortgage of lands and a pledge of goods. This is pointed out in *Ratcliff v. Davies* (1), where it is said, "for the mortgagee hath an absolute interest in the land, but the other hath but a special property in the goods to detain them for his security." And in *Franklin v. Neate* (2) it was held that the pawnor of a chattel still retains his property in it (though qualified by the right existing in

the pawnee), which he has a right to sell, and by the sale to transfer that property to the buyer; and if the pawnee, on the buyer's tendering him the amount due, refuses to deliver it up, the buyer may maintain trover to recover it. It follows therefore from this that if the bill of sale to the defendants gave them a right to the goods only as security for their debt, the law would impose a duty on them to take care of such goods, and if they sold them under their power of sale, then to get the largest possible price they could reasonably get for them. The following cases were referred to as to the effect of the bill of sale being that of a pledge only—*Reeves v. Copper* (3), *The Lancashire Waggon Company v. Fitzhugh* (4), *Mears v. the London and South-Western Railway Company* (5), *Johnson v. Stear* (6) and *Pigott v. Cubley* (7). Next, the defendants are not properly named in the bill of sale. It is an assignment to "the City Investment and Advance Company," and conveys therefore no property in the goods to the defendants. In *Com. Dig. tit. 'Fait,'* (E 3.), it is said, "If Edmund executes a deed in which he is named Edward, and he be sued by the name of Edmund alias dict. Edward, &c., he may plead *non est factum* and shall avoid the deed." The case of *Williams v. Bryant* (8) is an instance of a bond being good where the party entered into it by the name by which he was then known. Here there was no evidence to shew that it was known that the defendants carried on their business under the name of the company to which the goods were assigned. On the contrary, it would rather appear that the company was held out as a corporate body, of which one of the defendants was secretary. It is submitted that the defendants had no right to assume such a corporate name, and at least they must take under the grant in the bill of sale by that name by which they could sue.

Garth (*Lush* with him), in support of the rule.—With respect to the objection

(3) 5 Bing. N.C. 136; s. c. 8 Law J. Rep. (N.S.) C.P. 44.

(4) 80 Law J. Rep. (N.S.) Exch. 231.

(5) 31 Law J. Rep. (N.S.) C.P. 220.

(6) 33 Law J. Rep. (N.S.) C.P. 130.

(7) 33 Law J. Rep. (N.S.) C.P. 134.

(8) 5 Mee. & W. 447; s. c. 9 Law J. Rep. (N.S.) Exch. 47.

(1) Cro. Jac. 244.

(2) 13 Mee. & W. 481; s. c. 14 Law J. Rep. (N.S.) Exch. 59.

that the defendants cannot take under the assignment in their bill of sale, because the assignment is made to the City Investment and Advance Company, it is submitted that they can do so, and that it is sufficient if they be described by the name under which they traded. Who is to say that the company mentioned in the deed is a corporation?

[WILLES, J.—The case of *Cooch v. Goodman* (9) shews that the Court will take notice of what is a corporation.]

There is nothing on the face of this instrument or in the facts of this case to shew that this company must necessarily be considered as a corporation. Then it is said this bill of sale, though in the ordinary form of a mortgage, did in effect operate only as a pledge. That is not so; it conveyed the property in the goods to the defendants, and was to all intents and purposes a mortgage, and not a pawn of the goods. The difference between a mortgage and a pawn is thus pointed out by Mr. Smith in his notes to *Coggs v. Bernard* (10): "from all this it will be seen that a pawn differs on the one hand from a lien, which conveys no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied,"—"and on the other hand from a mortgage, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that when the condition is broken the property remains absolutely in the mortgagee; whereas a pawn never conveys the general property to the pawnee, but only a special property in the thing pawned." Burnet, J., in delivering his opinion in *Ryall v. Rowles* (11), says,—“It was contended that pawns by the Roman and English law required delivery, but that hypothecation or mortgage did not. As to the Roman law, there was an authority cited—*Just. Inst. lib. 4, tit. 6, s. 7*,—which passage, if it stood alone, might go a good way to prove what it was cited for.” He afterwards quotes authorities to shew that delivery was not necessary by the Roman law, and then adds, “But supposing that distinction true, it could have

no influence in the present case, unless the Roman hypothecation and English mortgage were the same, which they are not. No property was transferred in the hypothecation; an English mortgage is an immediate conveyance, with power to redeem, and equity at any time admits redemption notwithstanding forfeiture; but that does not alter the conveyance, therefore there is no comparison between them.” If this were then a mortgage to the defendants, as it is submitted it was, it is clear they had ample power to sell the goods as they might please, and the plaintiff, who claimed under the mortgagor, could have no better right than the mortgagor to complain of the mode in which the sale was conducted.

ERLE, C.J.—I am of opinion that this rule should be made absolute. In this action the plaintiff has recovered a verdict for a sum of money, whereby he may be indemnified for what he has paid in getting rid of a distress for rent put upon goods which had been assigned to him. The difficulty is, whether one can find any law by which the plaintiff may be entitled to keep that verdict. I have come to the conclusion that there is no law authorizing us to decide in the plaintiff's favour. He has brought this action against the defendants for selling goods to which he claims to be entitled. The defendants have pleaded that the goods were their property, and that they sold them in their own right; and in support of such plea they have relied on an instrument, which is, in terms, a conveyance of the goods to them, by which the property therein is vested in them, subject to certain rights of the mortgagor in the event of his paying the mortgage-debt. Now, if the property in these goods passed to the defendants by that instrument, their plea is sustained. We have searched the authorities in order to see whether we would be warranted in regarding the transaction as substantially that of a pawn of these goods to the defendants, by which they would be only pawnees, and the plaintiff, as the party claiming under the pawnor, would have a cause of action. But I am of opinion that that view of the matter is entirely excluded by the instrument itself, and that therefore the plea is proved. An-

(9) 2 Q.B. Rep. 580; s. c. 11 Law J. Rep. (N.S.) Q.B. 225

(10) 1 Smith's Lead. Cas. 194, 5th ed.

(11) 2 Tudor's Lead. Cas. 628.

other point which has been raised is, that as the deed conveyed the goods to the City Investment and Advance Company, and not to the defendants by name, the property in the goods did not pass to the defendants. There is no doubt that Dolby considered that there was a company, and the defendant Sharpe held himself out as the secretary of such company, and Dolby intended to convey the goods to that company. It is clear that individuals may carry on trade under any name they may choose to adopt; and I do not see why they may not do so under the name of the City Investment and Advance Company. If they usurp the title of a corporation, the law may punish them for it; but as between them and the plaintiff in this action, the deed was a conveyance of the goods to them in the name of that company, and I cannot say that the deed was on that account inoperative.

WILLIAMS, J.—I am of the same opinion. I have tried in vain to remove the difficulties in the way of the plaintiff, because I think the case is one which has been hard upon him. With respect to the deed assigning the goods from Dolby to the defendants, it is said it is inoperative, because of the necessity to name a grantee, to enable a deed to have an operation. I apprehend, however, that it is settled a grant may be good, though the grantee be not named by his christian name or surname. In *Shep. Touch.* 236, after stating the consequences of a mistake in the christian name or surname of the grantee, it is stated: "And yet if the grant do not intend to describe the grantee by his known name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism," and, it is added, "*id certum est quod certum reddi potest.*" I am of opinion that the meaning of the grant in this deed is to convey the goods to the persons using the style and name of the "City Investment and Advance Company." They may, or may not, be a corporation; but when it has been ascertained that the persons answering to that description are the defendants, the grant operates accordingly to convey the property to them. The next question is, what is the effect of the deed if the grant has that operation? Now, if it be competent to make a mortgage of per-

sonal property, this deed has done it. It conveys the property from the grantor to the grantees in the most full and absolute terms, so as to make them the owners of the chattels, subject only to the condition of its being defeated on performance by the grantor of certain matters. That is a mortgage according to its most strict definition; but it is said that there cannot be a mortgage of personal chattels, and that the deed must therefore operate as a pledge. Why so? There is nothing illegal in such a mortgage; and the books, moreover, draw a distinction between a mortgage and a pledge of personal chattels. The case of *Flory v. Denny* (12) is an express authority that there may be a mortgage of a personal chattel without a deed; so that there would seem to be nothing contrary to law in holding that there may be a mortgage of such chattels. Unless, then, the condition for defeating it is performed by the grantor, the property in the goods is absolutely vested in the mortgagee; and a Court of law cannot look to any other owner of such goods than the mortgagee. When, therefore, Dolby made the bill of sale to the plaintiff, he had nothing to assign, and the plaintiff, consequently, cannot now complain in a Court of law of the way in which the mortgagees, who were the absolute owners of the goods, have dealt with them. It is true that there is a covenant in the mortgage deed, by which the mortgagees, if they are guilty of misconduct in the exercise of the power of sale, are answerable to the mortgagor; and it may be that an action on that covenant may lie against them, or that in a Court of equity they may be considered as trustees for the mortgagor, or those who, like the plaintiff, are identical with the mortgagor; and that in such Court there may be a remedy for any abuse by the mortgagees in the exercise of the power of sale. We, however, sitting, as we do, in a Court of law, cannot look at the defendants otherwise than as the absolute owners; and therefore no such action as the present one can lie against them.

WILLES, J. concurred.

Rule absolute.

(12) 7 Exch. Rep. 581; s. c. 21 Law J. Rep. (N. S.) Exch. 223.

1864. } THE GENERAL DISCOUNT COM-
Nov. 25. } PANY (LIMITED) v. STOKES.

Bankruptcy — Liability of Bankrupt Shareholder — Calls — Money payable on a Contingency — Bankruptcy Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 178.

The liability of a shareholder of a joint-stock company to pay future calls is not a liability to pay money on a contingency within section 178. of the Bankruptcy Law Consolidation Act, 1849 (12 & 13 Vict. c. 186), and consequently such shareholder's bankruptcy is no bar to an action for a call made subsequently to such bankruptcy.

Action for calls. — Plea, that before action the defendants became bankrupt within the meaning of the statutes in force concerning bankrupts, and that the causes of action in the declaration mentioned accrued before the defendant so became bankrupt. Issue thereon.

At the trial, before Byles, J., at the London Sittings after last Trinity Term, the following were admitted to be the facts of the case: The company now suing for calls had been incorporated in September 1857, under the Joint-Stock Companies Acts of 1856 and 1857, and were being wound up under an order for winding up voluntarily made on the 14th of May 1861. The defendant was a holder of twenty shares of 10*l.* each in the company, in respect of which 2*l.* 10*s.* only had been paid up on each share. A call of 5*l.* 10*s.* per share was made on the 4th of July 1861, and the present action was brought to recover this call, amounting on the twenty shares to 110*l.* The defendant was adjudged bankrupt on the 3rd of November 1860, and he obtained his certificate on the 4th of February 1862. A verdict was entered for the plaintiffs for 110*l.*, the amount claimed, with leave to the defendant to move to set the same aside and to enter a verdict for the defendant if the Court should be of opinion that the bankruptcy was a defence to the action. A rule nisi to that effect having been obtained, —

Kemp now shewed cause. — The question is, whether the claim in respect of this call is a debt or liability within the meaning of sections 177. and 178. of the Bankruptcy

Consolidation Act, 1849 (12 & 13 Vict. c. 106), and as such provable under the defendant's bankruptcy. The case of *The South Staffordshire Railway Company v. Burnside* (1) decided that such a claim for calls by a railway company was not a debt due on a contingency within the 6 Geo. 4. c. 16. s. 56, which section is precisely similar to section 177. of the 12 & 13 Vict. c. 106.

[*Archibald*, for the defendant, admitted that after that decision he could not contend that the claim in the present action was a debt payable upon a contingency within the 177th section.]

The same principle which governed that case is equally applicable to sect. 178. To be "a liability to pay money upon a contingency" under that section, it must be a liability capable of being valued. How could the value be ascertained or the sums fixed for which the claim was to be made under the bankruptcy? Until a call is made this cannot possibly be done. The case of *Thomas v. Hopkins* (2) is in point. There a schoolmaster sued for a quarter's schooling of the defendant's son, which was contracted to be paid quarterly; the defendant having become bankrupt during such quarter, it was held that his liability to pay on the quarter-day was not a liability on a contingency within the 178th section.

[*BYLES, J.* — What do you understand by the words "liability to pay money upon a contingency"?]

They apply to the case of a guarantie; there there is a debt, but the liability of the guarantor to pay it depends on the contingency of the debt not being paid by the principal debtor. There is a distinction between a debt on a contingency and a contingent debt. Until the Bankruptcy Act of 1861 (24 & 25 Vict. c. 134. s. 154), a liability to pay, or indemnify against the payment of, premiums upon a policy of insurance, was not a liability within this 178th section — *Warburg v. Tucker* (3). In the present case there was no debt until the call was made; and at the time of the defendant's bankruptcy it was contingent whether the defendant would be liable

(1) 5 Exch. Rep. 129; s. c. 20 Law J. Rep. (N.S.) Exch. 120.

(2) 7 Com. B. Rep. N.S. 711; s. c. 29 Law J. Rep. (N.S.) C.P. 187.

to pay anything more to the company; indeed it was possible that no call ever would have been made if the company had not become insolvent.

Archibald, in support of the rule.—The present case, it is submitted, comes within section 178. of the Bankruptcy Act, 1849. It is distinguishable from the case of *Warburg v. Tucker* (3), which was the case of unliquidated damages for breach of a covenant to pay premiums; but in *Young v. Winter* (4) this Court held that a liability on the defendant's covenant to repay the plaintiff the premiums which he had paid to keep the policy alive, was a liability to pay money on a contingency within the 178th section, and such holding was not decided to be wrong by the Court of Exchequer Chamber in *Warburg v. Tucker* (3), as upon that point it became unnecessary to express any opinion. The 153rd and 154th sections of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), which enables proof to be made in respect of unliquidated damages and premiums upon policies, though they do not apply to the present case, where the bankruptcy was under the previous statute, yet they serve as a declaration of the legislature that the Bankruptcy Act, with regard to discharging the bankrupt from liability, should have the largest possible interpretation put upon it. This company was registered under the Joint-Stock Companies Acts, 1856 and 1857, and by section 22. of the act of 1857 (19 & 20 Vict. c. 47), a call is to be deemed a debt to the company; but in the case of winding up any such company the 75th section of the act, 25 & 26 Vict. c. 89, declares that the liability of a contributory is to be a debt from him at the time his liability commenced, though payable at the time the calls are made for enforcing such liability. The legislature therefore assumes that there is such liability on the part of the shareholder, and converts it into a debt when the company is being wound up, which would then be provable under section 177. of the Bankruptcy Act, 1849.

[KEATING, J.—When the company are

being wound up, calls may with certainty be expected to be made. BYRNES, J.—Here there were two uncertainties, first, whether any call would ever be made; and, secondly, whether the defendant would be a shareholder at the time such call was made.]

With respect to contingent liabilities Lord Justice Turner said, in *Ex parte Barwis* (5), that “the 178th section was introduced into the act for the purpose of enabling claims founded on such liabilities to be worked out. That shewed that it was the intention of the legislature to exonerate bankrupts as far as practicable from such liabilities; and it was the duty of the Court to endeavour to carry into effect the intention of the legislature.” In that case a joint and several covenant had been entered into by a principal debtor and his surety, that the principal would pay a sum of money by certain instalments with interest on specified days, and the surety having become bankrupt before all the instalments became payable the creditor was allowed to claim against the bankrupt's estate in respect of the amount of the instalments not then due, as upon a contingent liability under the 178th section. It was decided by this Court, in *Boyd v. Robins* (6), that the liability of the defendant on a guarantee given by him which was revocable at his option on giving notice in writing, was a contingent liability within the 178th section. That case was afterwards reversed on error (7); but the judgment of the Court of Exchequer Chamber does not conflict with the general principles decided by this Court. In *Parker v. Ince* (8), a covenant in a deed of separation by a husband to pay to his wife's trustees a certain annuity during the joint lives of himself and wife, but which covenant was to cease in the event of future cohabitation, was held not a liability to pay money on a contingency provable under the husband's bankruptcy, for there no value could be set upon it, as it was impossible to say that the husband and wife might not come together again. But in the case of one

(5) 25 Law J. Rep. (N.S.) Bankr. 10.

(6) 4 Com. B. Rep. N.S. 749; s.c. 27 Law J. Rep. (N.S.) C.P. 299.

(7) 5 Ibid. 597; s.c. 28 Law J. Rep. (N.S.) C.P. 78.

(8) 4 Hurl. & N: 53; s.c. 28 Law J. Rep. (N.S.) Exch. 189.

(3) 5 El. & B. 384; s.c. 24 Law J. Rep. (N.S.) Q.B. 317; and in error, 28 Law J. Rep. (N.S.) Q.B. 56.

(4) 16 Com. B. Rep. 401; s.c. 24 Law J. Rep. (N.S.) C.P. 214.

of two makers of a promissory note, who have signed as sureties for a third maker, the liability to contribution upon the contingency of the co-surety paying the note on default of the principal, has been held to be a liability within the 178th section—*Adkins v. Farrington* (9). It is only sought in the present case to relieve the defendant in respect of the liability to pay the call which has been made. If the contingency does not arise so that the claim can be converted into a proof within six months of the filing of the petition, the claim may be expunged, as is provided for by the 178th section.

[BYLES, J.—If a shareholder is not discharged by his bankruptcy from his liability to pay future calls, how can he protect himself?]

Kemp.—By becoming bankrupt every time a call is made. That course has been adopted.

ERLE, C.J.—I am of opinion that this rule should be discharged. This is in effect an action by a company against a shareholder for calls; in fact, the action is for a call made under the winding up of the company, but the principle is the same as if the call had been by a continuing company. Now the party required to pay the call was adjudged a bankrupt on the 3rd of November 1860, and the order for winding up the company was made on the 14th of May 1861, and the call itself was made on the 4th of July 1861, so that the action is for a call made in July 1861, on a shareholder who had become bankrupt in November 1860. Does then the certificate, which the bankrupt obtained in February 1862, constitute a bar to the company's enforcing payment of that call? The call being made after the bankruptcy would not, under ordinary circumstances, be provable under the bankruptcy; but the question turns on the construction of the 178th section of the Bankruptcy Consolidation Act, 1849, which enables a party, with whom a liability to pay money upon a contingency has been contracted, to make a claim, and, after the contingency has happened and the demand has been ascertained, to prove such demand. That is, where there is such a

liability to pay money upon a contingency, the party who has contracted it may become clear of it, on his becoming bankrupt, as the person with whom it was contracted may prove his claim against the bankrupt's estate. Now, was the liability of this shareholder to be called on to pay money to the company a liability to pay money upon a contingency? The words of the statute at first sight would seem to declare that he is to be discharged from such liability; but after looking at the authorities, I am of opinion that the legislature has not stated with sufficient clearness that he is to be discharged. Where a person holds shares in a continuing company his liability to pay must depend on more than one contingency, and no liability attaches which is dependent on a single contingency, which is required to bring it within the 178th section. The authority which authorizes my coming to this conclusion is that of *Parker v. Ince* (8), where the Court of Exchequer said that, as the money was payable only under several contingencies, the case did not come within the protection of the 178th section. The case of *Adkins v. Farrington* (9) was that of contribution between sureties, and at the time the plaintiff paid the balance there was a certainty as to what was the amount of deficiency which had to be made good by the sureties, and the judgment of the Court therefore was that he ought to prove for that amount, because, as I gather from the report, there was there one sum and one contingency. The case of *Ex parte Barwis* (5), was where money had been borrowed on mortgage with a covenant by the debtor and his surety to repay the money with interest by instalments on certain specified days. The surety had become bankrupt before all the instalments were due, and it was held that the creditor had a right to prove for the balance against the bankrupt's estate. That case is the nearest case in favour of what has been contended for by Mr. Archibald, but it does not, I think, go so far as is required for the purposes of the present case, because a continuing company, in order to prove against the estate of a bankrupt shareholder, must say we expect this shareholder will be called on to contribute to the full amount of his shares, and the claim must depend on the state of the affairs of the company, whether

(9) 5 Hurl. & N. 586; s.c. 29 Law J. Rep. (N.S.) Exch. 345.

they are likely to fail or not, and a variety of contingencies, and because it would be unjust to hold that they have no right to make calls unless they come forward and disclose the state of their affairs. It is said that this imposes the hardship on a shareholder of being obliged to continue with an undefined liability; but I will only say that if he has not the means, his remedy must be to pay each call by a fresh bankruptcy. For these reasons I have come to the conclusion that the defendant's bankruptcy on the present occasion is no bar to this action.

BYLES, J.—I am of the same opinion. The questions which arise on these sections of the Bankruptcy Act are thorny ones. At first I thought that this case fell within the words of the 178th section; but the decisions which have been referred to go to this extent, that where the contingency is several and not one, the words of the act are not satisfied. Here there was a contingency, first, whether any call would ever be made, and secondly, whether the bankrupt would then be liable to pay it, because it was uncertain whether he would be a holder of shares or not at the time the call was made. If ever, therefore, there was a case in which the existence of several contingencies would prevent its being a contingent liability under this 178th section, the present is that case. Then, again, if the bankrupt is to be discharged at all it must be from all liabilities, and then we are driven to this absurdity, that the bankrupt may hold the shares (for the assignees may not think proper to accept them) and yet be discharged from all past and future calls in respect of them. On the other hand, until Mr. Kemp pointed out that a fresh bankruptcy *toties quoties* would of course discharge him from future calls, there seemed no end to the shareholder's liability. The balance of authority coincides with the balance of convenience, and I therefore think this rule should be discharged.

KEATING, J.—This 178th section of the Bankrupt Act is not free from difficulty, but after looking at the authorities which have been cited, I agree with the rest of the Court in thinking that this rule should be discharged.

Rule discharged.

1864. } FITTON v. THE ACCIDENTAL
June 18.* } DEATH INSURANCE COMPANY.

Insurance against Injury by Accident—Construction of Policy—Condition.

A policy for insuring the payment of a sum of money in case the insured should be injured by accidental violence and die from the direct effect of such accident, was subject to the following condition: "this policy insures against all forms of cuts, stabs," &c., "when accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to the insured," "but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured before or at the time or following such accidental injury":—Held, that the insurers were liable under such policy where the insured died from hernia caused solely by external violence.

This was an action, by the administrator of John Fitton, deceased, on a policy effected by the deceased in his lifetime with the defendants, for securing the payment of 1,000*l.* in the event of his death by accident. The declaration set out the policy *in hæc verba*, of which it is only necessary to give the following:

"Now this policy witnesseth, that in case the said insured shall be injured by accidental violence, and shall, within three calendar months of its occurrence, die from the direct effect of any such accident, the company shall be liable to pay to his executors or administrators the sum of 1,000*l.* sterling, three calendar months after proof has been given of such accidental death to the satisfaction of the directors, or in case such accidental violence shall wholly disable the insured from attending to business, shall be liable to pay to him a sum at the rate of 6*l.* per week during the continuance of such disability, for a period not exceeding in all six calendar months, or in case such accidental violence shall not wholly disable the said insured, but shall partially disable him, or render him in part unable to attend to business, shall be liable to pay to him a sum not ex-

* Decided in the Sittings after Trinity Term.

ceeding in the whole one quarter of the sum payable in respect of the whole or entire disablement." "Provided also that this policy and the insurance hereby effected are and shall be subject and liable to the several conditions, restrictions, stipulations and notice hereupon indorsed, so far as the same are or shall be applicable, in the same manner as if the same respectively were here repeated and incorporated in this policy." The declaration then set out the conditions and stipulations so referred to in the said policy, of which the following is alone material for the present purpose: "This policy insures against all forms of cuts, stabs, tears, bruises, concussions, crushings, gunshot wounds, poisoned wounds, sprains, ruptured tendons, broken bones, dislocations, burns and scalds, the effects of explosions and chemicals, frost-bites, bites of mad dogs, serpents or insects, the action of lightning, suffocation by choking, drowning, hanging when accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocation; *but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured before or at the time, or following such accidental injury,* (whether causing such death or disability directly or jointly with such accidental injury,) nor against death or disability arising from prize-fighting, duelling, the hands of justice, from intentional self-injury, whether under the influence of insanity or not, nor from injuries sustained on a railway whilst travelling otherwise than in a passenger carriage, nor whilst acting in violation of the by-laws of the railway company, nor from injuries received in the wanton and voluntary exposure of himself to obvious and unnecessary risk or injury, nor from injuries received whilst in a state of intoxication, or whilst performing any unlawful act, nor against death or disability arising accidentally from anything administered or act performed for the treatment of disease, whether surgical, medical or otherwise, except from surgical operations performed for the treatment of injuries enumerated in the first part of this clause, for which compensation under this policy would be other-

wise payable, nor against injury occasioned by any invasion, foreign enemy, civil commotion, popular riot, or by any military or usurped power whatsoever, and in no case against death or disability occurring beyond the period of three months from the date of injury."

The declaration then averred that after the making and entering into of the said policy and agreement, and within the period of one year from the date thereof, and whilst the same was in full force and effect, and whilst the said John Fitton was insured thereby, the said John Fitton was injured by accidental violence within the true intent and meaning of the said policy and agreement, to wit, by accidentally falling with great force and violence upon and against the floor of a certain room. And further, that the said John Fitton did within three calendar months of the occurrence of the said accident and injury, and whilst the said policy and agreement was in full force and effect, and whilst the said John Fitton was insured thereby, die from the direct effect of such accident within the true intent and meaning of the said policy and agreement, and that all conditions necessary to be performed, and all things necessary to happen, and all times necessary to elapse, to entitle the plaintiff as such administrator as aforesaid to the performance in all things of the said policy and agreement by the defendants, and to entitle him to be paid the said sum of 1,000*l.* therein mentioned, and to maintain this action against the defendants were performed and did happen and did elapse long before the commencement of this suit, and that nothing hath at any time happened to disentitle the plaintiff as such administrator as aforesaid to the performance in all things of the said policy and agreement, or to be paid the said sum or to maintain this action; yet the defendants have not paid the said sum of 1,000*l.* or any part thereof, and the same always hath been and still is wholly unpaid.

Plea, that the injury and accidental violence to the said John Fitton in the declaration mentioned, was as follows, and not otherwise; that is to say, the said John Fitton accidentally fell with violence on the floor of the said room and thereby became and was immediately ruptured in his bowels and afflicted with strangulated hernia in his

abdomen, whereupon a surgical operation was necessarily performed on the body of the said John Fitton, for the purpose of relieving him from the said strangulated hernia, and the said John Fitton afterwards, and within three calendar months of the said accident and injury, died from the said hernia, and from the said surgical operation performed as aforesaid for the treatment thereof and the effects thereof, and not otherwise or from any other cause.

Demurrer to such plea and joinder in demurrer.

Coxon (*Mellish* with him), for the plaintiff.—The question is, whether death from hernia which has been superinduced by external cause is within the exception mentioned in the first condition of this policy, so as to exempt the defendants from liability. It is submitted that the words "or any other disease or cause arising within the system of the insured" override and govern what immediately precedes it, and that "hernia" in such exception means hernia arising from some internal cause in the system, and not hernia which may arise from external violence.

[*WILLES, J.*—It would be a most illusory policy if it were not so.]

Yes; it would be a fraud on the assured, and such a construction would in fact not tend to the benefit of the company.

J. Brown, for the defendants.—It is simply a matter of bargain between the insurers and the insured, and as in the cases which this company insure there is no previous examination by a surgeon, and it has been found by experience that accidental violence does not produce hernia unless there exist a previous weakness of the parietes of the abdomen (*Druid's Surgeon's Vade-Mecum*, p. 468), it has been deemed only a proper condition, by way of protecting the company, to exclude from the risk insured against death produced by hernia, whether caused by accidental violence or not. As to the words in the exception "arising within the system," it is submitted that they mean no more than arising on any part of the body of the insured, for erysipelas exhibits itself on the surface. If "hernia" in this exception is to be confined to hernia arising within the system there would be no necessity to mention it, for the insurance is against accidental injury,

and it cannot be supposed, therefore, that hernia, unconnected with accidental injury, could be contemplated.

Mellish, in reply.—Gout and rheumatism never arise except from an internal disease, but hernia and erysipelas may or may not do so, and the condition should therefore be read so as always to except death from rheumatism or gout, but to except death from hernia or erysipelas only when these should arise within the system. If, however, there is any ambiguity in the condition, then the utmost that can be said is, that the policy applies and not the condition, which latter, if ambiguous, must be construed most strongly against the company.

WILLIAMS, J.—I confess to having had considerable doubt in this case. The point is a remarkably simple one, namely, whether the provision in the first condition, that the company does not insure against death arising from hernia, means hernia generally, or whether "hernia" is governed by the words following, "arising within the system of the insured before or at the time or following such accidental injury," and does not therefore mean hernia arising from an external act. If we decide that the company are liable where the death was caused by hernia arising from external violence, the plea is bad. Now, according to the best interpretation I can put upon such condition, I think it means only to exempt the company from liability where the hernia has arisen within the system of the insured. Hernia is not a disease which in all cases arises within the system; and I think that where it does not arise within the system, in that case this condition does not apply, and, consequently, the plea is bad.

WILLES, J.—I am of the same opinion. It is, I think, important that there should be a tendency rather in favour of the assured than of the company insuring, where there is any ambiguity in the language of a policy of insurance. No doubt this is a valuable company, and that it has saved many persons from want; but it would be valueless in many respects if the contention which has been made in this case on behalf of the company should prevail, and that the company should be protected from loss where death has been caused by an injury from

accidental violence, if it should appear that the immediate cause of the death was hernia though such hernia was the result of the accident. I agree with my Brother Williams that the terms of this policy are large enough to include this case, and that we should therefore give our judgment for the plaintiff.

BYLES, J.—Here the injury to the assured was plainly within the words of the policy. Then there is this exception contained in the first condition, “but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured.” That must, however, be read with what precedes it, namely, “this policy insures against all forms of cuts,” &c. (not including in that list “gout, hernia, &c.”) when accidentally occurring from material and external cause where such accidental injury is the direct and sole cause of death to the insured.” I therefore agree that the proper construction is that which has been put on it. The exception says also, it is to apply to such disease whether arising “before or at the time or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury,” and this hernia may do. I have one other observation to make, that neither of these latter words includes the case of an injury which is the *causa causans*, whereas there are words in the part before this which would do so. For these reasons, I am of opinion that the present case comes within the policy, and not within the exception.

Judgment for the plaintiff.

a certain wood of the plaintiff, so negligently controlled and restrained his said dogs near to the said wood that they entered the said wood and hunted and destroyed the game therein. It was proved at the trial that the defendant had a dog of a peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account, and that that vice was known to the defendant, who, notwithstanding, allowed the dog to be at large in the neighbourhood of the plaintiff's said wood, and that the dog consequently entered the wood and did the damage complained of:—Held, that the declaration was proved in an actionable sense, and was also good after verdict.

Quære—whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another.

The second count of the declaration stated, that on divers days and times the defendant then knowing that certain of his dogs were accustomed to hunt for and pursue game, and also then knowing that the plaintiff preserved and had game in the wood and plantation of the plaintiff hereinafter mentioned, so negligently kept the said dogs near to the said wood and plantation, that through and by reason thereof the defendant's said dogs broke and entered the said wood and plantation of the plaintiff, called Hockering Wood, situate at, &c., and trod down, damaged and destroyed the herbage, soil and underwood thereof, and ran about, hunted and chased therein, and hunted, chased and pursued, drove about and disturbed, and killed and destroyed the game, pheasants, hares and rabbits which were in the said wood, by reason whereof large quantities of the said game, &c. were greatly terrified, affrighted and caused to leave the said wood and plantation and were injured; and by reason of the premises the plaintiff hath been and is seriously damaged and injured, and the plaintiff's right to shoot and sport in the said wood and plantation hath been spoiled and damaged, and divers monies heretofore expended and laid out in and about and incident to the raising, rearing, feeding, taking care of and watching the said game, &c., became and were wholly lost to the plaintiff; and the plaintiff was thereby caused to incur greater expense

1864.

June 18;
July 4.* }

READ v. EDWARDS.

Negligence—Mischievous Animals—Dogs accustomed to hunt Game—Scienter.

The declaration stated, that the defendant knowing that certain of his dogs were accustomed to hunt for and pursue game, and also knowing that the plaintiff preserved game in

* Decided in the Sittings after Trinity Term.

than he would have done in and about the watching and taking care of the said wood, game, &c.; and the plaintiff hath also thereby been deprived of the said game, &c., and of the enjoyment thereof, and of having such pleasure and recreation therein, as otherwise and but for the premises he would have had; and also thereby the plaintiff hath been deprived of divers great gains and profits which otherwise and but for the premises he would have derived, and which might and would have accrued to the plaintiff therefrom, and from the disposal thereof.

To this count the defendant pleaded—first, not guilty; thirdly, that the dogs were not the defendant's; fourthly, that the wood and plantation were not the plaintiff's; fifthly, so far as related to the alleged right to shoot and sport, that the plaintiff had no right to shoot or have sport as alleged; sixthly, that the defendant did not know that the said dogs were accustomed to hunt for and pursue game, nor did he know that the plaintiff preserved and had game in the said wood and plantation. Issue thereon.

The cause was tried, before Cockburn, C.J., at the Norfolk Spring Assizes for 1864, when it appeared that the plaintiff occupied Hockering farm and wood in Norfolk, where he preserved and had pheasants and other game, and that the defendant, who had a farm close to the plaintiff's, was the owner of a pointer which had entered the plaintiff's wood and had injured and destroyed the game therein. It was proved that this dog had not merely the propensity common to many dogs of chasing and pursuing game, but that it had the habit of going out and hunting game on its own account, and that the defendant, although he was aware of this and had been cautioned about it by the plaintiff's gamekeepers, allowed the dog to remain loose, in consequence of which it got into the plaintiff's wood and injured the game there in the way complained of. The jury found a verdict for the plaintiff, damages 5*l.*, which was entered for the plaintiff for the second count only. A rule nisi was afterwards obtained to set the same aside, and to enter a verdict for the defendant, on the ground that there was no evidence in support of the declaration, and also to arrest the judgment on

the ground that the second count disclosed no cause of action.

Hayes, Serj. and Metcalfe shewed cause against such rule.—This second count may be treated as a count in an action on the case for not restraining a dog known to his owner to have a mischievous propensity. The evidence fully supported this, for it shewed that the dog had the propensity to hunt for game on the plaintiff's preserve, and that the defendant had been informed of this and had yet neglected to properly prevent the dog from exercising such mischievous propensity.

[WILLES, J. referred to a case in the *Year-Book*, 20 Edw. 4. (1)].

(1) The following is the case referred to in the *Year-Book*, 20 Edw. 4, fo. 10 b :

In trespass for entering plaintiff's close and depasturing his herbage with his beasts,—

Per Gery (for defendant).—Action not maintainable, for defendant says that all the men of D had had common in 200 acres of moor from time whereof memory is not to the contrary, and that the plaintiff's land is adjoining to the 200 acres in which they were put, and that they entered in the land of the plaintiff without defendant's knowledge, and immediately the defendant knew it, he drove them out; wherefore he prays judgment, &c.

Briggs.—This is no plea; for if they wish to prescribe, he ought to prescribe in a certain name—as of a town corporation.

Brian.—As far as this is concerned, the plea seems good enough; but it appears to me that the plea is naught for another cause; for when he put his beasts in the common, he ought to use his common so that they do no wrong to another man; and if the land in which he ought to have this common is not inclosed, as it is here, he ought to keep his beasts in the common and out of the land of another.

Littleton.—I think so too; for I understand that this is the law: if a common road lies over the land of divers men, and if a drover come with his beasts, and some of them go out of the way, he shall be punished in an action of trespass; and so here.

Townsend.—Then we say that we put in our beasts, and they were driven out of the common by wild beasts; to wit, dogs.

Brian.—What is this to the purpose?

Townsend.—In that case he may have an action against the master of the dog.

Nele.—Have you in your country wild dogs? This is wonderful.

Brian.—Notwithstanding you may have an action against the dog's master, still the plaintiff may have an action against you; as if I bail goods to a man to keep, and a stranger takes them out of his possession, I may have an action against him or against my bailee.

Genny.—We traverse generally not guilty.

Brian.—That is right; for you or the dogs [gy. dog's master!] should be punished, for the plaintiff is injured wrongfully.

The effect of that case is that the owner is bound to restrain his animals from straying beyond the common, and that case seems also to assume that if a dog drove them off the common an action would lie against the owner of the dog.

[WILLIAMS, J. referred to *Cooke v. Waring* (2).]

In *Hartley v. Harriman* (3) the declaration was not proved; but the Court held that if the owner of the dog knew it was accustomed to bite sheep, he would have been responsible for its having done so. An action lies for discharging guns near the decoy pond of another, with design to damnify the owner by frightening away the wild fowl resorting thereto—*Keeble v. Hickeringill* (4), *Carrington v. Taylor* (5). It is true that an action does not lie for disturbing a rookery, because a man can have no property in rooks, or any right to have them resort to his trees—*Hannam v. Mockett* (6). But with regard to game, the owner of the land on which the game is kept has such a qualified property in the game whilst it is on his land as will enable him to maintain an action for disturbing it; indeed, when the game has been started and killed on his land, his property in it becomes absolute—*Sutton v. Moody* (7), *Rigg v. the Earl of Lonsdale* (8), *Blades v. Higgs* (9), *The case of Swans* (10), *The Queen v. Head* (11) and *The Queen v. Pratt* (12).

O'Malley and Keane, in support of the rule.—No action will lie for negligently keeping a dog because he is accustomed to hunt game. The case of *Cox v. Burbidge* (13) shews that the gist of the cause of action is the keeping, and not the neg-

ligently keeping, an animal known to have a mischievous or ferocious propensity, that is to say, the owner will be liable for the consequences if he keeps a ferocious bull, or a dog which he knows is accustomed to bite sheep or to bite hogs—*Boulton v. Banks* (14); but what is there in the law which prevents a person from keeping a dog accustomed to pursue and bite game? When the game has been started and killed on the land, there is, no doubt, a property in such dead game in the owner of the land; but there is no such property in live game; and there is nothing, it is submitted, which makes it unlawful for a person to keep dogs which hunt live game, nor is the owner of a dog liable for a trespass committed by the dog in going after game, where the trespass has not been encouraged by him, but was on his part involuntary. In *Brown v. Giles* (15) Park, J. was of opinion that a dog jumping into a field without the consent of its master was not a trespass for which an action would lie; and in *Millen v. Fandrye* (16) the defendant's dog chased the plaintiff's sheep; the defendant called him off, and it was held no action lay. It is stated in *The King v. Huggins* (17): "There are, indeed, cases of murder where no act was done by the persons guilty; as the letting loose a wild beast, which the party knows to be mischievous, and he kills a man"; and in *Mason v. Keeling* (18): "There is a great difference, it is said, between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs; the former the owner ought to confine, and take all reasonable caution that they do no mischief, otherwise an action will lie against him; but otherwise of dogs before he has notice of some mischievous quality." The only *scienter* which is alleged in the declaration in the present case is, that the dog is accustomed to hunt for and pursue game; but that is not a vice in a dog which imposes on its owner the obligation to fasten it up and restrain it.

Cur. adv. vult.

(2) 2 H. & Colt. 332; s. c. 32 Law J. Rep. (N.S.) Ercb. 262.

(3) 1 B. & Ald. 620.

(4) 11 East, 574, n.

(5) Ibid. 571.

(6) 2 B. & C. 934.

(7) 1 Ld. Raym. 250.

(8) 1 Hurl. & N. 923; s. c. 26 Law J. Rep. (N.S.) Ercb. 196.

(9) 13 Com. B. Rep. N.S. 844; s. c. 32 Law J. Rep. (N.S.) C.P. 182.

(10) 7 Rep. 15.

(11) 1 F. & F. 350.

(12) 4 El. & B. 860; s. c. 24 Law J. Rep. (N.S.) M.C. 113.

(13) 13 Com. B. Rep. N.S. 430; s. c. 32 Law J. Rep. (N.S.) C.P. 89.

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(14) Cro. Car. 254.

(15) 1 Car. & P. 118.

(16) Pop. 161.

(17) 2 Ld. Raym. 1583.

(18) 1 Ibid. 606.

The judgment of the Court (19) was (July 4) delivered by—

WILLES, J.—We discharge the rule to enter a verdict for the defendant, because the declaration was proved, and that in a sense in which there was a cause of action. The question was much argued, whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as is the case of an ox; and reasons were offered, which we need not now estimate, for a distinction in this respect between oxen and dogs or cats, on account of, first, the difficulty or impossibility of keeping the latter under restraint; and, secondly, the slightness of the damage which their wandering ordinarily causes; thirdly, the common usage of mankind to allow them a wider liberty; and, lastly, their not being considered in law as absolutely being the chattels of the owner, so as to be the subject of larceny. It is not, however, necessary, in the principal case, to answer this question, because it was proved at the trial that the dog which did the damage was of a peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account; that that vice was known to its owner, the defendant; and that he, notwithstanding, allowed it to be at large in the neighbourhood of the plaintiff's wood, in which there was game; so that the entry of the dog into the wood, and the destruction of game, was the natural and immediate result of the animal's peculiarly mischievous disposition, which his owner knew of, and did not control.

As to the property damaged being game, we think this is no answer to the action, because the law recognizes in the proprietor of land a qualified right to game whilst it is upon the land.

We also discharge the rule to arrest the judgment, because after verdict the declaration may be read as capable of being, and therefore must be taken to have been, in fact, proved in an actionable sense.

Rule discharged.

(19) Williams, J., Willes, J., Byles, J. and Keating, J.

1864.
April 21; } RONNEBERG v. THE FALKLAND
May 26.* } ISLANDS COMPANY.

Damages—Remoteness—Costs of Litigation.

The plaintiffs were owners of a vessel chartered as a general ship from London to Valparaiso, with liberty to touch at the Falkland Islands. She had on board goods consigned to the defendants at the Falkland Islands, and 400 barrels of gunpowder for Valparaiso. When she arrived at the Falkland Islands it was necessary for her to unload her gunpowder before she could enter the harbour. The defendants accordingly lent the captain a vessel in which temporarily to stow the powder. Subsequently, the defendants removed the powder into another vessel, which was not a proper one for the purpose, and the latter vessel went down with the powder on board. The captain went on to Valparaiso, and not having delivered the gunpowder or otherwise satisfied the consignees, he was sued by them. The captain defended the action and was defeated, incurring considerable costs in so doing:—Held, that, though the defendants were liable to the plaintiff for the value of the gunpowder, they were not liable for the costs incurred in defending the action at Valparaiso (1).

This was an action tried, before Erle, C.J., at the Sittings in London after Hilary Term, 1864.

The declaration contained a count on a contract, by the defendants, safely and securely to keep certain gunpowder; breach—that the defendants did not safely and securely keep the said gunpowder; and also a count on a contract by the defendants to use due and proper care and diligence in the keeping of certain gunpowder intrusted to them by the plaintiff. Breach—That the defendants did not use due and proper care and diligence in the keeping of the said gunpowder. The declaration also

* Decided in Trinity Term.

(1) It is difficult to say whether the *ratio decidendi* in this case was, that the conduct of the captain in defending the action at Valparaiso was imprudent, or that the costs incurred in that action are too remote to be given as damages. Each *ratio* is sufficient, and each is referred to.

alleged, as special damage, that, by reason of the said several premises, the plaintiff had incurred and become liable to pay, and had paid, large sums of money by way of damages to the owners of the said goods, and were compelled to pay the said parties their costs of obtaining the said damages, and had thereby incurred heavy costs himself from the claim of the said parties.

The facts were, that the plaintiff was owner of a vessel, called the *Johanna Ohiffa*. This vessel was chartered by Smith & Co., merchants, in London, as a general ship, for a voyage from London to Valparaiso, with liberty to touch at Port Stanley, in the Falkland Islands. Part of her cargo consisted of 400 kegs of gunpowder to go to Valparaiso, and she had also on board a consignment of goods for the defendants at Port Stanley.

When the ship arrived at Port Stanley she was not allowed to proceed to the usual landing-place on account of her having gunpowder on board, and accordingly an arrangement was made by the captain with the defendants that the powder should be taken out and placed on board a vessel belonging to the defendants, called the *Fairy*, after which she could proceed to the usual landing-place and deliver the defendants' goods. This was accordingly done. Subsequently the defendants, being desirous to make use of the *Fairy*, transferred the powder to another vessel of theirs, called the *Lily*. This was a vessel which was only half-decked, and a gale coming on, she went down with the powder on board. The captain knew of the removal of the powder, but did not express either assent or dissent.

When the *Johanna Ohiffa* arrived at Valparaiso, the consignees of the powder instituted proceedings and arrested the ship on account of the non-delivery of the powder. The captain appeared and defended the action, and judgment was pronounced against him for 312*l.*, the value of the powder. In these proceedings he also incurred costs to the amount of 99*l.* 12*s.* The proceedings in the court at Valparaiso were put in evidence at the trial.

The defendants contended that the powder was put on board the defendants' vessels for the convenience of the captain alone; that the defendants were under no obligation with respect to keeping the gunpowder, and

that it was entirely under the control of the captain, to whom the defendants had lent their vessels; that the captain, not objecting, must be taken to have assented to the powder being transferred from the *Fairy* to the *Lily*, so that no obligation was cast upon the defendants by that transaction. The defendants also contended that the plaintiff was, at any rate, not entitled to recover the costs of defending the action at Valparaiso.

The learned Judge told the jury that if the defendants, without the consent of the captain, removed the gunpowder into a vessel which was not proper for the reception of it, they were liable for any injury arising from that act, and that, if they thought the *Lily* was not a proper vessel wherein to stow the gunpowder, they ought to find for the plaintiff for the value of the gunpowder. He also told them that if they thought the conduct of the captain was reasonable and prudent in defending the action at Valparaiso, they might give the plaintiff the costs of that litigation as damages in this action.

The jury found for the plaintiff. They stated their opinion that the *Lily* was not a proper vessel wherein to stow the gunpowder; that the captain was aware of the removal of the gunpowder, but that he did not assent to it. They gave damages 312*l.* for the value of the gunpowder, and 99*l.* 12*s.* for the costs of the litigation at Valparaiso.

Leave was reserved to the defendants to move to reduce the damages by the amount of the costs.

Karslake, in Easter Term, April 21, moved accordingly, and also for a new trial on the ground that the learned Judge ought to have told the jury that the defendants, as gratuitous bailees, were not liable; and that the captain, having known of and not objected to the removal, must be taken to have assented to it.

WILLIAMS, J.—As to the second part of the application, there will be no rule. Whatever might have been the case if the goods had remained on board the *Fairy*, the result of the removal of them to the *Lily* is clearly to render the defendants liable. This was either a trespass in removing the goods to an improper place without the consent of the owner, or, at least, it cast upon the

defendants the ordinary duties of bailees, namely, to take reasonable care of the goods. This they have not done. There is no pretence for saying that the jury ought to have been told, as a matter of law, that the captain having stood by and not objected to the removal of the powder, must be taken to have assented to it. Upon the point of damages, we think there should be a rule to shew cause.

Lush and Honyman (May 26) shewed cause against the rule.—The party who does the wrong is responsible for all the consequences of his wrongful act, provided the party who suffers the wrong or those who represent him have done that which prudent persons can reasonably be required to do—*Tindall v. Bell* (1) and *Broom v. Hall* (2). The jury here have found that the conduct of the plaintiff was prudent. There is no question here of remoteness; the proceedings at Valparaiso were the direct and natural consequence of the loss of the gunpowder.

Karslake and Pollock, in support of the rule.—The plaintiff is not entitled to recover these damages. There is no case in which in an action for breach of a contract of bailment the plaintiff has been held to be entitled to recover more than the value of the goods. Whether the captain was right in defending the action or not has nothing to do with the question. Even if the defence had been successful, the plaintiff would have been entitled to recover as against the defendants the full value of the gunpowder. But he cannot recover any more. The cases relating to a warranty, referred to in *Mayne on Damages*, p. 29, stand on an entirely different footing. A. sells a horse to B. and warrants him to be sound; B. sells him to C. with a similar warranty; C, finding the horse unsound, sues B. in an action for breach of warranty, and B, acting upon the faith of the warranty given him by A, defends the action; then when B. in his turn sues A. for the breach of warranty, he may recover not only the costs and damages which C. has recovered against him, but also his own costs and damages in defending the action, if that defence was prudent. But, as pointed out by Parke, B., in *Walker*

v. Hatton (3), that is because A. was led by B. to believe that the horse was sound; if A. was aware of the defect in the horse when he defended the action, or by reasonable diligence could have discovered it, he could not recover, as was held in *Wright v. Chamberlain* (4).

ERLE, C.J.—I am of opinion that the rule to reduce the damages should be made absolute.—[The learned Judge stated the facts of the case, and continued]—The jury having found that the *Lily* was an improper vessel in which to stow the powder, there is a breach of duty on the part of the defendants, notwithstanding that they are gratuitous bailees. The question is for what damages they are liable. They are clearly liable for the value of the powder, which is taken to be 312*l.*, but in addition to that the plaintiff claims the costs of defending a claim made by the consignees of the powder at Valparaiso. The captain was called upon by virtue of his contract to deliver the goods, and as he was unable to do so, and failed to satisfy the claim of the consignees, the ship was arrested and proceedings instituted to recover damages for the breach of contract. The captain must have known that to an action on a bill of lading, it was no answer that he had delivered the goods into the hands of some one else, who had destroyed or lost them. Nevertheless, he defended himself against the claim and failed. But the costs of this defence in no way arose from the loss of the gunpowder in that sense, that they are damages which may be recovered against the persons who are responsible for that loss. In *Tindall v. Bell* (1), the Court of Exchequer held, that the plaintiff could not recover as damages the costs of litigation which arose out of the injury unless those costs were such as a prudent man would have incurred; and they were also of opinion, that the costs there claimed as damages were not such as a prudent man would have incurred. What is decided in that case is, that at least the conduct of the plaintiff in incurring the costs claimed as damages must be prudent. But in this case I think the damages are too remote.

(1) 11 Mee. & W. 228; s.c. 12 Law J. Rep. (N.S.) Exch. 160.

(2) 7 Com. B. Rep. N.S. 508.

(3) 10 Mee. & W. 249 (at p. 255); s.c. 11 Law J. Rep. (N.S.) Exch. 361.

(4) 7 Scott, 598.

WILLIAMS, J.—I am of the same opinion. The question is, whether the act of the captain in incurring costs at Valparaiso is a consequence of the wrongful act of the defendants for which they are liable. I think there is no evidence to shew that the conduct of the captain was prudent in this respect. The costs incurred in upholding a defence which was wholly untenable were a useless and wasteful expenditure of money, and I do not think the defendants ought to be called upon to reimburse them.

WILLES, J.—I am of the same opinion. In order that the plaintiff may be entitled to recover these costs, he must shew that the conduct of the captain in defending the action at Valparaiso was reasonable. It certainly would not have been so here, and I am of opinion that the plaintiff has not made out his claim for special damage.

BYLES, J. concurred.

Rule absolute.

[IN THE EXCHEQUER CHAMBER.]
(Appeal from the Court of Common Pleas.)

1864. }
June 18. } TOBIN v. HAFORD.*

Marine Insurance—Time Policy—Valued Policy—Total and Partial Loss.

A policy of insurance for twelve months on ship and cargo, the ship being intended for the barter trade on the coast of Africa, contained a stipulation that "outward cargo should be considered homeward interest twenty-four hours after arrival at the first port or place of trade." By a subsequent clause the policy was declared to be "on the ship valued at 2,000l., cargo valued at 8,000l." There was liberty given to the insured "to discharge, load, unload, reload, sell, barter, exchange and trade" any part of the cargo. The ship arrived at a place on the coast of Africa and there discharged a large part of her cargo, and after a stay of more than twenty-four hours proceeded towards other ports in order to take in other cargo; before arriving at her next port of destination she was totally lost:—Held, that the insurers were not liable to pay the whole 8,000l., but a proportion only; that the

valuation in the policy was applicable to what was substantially a full cargo, whereas here there was not substantially a full cargo.

Held, also, that the proportion of the 8,000l. which the underwriters were liable to pay, was to be ascertained by finding the proportion which the goods on board at the time of the loss bore to a full cargo, and if this proportion could not be found, that then the underwriters would be liable as upon an open policy underwritten for 8,000l.

This was an appeal by the plaintiff against the decision of the Court of Common Pleas, making absolute a rule to enter a verdict for the defendant pursuant to leave reserved. The facts and arguments are set forth in the report below (1).

The following is a short summary of the case. The action was on a policy of insurance on a vessel called the *Shark*, for twelve months, commencing from the date of the vessel's leaving the port of Liverpool, on any kind of goods and merchandises, and also on the body of the ship. It was provided in the policy that it should be lawful for the ship to proceed to touch and stay at any ports or places, with leave to discharge, load, unload, reload, sell, barter, exchange and trade all or either goods or property upon the coast of Africa and African islands, &c., without prejudice to the insurance. The outward cargo was to be considered homeward interest, twenty-four hours after arrival at the first port or place of trade. The policy was declared to be on the ship for 2,000l. and on the cargo for 8,000l. The defendant had underwritten the policy for 100l.

The ship sailed in due course and arrived at Kinsembo, on the coast of Africa. She had then on board a cargo, the prime cost of which was 6,226l. 5s. 6d., and she landed there a portion, the invoice cost of which was 3,952l. 8s. 3d. A few days afterwards, without taking in any fresh cargo, she sailed away, and while on her way to Congo, for the purpose of taking in fresh cargo, and during the time insured against, she was totally lost by perils of the sea. The defendant paid into court 20l. in respect of the loss of the ship, and

* Decided in the Sittings after Trinity Term, coram Pollock, C.B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J. and Shee, J.

43*l.* in respect of the loss of the cargo. The plaintiff contended that the underwriters were liable as for a total loss of the cargo, and that they were bound to pay the whole 8,000*l.*, and consequently that the defendant was bound to pay the whole of the 100*l.* without any reference to the proportion, which the cargo lost bore to the cargo with which the ship had started on her voyage.

A verdict was entered for the plaintiff for 37*l.*, the difference between the amount paid in and the amount claimed, leave being reserved to the defendant to move to enter a verdict for himself.

Bovill (J. Brown with him) (June 17), for the plaintiff, the appellant, contended that the plaintiff was entitled to recover the whole sum of 8,000*l.* in respect of the loss of the cargo; that the policy was framed to meet the case of a shifting cargo, and that it was the intention of the parties that that sum should be deemed and taken to be the value of the goods on board at the time the ship went down.

Mellish (Lush and Sir G. Honyman with him), for the defendant, the respondent, urged that, although the plaintiff would have been entitled to receive the 8,000*l.* if there had been a whole cargo on board, yet as the goods on board at the time of the loss were only a portion of a cargo, the plaintiff was entitled to recover only such a proportion of the 8,000*l.* as the portion of cargo on board at the time of the loss bore to a complete cargo.

* *Cur. adv. vult.*

The following judgments were delivered on the 18th of June.—

POLLOCK, C.B.—I believe, with the exception of my Brother Bramwell, who entertains some doubt upon the matter but does not differ from our judgment, that we are all of opinion that the judgment of the Court below ought to be affirmed, for the reasons stated in the judgment of that Court. I will merely add, for my own part (the rest of the Court not being responsible for what I say), that the question as stated by Mr. Mellish seems to be, what is the meaning of the word "cargo"?—whether "cargo" means the goods that may accidentally be on board the vessel at a particular moment, or whether it is used with

reference to the anticipation of that which the vessel is really afterwards to carry. Applying to the word the ordinary rules of construction, I think there cannot be a question that it must mean, not the accidental goods that may happen to be on board, which no doubt may be called the vessel's "cargo" in one sense, but that it must have reference to something more, to be derived from the known employment of the vessel. The "cargo," in my opinion, means the entire quantity of goods which are expected to be put on board.

CROMPTON, J.—I am of the same opinion, for the reasons stated by my Brother Williams in the Court below, and now given by the Lord Chief Baron.

BRAMWELL, B.—I am sorry to say that in my mind there is considerable doubt, to which I would desire to give expression. I have not the courage to differ from the opinion of the learned Judges in the Court below, and of my Lord and my learned Brothers now present, but I think that my own unassisted judgment would not have come to the same conclusion at which they have arrived. This is a policy on the ship and goods, and a valued policy on goods; and it is upon a voyage where the ship is to sail with more or less cargo in her, and come back with more or less cargo in her. The character of the trade is such that it is impossible for the assured to say at any time what is the quantity of cargo on board, and what its nature and value,—probably he can tell when she goes out what she carries—or when she is finally on her voyage home, what she has got; but as to the intermediate ports he cannot tell beforehand, or by advice, what is to be given to him. In order to guard against that, he says, I will effect a policy for 8,000*l.*, whereby it is to be assumed that the ship has always on board 8,000*l.* worth of goods. It is said that it is a reproach to this policy that it is wagering: no doubt it is; but the justification of it is, that it is the least gaming speculation that the assured can enter into. If he had had no policy at all, his voyage would have been of a more wagering and speculative character, and in no other possible way, according to his account, can he insure himself. Therefore, although this is wagering, it has the merit of being the least wagering transaction that can be entered

into in relation to the matter in hand. Now, documents ought to be construed not so much in relation to extreme improbabilities, but rather with reference to what is likely to happen. It was probable that the vessel would always have on board a substantial cargo; that at one place she might put out goods to a considerable amount, and at another place she might take in probably what was worthless. We have not delegated to us the power to make this instrument, but merely to construe the agreement for the parties. Then, what construction ought it to receive? It is a policy on ship and goods, and manifestly, but for the statement of value, it would be a policy upon whatever goods are on board at the time: because the shipper is at liberty to put some goods out and take some in, and put those out again, and again take others in. The ship is valued at 2,000*l.*, and the cargo valued at 8,000*l.* Making every allowance as I do for the unmethodical way in which the policy is drawn, it seems strange that the introduction of the word "cargo" (by which I believe the parties meant no more than goods) should make the policy mean that it is not to be a valued policy upon the goods, but that it is to be a valued policy on a sort of entity, or thing, which is called a cargo, and that it is afterwards to be found out what proportion the actual goods on board bore to this cargo. Then, avowedly, there is not only considerable difficulty in applying that rule, but it really is an impossibility, because the word "cargo," as certainly was conceded by Mr. Mellish yesterday, does not mean a full cargo. If the vessel had taken a partial or not a full cargo out with her, and was totally lost,—so if she was lost on her final voyage home with not a full cargo, it is conceded, as I understand, that the whole 8,000*l.* would have been recoverable. Therefore, the word "cargo" here does not mean a full cargo. Then, what other meaning is to be given to it? It is said that it is an intended cargo, or a destined cargo, the cargo which it was right she should have at the time, and not an incomplete cargo. Why so? It possibly may be, that if the ship got to a port and a quantity of cargo was there for her, and after she had got some on board, was blown out to sea and lost before she had

got the residue on board, it might possibly be said that there was not the intended cargo on board, and that the intended cargo in that sense was not lost. Supposing that is so, why in this particular case had the vessel not got on board her cargo? She had got on board everything that it was intended she should have there; she was not in a state of incompleteness in any sense. She had gone out with a great quantity of goods, and had landed some of them at this place, Kinsembo, and then she was lost with the residue. Suppose that she had started with the residue only on board, and landed none at Kinsembo, if I understand Mr. Mellish's concession right, the plaintiff would have been entitled to recover the whole 8,000*l.*, for she would then have had on board her destined and intended cargo, and having put none of it out there would have been a loss of the cargo within the meaning of the policy. It seems strange that because she takes out something more, and that additional portion is landed at this place, the plaintiff cannot recover the 8,000*l.* Suppose the vessel had taken something on board at Kinsembo; suppose she had filled up with a variety of goods of small value, it is, I believe, admitted that she would have had her destined cargo on board. It seems to me singular that taking in those few comparatively worthless goods at Kinsembo should make her have her cargo on board. All these circumstances would have made me think (of course I cannot think so now, after the unanimous judgment of the Court of Common Pleas and of my learned Brethren here) that this word "cargo" was simply identical with "the goods"; and, consequently, that the true construction of the policy would have been in conformity with what has been contended on behalf of the plaintiff.

Then, with respect to the authorities. The reasoning of the Court in *Shaw v. Felton* (2) is, I think, in favour of the plaintiff. In *Forbes v. Aspinall* (3) the Court expressly say, that because the intended cargo was not on board the whole of the freight was not the subject of the loss, and that they must take such a proportion as the cargo put on board bore to the intended cargo.

(2) 2 East, 109.

(3) 13 Ibid. 323.

I think that that case is in the plaintiff's favour, because here the whole of the intended cargo was on board. A similar remark applies to the case of *Rickman v. Carstairs* (4). I think, therefore, if I had been left to myself upon the authorities I should have decided this case in favour of the plaintiff. I am at a loss to understand the meaning of the Court of Common Pleas, confessedly acknowledging that the fact of this being a valued policy must be left out of consideration in apportioning the loss. However, I must, of course, concur with the judgment of the Court.

BLACKBURN, J.—Agreeing as I do with the majority of this Court, that the Court of Common Pleas were right in their decision, and right also in what I understand to be their reasons, I would wish to say with regard to the real point to be decided, that in my mind the fact that this is a valued policy is a mere accident, and has nothing to do with the question. The question of whether there was a total or a partial loss is independent in this case, as in my mind it ought to be in every case, of whether the policy was valued or not valued. The question in all cases is, what is the subject-matter that is covered by the insurance? Let us see whether the whole of the subject-matter is lost, in which case it would be a total loss, or whether only a part is lost, in which case it would be a partial loss, the amount of which would depend on the proportion which the part that was lost bore to the subject-matter of the insurance. Then, if that is a valued policy, the value being admitted, the sum when reduced to figures is proved. If it be an open policy you must prove the value of the whole of the subject-matter. It would come to the same result after it is proved, and it being a valued policy only dispenses with the proof. However, in my mind the question comes to be, what is the subject-matter of insurance in the policy? The policy itself is made up, as every policy ought to be, of a printed form originally intended for an ordinary voyage policy altered to meet this peculiar African trade, and further altered into a time policy for twelve months. Thus much appears clear enough, that this is a policy partly on the ship (with which we are not now con-

cerned), and partly on the cargo. To my mind it is immaterial whether it said on cargo or on goods,—goods, I think, would mean cargo, cargo would mean goods. It means, in my opinion, the goods which, on such a voyage, would be all that are to be carried by the vessel as her cargo, and if it had been the word “goods,” the same would have been meant. The facts appear to be this: that this ship sailed on this time policy from Liverpool, and that it attached on the cargo which she had on board. The nature of the adventure on which she was bound to the coast of Africa, was that the cargo taken on board at Liverpool was intended to be substituted and exchanged by barter for cargo the produce of the coast of Africa. There are words in the body of the policy intended to meet that state of things, and which, no doubt, were framed in those terms when originally the natives were in the habit of carrying on the barter from their canoes alongside the ship, and as the master parted with the European goods which the natives wanted to receive, he obtained from the natives the produce of their country in exchange. The effect of the words in the policy is, that it is to continue to attach to what is substituted for the goods originally put on board: that this policy on the cargo that went out is to be also on the cargo that comes in the place of it afterwards. In this case it appears that the cargo that went out from Liverpool to Africa arrived on the coast of Africa, and that 57 per cent. was safely landed, and the ship was lost with the other 43 per cent. on board. Nothing being substituted for the 57 per cent. which had left the ship, it seems very clear that, as nothing had been put on board to take the place of that which was safely landed, only 43 per cent. was lost of that on which the risk had originally attached. That is in effect what was decided in the Court below. Had other produce been partially put on board, it might have been a troublesome question, not of law but of fact, whether that which was partially put on board was the whole of what was intended to be substituted, or only a part of it. When the question arises it will be time enough to consider it. But the Court below had evidently that present to their mind, and they expressly point to that where they speak of the datum value of the full cargo intended

(4) 5 B. & Ad. 651.

to be put on board. Had some other produce been put on board and the ship then lost, I hardly know how one could then get at this datum, except by a compromise or agreement between the parties. But that difficulty does not apply to the present case, for it seems to me to be clear enough that what was lost was 43 per cent. of the cargo, and no more. That being so, I think the decision of the Court below was perfectly right for the reasons I have stated.

Judgment affirmed.

1864. } BERRSFORD AND OTHERS v.
May 28.* } MONTGOMERIE AND ANOTHER.

Shipping—Merchant Shipping Amendment Act, 1862, s. 67.—Landing Goods entered for a particular Warehouse—Offer to take Delivery—Notice before Landing.

By the Merchant Shipping Amendment Act, 1862, (25 & 26 Vict. c. 63. s. 67.), a shipowner is empowered to land goods imported in his ship from foreign parts subject to the condition, that "if before the goods are landed the owner thereof has made entry for the landing and warehousing thereof at any particular wharf other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice do so at his own risk and expense":—Held, that the owner of the goods when he makes an offer to take delivery of them must be in a condition to receive the same if the offer be then accepted in order to entitle him to the benefit of such condition.

Held, further, that when such offer is made, the shipowner, if he then fails not only to make delivery of the goods, but also to give such owner of the goods informa-

tion of the time at which they can be delivered, is bound to give the twenty-four hours' notice above specified before he lands the goods, although he was never asked to give such information.

The first count of the declaration stated, that before and at the time of the grievances hereinafter mentioned the plaintiffs were owners of goods, to wit, of hides, within the meaning of the Merchant Shipping Act, 1862, and were entitled, as agents for the owners thereof, to the possession of the same. That the defendants were shipowners within the said act, and were authorized to act as agents for the owners of a certain ship called the *City of Edinburgh*, and were entitled to receive the freight, demurrage and other charges in respect of the said ship. That the said goods were imported in the said ship from foreign parts into the United Kingdom in the said ship, and that before the said goods were landed or unshipped the defendants made entry of the said goods, within the meaning of the said act, for the landing and warehousing thereof at their wharf, called Pickle Herring Upper Wharf, which said wharf was not the wharf at which the said ship was discharging, and were entitled and ready and offered to take delivery of the said goods; of all which premises the defendants had notice. That all things were done, and had happened and existed, and all times had elapsed to entitle them to take such delivery, and to land the said goods, yet the defendants did not allow them to do so. That the defendants and all persons whose duty it was so to do failed to make such delivery, and failed at the time of such offer to give the plaintiffs correct information of the time at which the said goods could be delivered. That, without the consent of the plaintiffs, the defendants landed and unshipped the said goods at a wharf or place, to wit, at the London Docks, other than the plaintiffs' wharf, which had been named in the entry as aforesaid, and without giving to them, being the owners of the said goods and wharf as aforesaid, twenty-four hours' notice of their readiness to deliver the said goods, and did not bear or pay the expenses of landing and unshipping the same; and that, by reason of the premises, the plaintiffs were compelled and obliged, in order to obtain pos-

session of the said goods, to pay divers large sums of money and the expenses which had been incurred by reason of such landing and unshipping as aforesaid, and also lost the use of, and had to pay large sums for the demurrage of divers barges and lighters which they had employed to take delivery of the said goods, delivery of which the defendants failed to make, and did not allow the plaintiffs to take, as in that count mentioned.

The defendants pleaded the general issue; and traversed, *inter alia*, that the plaintiffs were ready and willing and had offered to take delivery of the goods; and that they, the defendants, had notice as alleged.

The action was tried, before Byles, J., at the London Sittings after Hilary Term, 1864, when, without leaving any question to the jury, a verdict was entered, by consent, for the plaintiffs for 10*l.* 2*s.* 6*d.*, with leave to the defendants to move to enter the verdict for them if the Court should be of opinion that upon the facts proved the plaintiffs were not entitled to recover, the Court having power to draw inferences of fact.

The plaintiffs were wharfingers, and the London Dock Company were the real defendants, the question being as to the construction of the 7th condition or paragraph in the 67th section of the Merchant Shipping Amendment Act, 1862, the 25 & 26 Vict. c. 63. (1), and the rights of wharfingers thereunder.

The nominal defendants to the action were the agents of the ship, the *City of Edinburgh*, mentioned in the declaration, and in which, amongst other goods, were fifty bales of hides, the bills of lading as to which had been indorsed by the consignees to the plaintiffs. The *City of Edinburgh*

arrived at the London Docks on the 24th of March 1863, and upon her reporting her arrival at the Custom-house, and before the hides (the goods in question) were landed or unshipped, the plaintiffs as owners thereof passed the entry at the Custom-house and obtained the usual order for the delivery of the goods overside the vessel into craft, to be landed at the plaintiffs' private wharf. This order was handed by the plaintiffs to their lighterman, of the name of Chapman, who sent it to the ship by the hands of his apprentice Caney. Accordingly Caney went to the vessel in the London Docks, and at 4 o'clock p.m. on the 26th of March 1863, he gave this order for delivery to the second mate, who was then on board in charge of the vessel, and at the same time applied for the goods. The mate said they were not ready, and Caney thereupon went away, and no information was given of the time when the goods would be ready, nor was such information asked for.

It appeared in evidence that Caney was a lad of only about eighteen, and that he had no lighter with him when he went to the vessel, but there was a barge belonging to his master then in the docks about 100 yards off from the vessel, and Chapman himself gave evidence that he had arranged with other men to use their craft in case of need. The ordinary working hours at the docks are from eight to four in the afternoon, but the legal hours for free goods are from six to six, and occasionally they work during those hours. At the time Caney delivered the delivery-order the crew had left the vessel.

On the 28th of March the hides, being reached in the course of unloading the vessel, were taken out and landed in the docks without twenty-four hours' notice

(1) The 67th section enacts, that "Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof to land the same or take delivery thereof and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of, and land or unship the said goods at the times, in the manner, and subject to the conditions following (that is to say):"

Amongst other conditions is the following, viz. "(7.) If at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any parti-

cular wharf or warehouse other than that at which the ship is discharging, and has offered, and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods, or of such wharf or warehouse as last aforesaid, twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice, do so at his own risk and expense."

having been given to the plaintiffs, and the dock company afterwards refused to let the plaintiffs have the goods except upon payment of 10*l.* 2*s.* 6*d.*, their usual landing and warehouse charges. The plaintiffs, having paid this sum under protest, brought the present action to recover it back; and the question was, whether they were entitled to the twenty-four hours' notice required by the 67th section of the act to be given by the shipowner before landing the goods by him under the powers of that section.

Giffard, for the defendants, having obtained a rule *nisi* to enter the verdict for the defendants pursuant to the leave reserved at the trial,—

F. M. White now shewed cause.—The plaintiffs offered and were ready to receive the goods, and complied with the terms mentioned in the 7th paragraph to section 67. of 25 & 26 Vict. c. 63. so as to entitle them to the twenty-four hours' notice before the goods were landed by the shipowner. The cases of *Gatliffe v. Bourne* (2) and *Howard v. Shepherd* (3), shew that, according to the law as it stood before that statute, the shipowner was bound to wait a reasonable time for the consignee to claim delivery of the goods before landing them. The clause as to the twenty-four hours' notice was introduced into the act at the instance of the wharfingers, who might otherwise have been obliged to keep their craft about a vessel for a long time uselessly and at great expense. According to the statute, this notice must be given if the shipowner fails to give information when the goods will be ready for delivery. The act does not say if he refuses, which would imply a previous request, but uses the word "fail." Therefore, if he omits to give such information he must then give them twenty-four hours' notice.

Giffard and *Murphy*, in support of the rule.—The plaintiffs did not apply for the goods at a proper time, nor with the proper means and appliances for receiving them. A mere offer to take delivery of the goods will not satisfy the statute. There must be at the time it is made a readiness to take such delivery. Here the plaintiffs were not so ready as to entitle them to the benefit of the 7th condition in the 67th section.

What was done by them on the occasion was, in fact, only a colourable compliance with the statute. The offer to take the goods being made at 4 o'clock, the ordinary hour to leave off work, and when in fact the crew had left, was not a proper time to make it a good offer to satisfy the statute. It might have done to have made it at that hour if the crew were still there, but not otherwise —*Startup v. Macdonald* (4). Then, with regard to the other branch of this section, it is submitted the words "failed at the time of such offer to give the owner of the goods correct information," &c., import that such information had been previously demanded. If so, then as none was here asked there was no failure to give information.

ERLE, C.J.—In considering the evidence in this case, the balance to my mind is in favour of the plaintiffs' right to recover. The shipowner had a right to land the goods, unless the merchant brought himself within the 7th condition of the 67th section of the Merchant Shipping Amendment Act, 1862. The facts appear to be that certain hides being on board the ship, the *City of Edinburgh*, in the London Docks, the plaintiffs, the owners of the hides, made an entry and got the custom-house order for their delivery over the ship's side; they gave that order to a lighterman, and the lighterman sent it by a young man of the name of Caney, who went on board the ship to ask for the goods and gave the delivery-order to the mate, the person then in charge of the ship. The mate said the goods were not ready, whereupon the young man went away. Now, do these facts shew that the plaintiffs offered and were ready to take delivery of the goods? It is clear that they desired to take them to the wharf, and they sent the official document which entitled them to receive those goods, through the proper channel (*viz.* the lighterman) for taking goods from the ship to the wharf where they were destined. I cannot call this a colourable compliance with the statute. If what was done had occurred during the working hours, there cannot be the least doubt that a lighterman of the age of eighteen was just as able to receive a cargo of hides as a lighterman of the age of twenty-one, and a lighter which was lying ten or twenty yards off in the London Docks

(2) 4 Bing. N.C. 314; and in error, 7 Man. & G. 850, and 11 Cl. & Fin. 45.

(3) 9 Com. B. Rep. 297; s.c. 19 Law J. Rep. (N.S.) C.P. 249.

(4) 6 Man. & G. 593.

was just as effective for the purpose as if it had been touching the side of the ship. Great stress has been laid upon the fact of Caney being sent on board at 4 o'clock, whilst the practical working hours in the docks for many purposes cease at 4 o'clock. I think if the goods had been at the top and the working people had broken off at 4 o'clock, and Caney had then come, the mate would have said, "I accept your order, you shall have the goods, but at this moment the working hours have ceased; when they begin again the goods will be ready for you." Instead of that, Caney was told that the goods were not ready,—in fact, they were not ready until after the lapse of several hours on the following day. I therefore cannot come to the conclusion that there was anything to render this offer to receive the goods from being a readiness to receive them because it was made at 4 o'clock. If there is an offer to take delivery and a readiness to take delivery on the part of the merchant, and the shipowner at the time fails to deliver the goods, and fails to give correct information of the time when such goods can be delivered, then the shipowner must give twenty-four hours' notice of his readiness to deliver the goods. Here the shipowner failed to make such delivery, and at the time of the offer by Caney he failed to give information when they would be ready, and no twenty-four hours' notice was given; but, on the contrary, the goods were landed without such notice. I think the owners of the goods complied with all the statute requires in the 7th condition of section 67, and that this rule should be discharged.

WILLIAMS, J.—I have felt some difficulty in this case, not with reference to any question of law, but as to the conclusion of fact regarding one part of it. With respect to the law, I think Mr. Giffard's argument is correct, that there must not only be a failure on the part of the shipowner to deliver the goods when the delivery is asked for, but that the party who asks for it, must be in a condition to receive the goods if the offer be accepted. That brings it to a question of fact (as to which I have felt some difficulty), viz., whether there is evidence here that the owners of the goods were ready to take delivery of them. My Lord and my learned Brothers think that there is satisfactory evidence that such was the case, and I dare

say I am wrong in coming to a contrary conclusion; but it is immaterial that I feel a difficulty in adopting the view they have taken of this question of fact. As to the remaining point, of law, whether there has been a failure to give the owners of the goods information of the time at which such goods could be delivered, it has been argued, on the part of the defendants, that in order to raise that question it is necessary not only that the shipowner should not have given to the owners such information, but that he should have been asked to do so, and declined to give it after having been so asked. I do not think that that is the proper construction of that part of the section. It appears to me that that passage was inserted in the statute in aid of and for the benefit of the shipowner. The 7th condition, taken generally, deprives him of the power conferred on him by the 67th section, and in the event of his not being ready to deliver the goods when the delivery is asked for, punishes him, as it were, by making him give twenty-four hours' notice of his being ready to deliver. Then, the meaning of this passage seems to me to be that the shipowner shall not be put to give such notice, if when he is not in a condition to deliver the goods at the time they are asked for, he gives information of the time when he will be ready to deliver them. But if, however, he fails to avail himself of this opportunity of giving the owner of the goods such information, he will be obliged to give the twenty-four hours' notice.

BYLES, J.—My Brother Willes, who has left the Court, is of the same opinion, and he has handed me his reasons in writing. He says, "It is now ascertained that Caney was an agent to offer to receive; that he did so offer, and that he made his offer to a person who had authority to receive that offer; that Caney was ready, that is, as ready as a reasonable man would be, to take the goods, and that the shipowners failed to give the owners of the goods correct information of the time at which the goods were to be delivered." I need add only that I quite agree in all the observations that have been made by the rest of the Court on the law of this case, upon which, indeed, the Court are unanimous.

Rule discharged.

1864. }
Nov. 21. } FRAY v. FRAY.

Libel — Defamatory Matter — What amounts to.

The declaration set out a letter addressed by the defendant to the clerk of the guardians of a poor-law union in respect of an allowance by the said guardians towards the maintenance of his, the defendant's, mother, being also the mother of the plaintiff, in part of which letter it was stated, "who" (meaning the plaintiff) "has for years, without the slightest cause, systematically done everything she can to annoy me" (meaning the defendant), "and I am sorry to say my mother is only too glad to assist her" (meaning the plaintiff). "Some years ago they" (meaning the plaintiff's and the defendant's said mother and the plaintiff) "dragged me into Chancery," "and almost every term I am obliged to appear by counsel before the Vice Chancellor. They" (meaning the plaintiff's and the defendant's said mother and the plaintiff) "had no business to include me in the bill, as I make no claim to my late father's property; but of course it is a pleasure to my mother and Miss Fray" (meaning the plaintiff) "to put me to all the expense they" (meaning the plaintiff's and the defendant's said mother and the plaintiff) "can." "Doubting as I do my mother's extreme poverty, I think the proper test of it is an order for the workhouse, the expense of which should be borne proportionately between all her children, and as Miss Fray" (meaning the plaintiff) "is a lady of independence and a single woman, and can find the money for carrying on all sorts of law proceedings, she" (meaning the plaintiff) "should not be exempted":— Held, on demurrer, that the declaration was good, as the publication of the above letter tended to disparage the plaintiff's character, and was therefore libellous.

The declaration stated, that the defendant falsely and maliciously wrote and published of the plaintiff, in the form of a letter addressed to the clerk to the guardians of a certain poor-law union, in respect of an allowance by the said guardians towards the maintenance of his, the defendant's, mother, being also the mother of the plaintiff, the words following, that is to say:

"I" (meaning the defendant) "do not know what grounds she" (meaning the said mother of the plaintiff and the defendant) "can have to claim of your board out-door relief. You will find that she" (meaning the said mother of the plaintiff and the defendant) "does not belong to your parish; in fact, Mr. Phillips, your relieving officer, informed me" (meaning the defendant) "by letter more than twelve months ago that her" (meaning the plaintiff's and the defendant's said mother) "parish was Llanfair Waterdine, Salop, a more fitting place for her" (meaning the plaintiff's and the defendant's said mother) "to end her days than in town, but her removal would not suit Miss Fray's" (meaning the plaintiff's) "purpose; again, I" (meaning the defendant) "say, if she" (meaning the plaintiff's and the defendant's said mother) "is a pauper she" (meaning the plaintiff's and the defendant's said mother) "is not justified in renting a cottage and paying rates and taxes. It is only done to keep a home for Miss Fray" (meaning the plaintiff), "who" (meaning the plaintiff) "has for years, without the slightest cause, systematically done everything she" (meaning the plaintiff) "can to annoy me" (meaning the defendant), "and I" (meaning the defendant) "am sorry to say my mother" (meaning the said mother of the plaintiff and the defendant) "is only too glad to assist her" (meaning the plaintiff). "Some years ago they" (meaning the plaintiff's and the defendant's said mother and the plaintiff) "dragged me" (meaning the defendant) "into Chancery as well as Mr. Drew, and almost every term I" (meaning the defendant) "am obliged to appear by counsel before the Vice Chancellor. They" (meaning the plaintiff's and the defendant's said mother and the plaintiff) "had no business to include me" (meaning the defendant) "in the bill, as I" (meaning the defendant) "make no claim to my" (meaning the defendant's) "late father's property; but of course it is a pleasure to my mother" (meaning the plaintiff's and the defendant's said mother) "and Miss Fray" (meaning the plaintiff) "to put me" (meaning the defendant) "to all the expense they" (meaning the plaintiff's and the defendant's said mother and the plaintiff) "can. My" (meaning the

defendant's) "solicitor has had notice to appear again in November. The cost I" (meaning the defendant) "have been put to is something considerable, and how I" (meaning the defendant) "am to obtain the money to pay my" (meaning the defendant's) "solicitor I" (meaning the defendant) "do not know. Doubting as I" (meaning the defendant) "do my mother's" (meaning the plaintiff's and the defendant's said mother) "extreme poverty, I" (meaning the defendant) "think the proper test of it is an order for the work-house, the expense of which should be borne proportionately between all her children, and as Miss Fray" (meaning the plaintiff) "is a lady of independence and a single woman, and can find the money for carrying on all sorts of law proceedings, she" (meaning the plaintiff) "should not be exempted."

Demurrer thereto and joinder in demurrer.

Inderwick, in support of the demurrer. —The declaration, it is submitted, discloses no cause of action. The publication of the letter which is there set out is not libellous. To be libellous, according to the acknowledged definition of a libel, the letter must contain such a reflection upon the character of the plaintiff as would be calculated to expose her to hatred, contempt or ridicule among her fellows. Here the only charge which the defendant makes against her is, that of dragging him into a Chancery suit, and all that is stated with reference to that amounts only to saying that the plaintiff takes a pleasure in suing the defendant in Chancery. The costs which he is thereby put to are the costs which the law awards, and there is no innuendo suggesting that the letter meant to infer that the plaintiff carried on such law proceedings improperly.

[ERLE, C.J.—The publication of that which can by any construction lower the estimation of the plaintiff's character, she has a right to have left as a question to the jury.]

The only point no doubt is, whether the Court can say that what has been here written is not libellous. In *Baylis v. Lawrence* (1) Lord Denman said, "If the Judge

and jury think the publication libellous, still, if on the record it appear not to be so, judgment must be arrested."

ERLE, C.J.—We cannot say that what is stated in this letter does not tend to disparage the plaintiff's character.

The plaintiff appeared in person.

Judgment for the plaintiff (2).

1864. }
Nov. 24. } DOGGETT v. CATTERMS.

Gaming—Betting Houses Act, 16 & 17 Vict. c. 119. s. 5.—Recovering Deposit.

Where a person resorted habitually to a certain spot in Hyde Park for the purpose of making bets on horse races, and there received a deposit on a bet, the 16 & 17 Vict. c. 119. s. 5. is applicable, and the deposit may be recovered as money had and received to the use of the depositor.

This was an action tried in the Sheriffs' Court of Middlesex.

The declaration was for money had and received; to which the defendant pleaded never indebted, and that the money was deposited by the plaintiff with the defendant under a contract by way of gaming and wagering and illegally betting on horses running at races.

It appeared that the defendant was in the habit of resorting daily to a certain spot under a tree in Hyde Park, and there making bets on horse races. As many as 150 to 200 persons were frequently collected together at this spot, and the defendant exhibited betting lists and cards, shewing the odds he was prepared to lay against horses. It was usual for persons making bets with the defendant to deposit with him the amount of their stakes. It was to recover a sum of money so deposited that the present action was brought.

The plaintiff relied on the 16 & 17 Vict. c. 119. s. 5, and contended that he was entitled to recover the deposit as money had and received to his use, under that section.

(1) 11 Ad. & El. 920; s. c. 9 Law J. Rep. (N.S.) Q.B. 196.

(2) Coram Erle, C.J., Byles, J. and Keating, J.

Upon these and other points taken, the Judge of the Sheriffs' Court decided in favour of the defendant, and a verdict was ultimately entered for him. Leave was, however, reserved to the plaintiff to move to enter the verdict for him for the amount of the deposit, if the Court should be of opinion that he was entitled to recover the deposit under the 16 & 17 Vict. c. 119. s. 5.

Yeatman having obtained a rule accordingly,—

Salter shewed cause.—The defendant is not bound to return the deposit. The 16 & 17 Vict. c. 119. s. 5. does not apply to such a case. That act was passed for the suppression of betting-houses. The 4th section imposes a penalty on the "owner or occupier of any house, office, room, or place opened, kept, or used," for the purposes of betting. By section 5, "any money or valuable thing received by any such person aforesaid, as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing may be recovered accordingly." This clearly refers only to money received by persons who are owners or occupiers of a "house, office, room, or place," kept or used for the purpose of betting. But the defendant was not such a person. "Place" must mean some building where the business of betting can be carried on. It is conceded that if this transaction had taken place in a house it would have been within the section.

Yeatman, in support of the rule, was not called on.

ERLE, C.J.—I am of opinion that this rule ought to be made absolute. The evidence shews that the defendant was in the habit of betting generally with any persons who chose to resort to a certain spot under a tree in Hyde Park, where the defendant was to be found, and that he used this place for the purpose of betting. I wish particularly to lay stress on this, that the witnesses proved that they had seen the defendant daily at the same spot for the purpose of betting on horse races. The defendant received the money for a purpose which it

is conceded is within the provisions of the act. But it is contended that a "place" must mean some kind of structure. The mischief, however, is equally great whether this business is carried on under the shelter of a tree or in a room in a house, or under a tent. The mischief intended is the habit of using a well-known place by persons skilled in betting, who hold out to improvident persons an inducement to make bets. I am clear that the 5th section was intended to prevent the habitual use of any place whatever for the purpose of recovering bets.

KEATING, J.—I am of the same opinion. The only question is, whether this is a place kept or used for the purpose of betting within the meaning of this act of parliament? The defendant habitually resorted to a certain spot; and I think that spot becomes then a "place" within this section.

Rule absolute.

1864. } THE VESTRY OF CHELSEA, ap-
Nov. 14. } pellants, v. KING, respondent.

Metropolis Local Management Act—
25 & 26 Vict. c. 102. s. 73.—57 Geo. 3.
c. xxix. s. 68.

The 57 Geo. 3. c. xxix. contains (amongst other things) powers for the suppression of nuisances, within a certain district of the metropolis, and by section 68. the keeping of pigs within forty yards of any street is prohibited, whether the same be a nuisance or not. By the 25 & 26 Vict. c. 102. s. 73, the powers of improving and regulating streets, and for the "suppression" of nuisances contained in the 57 Geo. 3. c. xxix. are applied to a larger district:—Held, dubitante Keating, J., that section 68. of the 57 Geo. 3. c. xxix., being a power of prevention and not of suppression, did not apply to the larger district.

[For the report of the above case, see
34 Law J. Rep. (N.S.) M.C. p. 9.]

I think that that case is in the plaintiff's favour, because here the whole of the intended cargo was on board. A similar remark applies to the case of *Rickman v. Carstairs* (4). I think, therefore, if I had been left to myself upon the authorities I should have decided this case in favour of the plaintiff. I am at a loss to understand the meaning of the Court of Common Pleas, confessedly acknowledging that the fact of this being a valued policy must be left out of consideration in apportioning the loss. However, I must, of course, concur with the judgment of the Court.

BLACKBURN, J.—Agreeing as I do with the majority of this Court, that the Court of Common Pleas were right in their decision, and right also in what I understand to be their reasons, I would wish to say with regard to the real point to be decided, that in my mind the fact that this is a valued policy is a mere accident, and has nothing to do with the question. The question of whether there was a total or a partial loss is independent in this case, as in my mind it ought to be in every case, of whether the policy was valued or not valued. The question in all cases is, what is the subject-matter that is covered by the insurance? Let us see whether the whole of the subject-matter is lost, in which case it would be a total loss, or whether only a part is lost, in which case it would be a partial loss, the amount of which would depend on the proportion which the part that was lost bore to the subject-matter of the insurance. Then, if that is a valued policy, the value being admitted, the sum when reduced to figures is proved. If it be an open policy you must prove the value of the whole of the subject-matter. It would come to the same result after it is proved, and it being a valued policy only dispenses with the proof. However, in my mind the question comes to be, what is the subject-matter of insurance in the policy? The policy itself is made up, as every policy ought to be, of a printed form originally intended for an ordinary voyage policy altered to meet this peculiar African trade, and further altered into a time policy for twelve months. Thus much appears clear enough, that this is a policy partly on the ship (with which we are not now con-

cerned), and partly on the cargo. To my mind it is immaterial whether it said on cargo or on goods,—goods, I think, would mean cargo, cargo would mean goods. It means, in my opinion, the goods which, on such a voyage, would be all that are to be carried by the vessel as her cargo, and if it had been the word “goods,” the same would have been meant. The facts appear to be this: that this ship sailed on this time policy from Liverpool, and that it attached on the cargo which she had on board. The nature of the adventure on which she was bound to the coast of Africa, was that the cargo taken on board at Liverpool was intended to be substituted and exchanged by barter for cargo the produce of the coast of Africa. There are words in the body of the policy intended to meet that state of things, and which, no doubt, were framed in those terms when originally the natives were in the habit of carrying on the barter from their canoes alongside the ship, and as the master parted with the European goods which the natives wanted to receive, he obtained from the natives the produce of their country in exchange. The effect of the words in the policy is, that it is to continue to attach to what is substituted for the goods originally put on board: that this policy on the cargo that went out is to be also on the cargo that comes in the place of it afterwards. In this case it appears that the cargo that went out from Liverpool to Africa arrived on the coast of Africa, and that 57 per cent. was safely landed, and the ship was lost with the other 43 per cent. on board. Nothing being substituted for the 57 per cent. which had left the ship, it seems very clear that, as nothing had been put on board to take the place of that which was safely landed, only 43 per cent. was lost of that on which the risk had originally attached. That is in effect what was decided in the Court below. Had other produce been partially put on board, it might have been a troublesome question, not of law but of fact, whether that which was partially put on board was the whole of what was intended to be substituted, or only a part of it. When the question arises it will be time enough to consider it. But the Court below had evidently that present to their mind, and they expressly point to that where they speak of the datum value of the full cargo intended

(4) 5 B. & Ad. 651.

to be put on board. Had some other produce been put on board and the ship then lost, I hardly know how one could then get at this datum, except by a compromise or agreement between the parties. But that difficulty does not apply to the present case, for it seems to me to be clear enough that what was lost was 43 per cent. of the cargo, and no more. That being so, I think the decision of the Court below was perfectly right for the reasons I have stated.

Judgment affirmed.

1864. } **BERRSFORD AND OTHERS v.**
May 28.* } **MONTGOMERIE AND ANOTHER.**

Shipping—Merchant Shipping Amendment Act, 1862, s. 67.—Landing Goods entered for a particular Warehouse—Offer to take Delivery—Notice before Landing.

By the Merchant Shipping Amendment Act, 1862, (25 & 26 Vict. c. 63. s. 67.), a shipowner is empowered to land goods imported in his ship from foreign parts subject to the condition, that "if before the goods are landed the owner thereof has made entry for the landing and warehousing thereof at any particular wharf other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice do so at his own risk and expense":—Held, that the owner of the goods when he makes an offer to take delivery of them must be in a condition to receive the same if the offer be then accepted in order to entitle him to the benefit of such condition.

Held, further, that when such offer is made, the shipowner, if he then fails not only to make delivery of the goods, but also to give such owner of the goods informa-

tion of the time at which they can be delivered, is bound to give the twenty-four hours' notice above specified before he lands the goods, although he was never asked to give such information.

The first count of the declaration stated, that before and at the time of the grievances hereinafter mentioned the plaintiffs were owners of goods, to wit, of hides, within the meaning of the Merchant Shipping Act, 1862, and were entitled, as agents for the owners thereof, to the possession of the same. That the defendants were shipowners within the said act, and were authorized to act as agents for the owners of a certain ship called the *City of Edinburgh*, and were entitled to receive the freight, demurrage and other charges in respect of the said ship. That the said goods were imported in the said ship from foreign parts into the United Kingdom in the said ship, and that before the said goods were landed or unshipped the defendants made entry of the said goods, within the meaning of the said act, for the landing and warehousing thereof at their wharf, called Pickle Herring Upper Wharf, which said wharf was not the wharf at which the said ship was discharging, and were entitled and ready and offered to take delivery of the said goods; of all which premises the defendants had notice. That all things were done, and had happened and existed, and all times had elapsed to entitle them to take such delivery, and to land the said goods, yet the defendants did not allow them to do so. That the defendants and all persons whose duty it was so to do failed to make such delivery, and failed at the time of such offer to give the plaintiffs correct information of the time at which the said goods could be delivered. That, without the consent of the plaintiffs, the defendants landed and unshipped the said goods at a wharf or place, to wit, at the London Docks, other than the plaintiffs' wharf, which had been named in the entry as aforesaid, and without giving to them, being the owners of the said goods and wharf as aforesaid, twenty-four hours' notice of their readiness to deliver the said goods, and did not bear or pay the expenses of landing and unshipping the same; and that, by reason of the premises, the plaintiffs were compelled and obliged, in order to obtain pos-

* Decided in Trinity Term.

session of the said goods, to pay divers large sums of money and the expenses which had been incurred by reason of such landing and unshipping as aforesaid, and also lost the use of, and had to pay large sums for the demurrage of divers barges and lighters which they had employed to take delivery of the said goods, delivery of which the defendants failed to make, and did not allow the plaintiffs to take, as in that count mentioned.

The defendants pleaded the general issue; and traversed, *inter alia*, that the plaintiffs were ready and willing and had offered to take delivery of the goods; and that they, the defendants, had notice as alleged.

The action was tried, before Byles, J., at the London Sittings after Hilary Term, 1864, when, without leaving any question to the jury, a verdict was entered, by consent, for the plaintiffs for 10*l.* 2*s.* 6*d.*, with leave to the defendants to move to enter the verdict for them if the Court should be of opinion that upon the facts proved the plaintiffs were not entitled to recover, the Court having power to draw inferences of fact.

The plaintiffs were wharfingers, and the London Dock Company were the real defendants, the question being as to the construction of the 7th condition or paragraph in the 67th section of the Merchant Shipping Amendment Act, 1862, the 25 & 26 Vict. c. 63. (1), and the rights of wharfingers thereunder.

The nominal defendants to the action were the agents of the ship, the *City of Edinburgh*, mentioned in the declaration, and in which, amongst other goods, were fifty bales of hides, the bills of lading as to which had been indorsed by the consignees to the plaintiffs. The *City of Edinburgh*

arrived at the London Docks on the 24th of March 1863, and upon her reporting her arrival at the Custom-house, and before the hides (the goods in question) were landed or unshipped, the plaintiffs as owners thereof passed the entry at the Custom-house and obtained the usual order for the delivery of the goods overside the vessel into craft, to be landed at the plaintiffs' private wharf. This order was handed by the plaintiffs to their lighterman, of the name of Chapman, who sent it to the ship by the hands of his apprentice Caney. Accordingly Caney went to the vessel in the London Docks, and at 4 o'clock p.m. on the 26th of March 1863, he gave this order for delivery to the second mate, who was then on board in charge of the vessel, and at the same time applied for the goods. The mate said they were not ready, and Caney thereupon went away, and no information was given of the time when the goods would be ready, nor was such information asked for.

It appeared in evidence that Caney was a lad of only about eighteen, and that he had no lighter with him when he went to the vessel, but there was a barge belonging to his master then in the docks about 100 yards off from the vessel, and Chapman himself gave evidence that he had arranged with other men to use their craft in case of need. The ordinary working hours at the docks are from eight to four in the afternoon, but the legal hours for free goods are from six to six, and occasionally they work during those hours. At the time Caney delivered the delivery-order the crew had left the vessel.

On the 28th of March the hides, being reached in the course of unloading the vessel, were taken out and landed in the docks without twenty-four hours' notice

(1) The 67th section enacts, that "Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof to land the same or take delivery thereof and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of, and land or unship the said goods at the times, in the manner, and subject to the conditions following (that is to say):"

Amongst other conditions is the following, viz. "(7.) If at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any parti-

cular wharf or warehouse other than that at which the ship is discharging, and has offered, and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods, or of such wharf or warehouse as last aforesaid, twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice, do so at his own risk and expense."

having been given to the plaintiffs, and the dock company afterwards refused to let the plaintiffs have the goods except upon payment of 10*l.* 2*s.* 6*d.*, their usual landing and warehouse charges. The plaintiffs, having paid this sum under protest, brought the present action to recover it back; and the question was, whether they were entitled to the twenty-four hours' notice required by the 67th section of the act to be given by the shipowner before landing the goods by him under the powers of that section.

Giffard, for the defendants, having obtained a rule *nisi* to enter the verdict for the defendants pursuant to the leave reserved at the trial,—

F. M. White now shewed cause.—The plaintiffs offered and were ready to receive the goods, and complied with the terms mentioned in the 7th paragraph to section 67. of 25 & 26 Vict. c. 63. so as to entitle them to the twenty-four hours' notice before the goods were landed by the shipowner. The cases of *Gatliffe v. Bourne* (2) and *Howard v. Shepherd* (3), shew that, according to the law as it stood before that statute, the shipowner was bound to wait a reasonable time for the consignee to claim delivery of the goods before landing them. The clause as to the twenty-four hours' notice was introduced into the act at the instance of the wharfingers, who might otherwise have been obliged to keep their craft about a vessel for a long time uselessly and at great expense. According to the statute, this notice must be given if the shipowner fails to give information when the goods will be ready for delivery. The act does not say if he refuses, which would imply a previous request, but uses the word "fail." Therefore, if he omits to give such information he must then give them twenty-four hours' notice.

Giffard and *Murphy*, in support of the rule.—The plaintiffs did not apply for the goods at a proper time, nor with the proper means and appliances for receiving them. A mere offer to take delivery of the goods will not satisfy the statute. There must be at the time it is made a readiness to take such delivery. Here the plaintiffs were not so ready as to entitle them to the benefit of the 7th condition in the 67th section.

What was done by them on the occasion was, in fact, only a colourable compliance with the statute. The offer to take the goods being made at 4 o'clock, the ordinary hour to leave off work, and when in fact the crew had left, was not a proper time to make it a good offer to satisfy the statute. It might have done to have made it at that hour if the crew were still there, but not otherwise—*Startup v. Macdonald* (4). Then, with regard to the other branch of this section, it is submitted the words "failed at the time of such offer to give the owner of the goods correct information," &c., import that such information had been previously demanded. If so, then as none was here asked there was no failure to give information.

ERLE, C.J.—In considering the evidence in this case, the balance to my mind is in favour of the plaintiffs' right to recover. The shipowner had a right to land the goods, unless the merchant brought himself within the 7th condition of the 67th section of the Merchant Shipping Amendment Act, 1862. The facts appear to be that certain hides being on board the ship, the *City of Edinburgh*, in the London Docks, the plaintiffs, the owners of the hides, made an entry and got the custom-house order for their delivery over the ship's side; they gave that order to a lighterman, and the lighterman sent it by a young man of the name of Caney, who went on board the ship to ask for the goods and gave the delivery-order to the mate, the person then in charge of the ship. The mate said the goods were not ready, whereupon the young man went away. Now, do these facts shew that the plaintiffs offered and were ready to take delivery of the goods? It is clear that they desired to take them to the wharf, and they sent the official document which entitled them to receive those goods, through the proper channel (*viz.* the lighterman) for taking goods from the ship to the wharf where they were destined. I cannot call this a colourable compliance with the statute. If what was done had occurred during the working hours, there cannot be the least doubt that a lighterman of the age of eighteen was just as able to receive a cargo of hides as a lighterman of the age of twenty-one, and a lighter which was lying ten or twenty yards off in the London Docks

(2) 4 Bing. N.C. 314; and in error, 7 Man. & G. 850, and 11 Cl. & Fin. 45.

(3) 9 Com. B. Rep. 297; s.c. 19 Law J. Rep. (N.S.) C.P. 249.

(4) 6 Man. & G. 593.

the payment of it on a ground which appears to me to be a matter of perfect indifference. The men holding rateable property must maintain the poor, and if we were to authorize parties to dispute the point of form about the validity of a rate, and keep back the funds required for the maintenance of the poor, we should be setting a bad example. I think, therefore, in this case that the claimant is not entitled to vote.

BYLES, J.—I am of the same opinion. The rate is perfectly good on the face of it, and it is found in the case that it has been published, and has been allowed by two magistrates. The statute 59 Geo. 3. c. 12, which creates the office of assistant overseer, makes him appointable by the vestry, and says nothing about obedience to the orders of his fellow-overseers, but authorizes him in the largest terms to execute such of the duties of the overseer of the poor as shall in the warrant of his appointment be expressed. Now, the warrant here, in the fullest terms, appoints him to assist the overseers of the poor in the performance of all the duties incident to the office of overseer, except the collection of rates. Looking at the statute, therefore, and the warrant of his appointment, he seems to be invested with the full power of an overseer. Mr. Hannen says that he is in the nature of a servant. It would not appear from the language of the statute that he was a servant, but rather that he was a coadjutor or fellow-officer; and that point is now past dispute, because both this Court, in *Points v. Attwood* (4), and the Court of Queen's Bench, in *The Queen v. Watts* (3), have held that he is not the servant, but the fellow-officer of the churchwardens and overseers. That being so, if it had stood there, if we were now going into the merits of the case on appeal, I own, without giving any distinct opinion upon it, I should doubt whether this was a bad rate. My Lord has pointed out the case of *The King v. Folly* (7); and looking at that case there seems to be good reason why the act of parliament should require the allowance of a rate by the magistrates, because strangers in the parish would not know who were the overseers who ought to sign; but the signatures of

two Justices resident in the neighbourhood might satisfy them upon the point, and although they do not make the rate good if the proper persons have not signed it, yet they may make the rate so far good that it is subject only to being quashed on appeal. It seems to me impossible to say that the revising barrister has come to a wrong conclusion.

KEATING, J.—I am of the same opinion, and I entirely agree with the reasons given by my Lord and my Brother Byles. Mr. Hannen relies in his view of the case upon the terms of the statute 7 & 8 Vict. c. 101, insisting that by that statute the assistant overseer was to obey the orders of the majority of the overseers. Now, I do not know why we should in this case hold that, in signing the rate, the assistant overseer was not obeying the orders of the majority of the overseers. It is not stated that he was not. Under these circumstances, I think the decision ought to be affirmed.

Decision affirmed, with costs.

(Appeal from Revising Barrister's Court.)

1864. } ORAM, appellant, v. COLE,
Nov. 18. } respondent.

Borough Vote—Notice of Objection—
6 Vict. c. 18, sch. B. form 10.

In the borough of D. there were two parishes or townships, S. and E, and there was a separate list of voters for each parish or township. The notice of objection described the objector as "on the list of voters for the borough of D. and township of E":—Held, that the notice sufficiently indicated on which of the two lists the voter's name was to be found.

Appeal against the decision of the Revising Barrister for the borough of Devonport.

E. W. Cole objected to the name of John Adams being retained upon the list of voters for the said borough.

The notice of objection was duly served, both upon the overseers and the voter, and was in the following form:

"To Mr. John Adams.

"33, Union Street, East Stonehouse.

"I hereby give you notice, that I object to your name being retained on the list of

persons entitled to vote in the election of members for the borough of Devonport and township of East Stonehouse. Dated this 24th day of August 1864.

"Edward William Cole, of 69, Durnford Street, on the list of voters for the borough of Devonport and township of East Stonehouse."

It was objected to these notices, that it did not appear from them on what list the objector's name was to be found; and moreover, that there was in fact no such list as that described in the notice of objection.

The borough of Devonport consists of the parish of Stoke Damerel and the parish or township of East Stonehouse; each of these parishes has distinct churchwardens and overseers, distinct places of worship, and separate lists of voters are stuck up at the several places of worship by the respective overseers and churchwardens of each parish or township.

The list stuck up by the churchwardens and overseers of Stoke Damerel is headed, "List of persons entitled to vote for the borough of Devonport, in respect of property occupied within the parish of Stoke Damerel."

The list stuck up by the churchwardens and overseers for the parish or township of East Stonehouse is headed, "List of persons entitled to vote for the borough of Devonport, in respect of property occupied within the township of East Stonehouse."

On this list the name of the said Edward William Cole appeared, with the place of residence, as stated in the notice of objection. There is no other Durnford Street in the borough of Devonport than the Durnford Street in which the said Edward William Cole lives, and that is within the township of East Stonehouse.

The Revising Barrister held the notice to be sufficient.

Karslake (*Lopes* with him), for the appellant, referred to *Eidsforth v. Farrer* (1) and *Crowthey v. Bradney* (2).

M. Smith, for the respondent, was not called upon.

(1) 4 Com. B. Rep. 9; s. c. nom. *Tidsforth v. Farrer*, 1 Lutw. 517; 16 Law J. Rep. (N.S.) C.P. 132.

(2) 15 Com. B. Rep. N.S. 536; s. c. 33 Law J. Rep. (N.S.) C.P. 70.

ERLE, C.J.—I think the revising barrister was right. It appears from the form given in Schedule B. to the 6 Vict. c. 18. (No. 10), that in the notice of objection to be delivered to the overseers, the place of abode of the objector must be stated, and the list of voters in which the name of the voter appears; and it is added in a note, that if there is more than one list of voters, the notice of objection should specify the list to which the objection refers. In this case it appears that there are two lists of voters for the borough of Devonport; one for the parish of Stoke Damerel, and the other for the township of East Stonehouse. The notice in this case describes the objector as "of 69, Durnford Street, on the list of voters for the borough of Devonport and township of East Stonehouse." I think that would sufficiently guide a person to the list intended, namely, the list of those voters for the borough of Devonport who reside in the township of East Stonehouse.

BYLES, J. and KEATING, J. concurred.

Decision affirmed.

(*Appeal from Revising Barrister's Court.*)

1864. } GAYDON, appellant, v. PEN-
Nov. 18. } CRAFT, respondent.

Borough Vote—Freemen—2 Will. 4. c. 15. s. 32.

In a borough in which freemen by birth were entitled to vote before the passing of the Reform Act, the right is preserved, by section 32, not only to those whose fathers were entitled to their freedom previously to the 31st of March 1831, but to the lineal descendants of all persons entitled to their freedom before that day.

Appeal from the decision of the Revising Barrister for the borough of Barnstaple.

J. P. Tucker duly objected to the claim of William Saunders to be placed on the list of voters for the borough.

In the borough of Barnstaple there is a body of freemen. The sons of these freemen are entitled, on proving their father's marriage, that they were born of that marriage, and that they have attained the age of twenty-one years, to be admitted as freemen

of this borough; but they can claim from or through no other relation than their father, and in no other way than that described.

The said William Saunders was duly admitted as a freeman (by right of birth from his father) of the said borough on the 31st of July 1856. His father was admitted also by right of birth on the 2nd of May 1831, having only come of age on the 4th of April in that year. The grandfather was admitted by right of birth on the 14th of October 1810.

On this state of facts it was contended on the part of the objector that as the said William Saunders derived his right to be admitted as a freeman of the said borough through his father, from and through whom alone he could claim, and as it was necessary by the 32nd section of the Reform Act that the father, to give him the right claimed, viz., to be on the list of freemen voting for the borough, should have been admitted a freeman or have been entitled to be admitted as a freeman previously to the 1st day of March 1831, and that as he (the father) was not admitted till the 1st day of May 1831, nor entitled to be admitted till he came of age on the 4th day of April in that year, the said William Saunders's right to be placed on the list of freemen voting for that borough could not be sustained. On the other side, it was contended, in support of the vote, that although the father could not have been admitted as a freeman till he came of age, that he had an inchoate right to be so admitted previously to the 1st day of March 1831, which was perfected on his coming of age, and that this was sufficient to satisfy the proviso of the 32nd section of the Reform Act, and to sustain the vote.

The Revising Barrister held that the said William Saunders originally derived his right from or through his father, and that there was no one from or through whom he thus derived his right, who was a freeman or entitled to be a freeman previously to the 1st day of March 1831, and that the vote could not be sustained, and the Revising Barrister struck his name out of the list.

W. H. Cooke, for the appellant.—The claimant was entitled to vote. The question turns on the 2 Will. 4. c. 45. s. 32. That section provides that every person who would have been entitled to vote at a borough election, either as a burgess or

freeman, if that act had not been passed, shall be still entitled to vote, provided such person shall be duly registered according to the provisions contained in the act; but that no such person shall be so registered in any year, unless he shall, on the last day of July in such year, be qualified in such manner as would entitle him then to vote, if such day were the day of election, and this act had not been passed; nor unless certain other requirements are fulfilled about which there is here no question. The same section then provides that no person who shall have been elected, made, or admitted a burgess or freeman since the 1st day of March 1831, otherwise than in respect of birth or servitude, or who shall hereafter be elected, made, or admitted a burgess or freeman, otherwise than in respect of birth or servitude, shall be entitled to vote as such in any such election for any city or borough as aforesaid, or to be so registered as aforesaid: provided also, that no person shall be so entitled as a burgess or freeman in respect of birth, unless his right be originally derived from or through some person who was a burgess or freeman or entitled to be admitted a burgess or freeman previously to the 1st day of March 1831, or from or through some person who since that time shall have become or shall hereafter become a burgess or freeman in respect of servitude. The question is, in fact, whether the right of voting is preserved to freemen in perpetuity or only to those who are sons of persons actually entitled to vote on the 1st of March 1831. It is contended that the franchise in respect of birth or servitude is intended to be preserved in perpetuity. The question turns on what is meant by the right being "originally derived from or through some person who was a burgess or freeman." It is said that this voter can only derive his vote from his father or through his father. But it is clear that he derives it from his grandfather, and all his other ancestors who were entitled to vote, just as a man derives a title of honour. He referred to *Gale v. Chubb* (1), *Croucher v. Brown* (2) and *Elliott on Registration*, p. 73, edit. 1843.

Dowdeswell, contra.—The intention of the legislature was only to preserve exist-

(1) 1 Lutw. 544.

(2) Ibid. 395.

ing rights and inchoate rights, except in the case of the right acquired by servitude. Persons in being who, if the act had not passed, would have gained a right, had an inchoate right which the legislature intended to preserve.

Cooke was not called on to reply.

ERLE, C.J.—I am of opinion that the decision of the revising barrister was wrong. The question is, whether the right of voting is preserved to freemen by birth for one descent only, or to all their lineal descendants. I am of opinion that it is preserved to all. The beginning of section 32. is general, and preserves the right of voting to all persons who would have been entitled if that act had not passed, on certain conditions. Then comes a proviso which excludes from the right to vote all persons made freemen or burgesses after March 1831, except those whose claim to be made burgesses or freemen is founded on birth or servitude. To those whose claim is so founded the right is preserved, although they are not made burgesses until after March 1831. But with respect to persons whose claim is founded on birth there is this limitation, that their right must be "originally derived from or through some person who was a burgess or freeman or entitled to be admitted a burgess or freeman previously to the 1st day of March 1831." Now, I think, the present claimant has fulfilled that requirement of the statute. I think he did originally derive his right from some person who was a freeman previously to the 1st of March 1831, namely, his grandfather. I think the legislature intended to preserve the right of voting to freemen by birth as a continuous hereditary right, and did not intend to restrict it to one generation after the passing of the act. It is clear that votes passed on freedom by birth were not intended to be entirely extinguished, because the section expressly preserves them to those freemen or burgesses by birth who derive their right "from or through some person who since that time [i. e. the 31st of March] shall have become, or shall hereafter become a burgess or freeman in respect of servitude." It provides, therefore, that the sons of freemen by ser-

vitute, who are freemen by right of birth, should have the franchise through all time. When the revising barrister says that voters in this borough can claim from or through no other relative than their father, I do not understand him to mean anything more than that only freemen and the sons of freemen are entitled to vote, without reference to this statute.

BYLES, J.—I am clearly of the same opinion. Freemen by birth are entitled to vote in this borough if they are not excluded by section 32. of the Reform Act. The grandfather of this claimant was admitted a freeman by birth in the year 1810. His son not being of age was not entitled to be admitted on the last day of March 1831. The respondent says the claimant is excluded because he does not claim "from or through" a person whose right of freedom was complete on the day named. But I entirely agree with the Lord Chief Justice, that the claimant does claim "from or through" his grandfather in the sense in which these words are used in this section. There is no reason for confining the words "some person" to the claimant's father, and there is no instance in which franchises of this description are not abolished altogether or preserved in perpetuity.

KEATING, J.—I am of the same opinion. Looking to the general scope of the act, I think the legislature intended to preserve the right to vote to a person whose grandfather was entitled to his freedom previously to the 31st of March 1831, although his father was not so.

Decision reversed.

(Appeal from Revising Barrister's Court.)

1864. { BLAIN, appellant, v. THE OVER-
Nov. 18. { SEERS OF PILKINGTON, re-
spondents.

Parliament — County Vote — Power to re-hear.

A. and B. were appointed to revise the list of voters for the county of L. At a Court held by A. the name of a voter was duly objected to, and the voter not being present his name was struck off. The Court was

adjourned, and on the following day the voter came before B, who was then presiding, and explained the cause of his absence, and prayed for a re-hearing. B. consented to re-hear the case, and eventually restored the voter's name to the list. Upon an appeal to this Court, the case not stating whether on the second day the objector was present or not,—Held, that in the absence of this statement the decision of the Revising Barrister could not be supported.

Appeal from the decision of one of the two Revising Barristers appointed for the Southern Division of the county of Lancaster.

At a Court held, by adjournment, in Bury, on the 13th of October 1864, before A, one of the barristers appointed to revise the list of voters in the election of members of Parliament for the southern division of Lancashire, the Rev. Thomas Corser, incumbent of Stand, in the township of Pilkington, applied to have his name restored on the list for that township.

The name had been removed from the Pilkington register in due course of proceeding by B, the other revising barrister for the same division of the county, at a previous sitting of the Court in Bury, in consequence of its having been duly objected to, and of the absence of the applicant, or any one on his behalf, when the name in its order was called. At the time in question the applicant had been in attendance on his bishop in performance of his duties as rural dean of Bury; but with due precaution he had provided a fit and proper person to attend the Revising Barrister's Court on his behalf, and support his right to remain on the register.

Upon this application being made, objection was taken that A. had no power to entertain it.

But A. was of opinion, first, that although the list in question had been gone through, and been duly initialed and signed by B, his colleague, yet as it was still in his hands, his power to do in open court all things proper for perfecting the list in accordance with the intention and purpose of the statutes in that case provided, still remained. Secondly, that the marks of erasure upon the name and qualification of

the applicant in the list accompanied by the initials of his colleague in the margin, were to him sufficient evidence that a valid notice of objection in this particular instance had been duly proved in open court, and that it was competent for him, without further proof of such notice, to investigate the right of the applicant to be upon the register. Thirdly, that such investigation, after being initiated by proof of such notice, was a proceeding in the hands of the revising barrister solely, and was not invalidated by the absence of the objector or his agent, or, if present, by any refusal on their part to assist.

Being further of opinion that the applicant through no default in him had been removed from the register, A. did, in the exercise of his discretion, entertain the application, and upon investigation of his right, being satisfied that he was entitled to be on the register, he restored the name of the applicant.

Keane, for the appellant, referred to the 6 Vict. c. 41, ss. 29, 30, 31, 40, and 41.

No one appeared for the respondent.

ERLE, C.J.—I am of opinion that the revising barrister had no power to do what he has done in this case. Two barristers were appointed to revise the list of voters in the southern division of the county of Lancaster, and at a Court held by one of them a question was raised between a voter and a person having a right to object as to the right of the former to a vote. This was a proceeding *in foro contentioso*. The objector was there to support his objection; the voter was not there to support his right. Thereupon the Judge disposed of the question in favour of the objector, and struck off the vote. As I read the case, on the following day, the voter came before the other barrister appointed for this division and prayed for a new trial, on the ground that his absence on the previous day was justifiable. The revising barrister consented to re-hear the case, and eventually restored the name of the voter.

Now the ground upon which I give my judgment, in favour of the appellant, that the revising barrister had no power to do

this is, that it does not appear from the case that the objector was present when the case was re-heard. If the matter was to be re-heard, at least he ought to have had some notice of it, so that he might attend and support his objection.

I am desirous to the last degree of upholding the power of any tribunal to amend errors in its own proceedings. There is, however, a great distinction between amendments made in the course of a proceeding and amendments made after the matter has been heard and determined. In the latter case great caution is required, and especially in the case where there are two revising barristers acting concurrently, and one rehears a case which has been finally heard and determined by another. It is quite clear that if the objector was not present, we ought to hold that the judgment given by the first barrister expunging the name was conclusive, and that the second barrister had no power to restore the name of the voter.

BYLES, J. and KEATING, J. concurred.
Decision reversed.

(*Appeal from Revising Barrister's Court.*)
1864. } STEELE, appellant, v. BOS-
Nov. 18. } WORTH, respondent.

Parliament—County Vote—Inmate of an Hospital—Separate Interest in Land.

An hospital was founded, and lands were devised to trustees upon trust to permit the rectors of two parishes to make certain fixed payments out of the profits to the inmates of the hospital. The inmates had each a separate room, and were removable for misbehaviour. There was a surplus income after making the specified payments not disposed of by the deed which created the trust:—Held, that the inmates of the hospital were not entitled to the surplus, and had not any equitable freehold interest in the lands of the charity, and were, therefore, not entitled to a county vote.

This was an appeal from the decision of the Revising Barrister for the Northern Division of the county of Leicester.

At a Court, held at Bottesford, J. A. Bosworth duly objected to the name of George Steele being retained on the list of voters for the parish of Bottesford. The name stood on the register as follows :

Steele George.	Bottesford.	Freehold interest in land.	Hospital land.
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It was proved, in evidence, that George Steele was an inmate of Bottesford Hospital for men in the same parish, founded, by the Earl of Rutland, in or about the year 1692, which from time to time was augmented until the year 1762, when certain lands and tenements in Bottesford, Muston, Abkettleby, Hotwell and Long Clowson, were conveyed to trustees therein named; and which conveyance, after reciting that the rents of the premises comprised in certain indentures therein recited had for some time been found sufficient for the support of fourteen poor people, and the said Duke [of Rutland] being desirous to extend the said charity to the maintenance of two other poor persons, had directed two more to be added to the twelve poor people already provided for out of the revenues of the said hospital, and declared that the said trustees should stand possessed of the

said lands and tenements upon the following trusts, that is to say :

"In trust that they the said trustees and survivors or survivor of them should permit and suffer the rectors of the rectories of Bottesford and Harley, respectively, for ever to receive and take the rents and profits of all and singular the said messuages, lands and premises thereby respectively granted, bargained and sold, as often as the same should become due and payable, to the intent and purpose that they the said rectors and their successors, or the rector for the time being of Bottesford and Harley aforesaid respectively, for ever should and would, by and out of the said rents and profits, pay and distribute to the fourteen poor men who then were, or thereafter should be legally and rightly admitted into and placed in the said hospital (that is to say) to each and every of them once in

every month the sum of 10s. 8d. of current British money, and also the sum of 6d. to each and every of the said poor men four several times in the year, namely, Easter, Whitsuntide, Bottesford feast, and Christmas, for pie-money; and also the sum of 10d. to each and every of the said poor men, in December every year, in lieu of capon-money; and also in February and August yearly to every of the said poor men 6d. a time, for buying them salt; and also to every of them the said poor men the sum of 10d. in September, yearly, for the finding them with candles; and also the sum of 1s. 6d. every month for the fire-maker of the said poor men's fires; and also the sum of 30s. for each and every of the said poor men, in April, yearly, for the providing every of them a suit of clothes, and to each and every of them a good cloth gown, and making, at Easter, every other second year; and also the sum of 6s. 8d. a man to the laundress for washing each poor man's clothes, at Lady Day and Michaelmas, yearly, by even and equal portions; and also out of the said rents to find and provide for each of the said poor men 20 cwt. of hard coals to be laid in yearly, in the month of May, and also then and from time to time, and at all times hereafter, to find and provide all necessary and reasonable beds and bedding, household goods and other necessary utensils for the use and benefit of the said poor men, but at the discretion of the said trustees, parties to these presents; and should maintain, repair and keep the said hospital or almshouse, with all necessary amendments and reparations, and also provide physic and attendance for the sick; and in case the said trustees or their successors, or the rectors for the time being of Bottesford and Harley aforesaid, should neglect or refuse to act or concern themselves in the said trust pursuant to, and to be guided by, the directions aforesaid, then and in such case it was thereby declared and agreed by and between all the said parties to these presents, and the said John Duke of Rutland (party thereto) did authorize and empower the said trustees, or any three of them, by any writing under their hands respectively, and also any subsequent grantees of the said premises, to nominate and appoint three or more honest and dis-

creet persons to act and be concerned in the said trust in such manner as the rectors aforesaid, or any of them might or were to do by virtue of these presents and of the powers aforesaid.

And it was thereby declared and agreed by and between all the said parties to these presents, and the said John Duke of Rutland (party thereto) did declare, that the said sole power of nominating or appointing for any person or persons whatsoever to be placed and admitted in the said hospital should be and remain in the said Duke and his heirs male for ever; and in case of failure of such heirs male, then the lord or lords of the manor of Bottesford, at the time of such failure, and their successors, lord or lords for the time being, should have the right of nomination and placing of poor persons in such manner as the said Duke then had and his heirs might have; and it was further declared, that in case any of the said poor men, after such nomination or admission into the said hospital, should in any way abuse the said charity by their immoralities, profaneness, or lewdness, or other misbehaviour, then it should and might be lawful for, and be in the power of the said then present Duke, party thereto, or his heirs, or, for failure of such, for the lords of Bottesford and their successors for the time being, to remove and displace such person or persons so as he or they should not have the benefit or advantage of the said charity, and to nominate and appoint any other person or persons in the place and stead of such person or persons so to be removed. And in the said conveyance is contained a declaration that the said trustees should demise or lease all or any part of the said premises for a term not exceeding twenty-one years so as upon every such lease there be reserved the full and inpr oved rent without any fine to be paid.

It was further proved that the said George Steele was paid by the trustees of the hospital the sum of 9s. 2d. per week; that the appointment of the hospital men by the Duke of Rutland for the time being was by word of mouth or by letter to his agent, who reduced such appointment to writing, and forwarded it to the parties so appointed; that there was in the said hospital a common hall, where the hospital

men had their meals; that each man had a separate room with a pantry, and that all the apartments were numbered; that the entrance to the said hospital is by one outer door into a passage, at the end of which is a second door, and all the inner doors of the said apartments open into the said passage; that a matron is appointed by the said trustees, who has apartments allotted to her, and who receives a salary of 20*l*. per annum, and whose duties consist in the general superintendence, in cleaning the apartments, and in cooking and working for the said hospital men; that the said hospital men pay no rates or taxes, and never repair the apartments; that they enjoy the use of an orchard and garden adjoining the hospital, and are supplied from the funds of the trust with coal, medicine, medical attendance and all necessaries (except meat and provisions), they also receive a cloak apiece once in two years; that they have uninterrupted enjoyment of their apartments, together with a key and with a power of ingress and egress at any time; but that after nine o'clock at night the matron, by arrangement among the hospital men, locks the outer door and hangs up the key in the passage; that no instance has ever been known of an hospital man being removed, although a power to remove is contained in the deed for immorality, &c., nor has any instance been known of any of the poor men having sublet their apartments; that as the rents of the said lands and tenements mentioned in the said deed of conveyance increased such increased rents were distributed among the hospital men from time to time, and so far back as the year 1778 each man has been in receipt of upwards of 10*l*. per annum, and each man is now in actual receipt of 9*s.* 2*d.* per week, exclusive of coals and gown.

Upon proof of the above facts, the Revising Barrister held: first, that although the weekly payments to each of the hospital men amounted to more than 10*l*. per annum, as the power of appointment and removal expressed on the deed appeared to him to be discretionary with the Duke of Rutland for the time being, that the said George Steele had not such an equitable freehold in the land as to entitle him, under the provisions of the 2 Will. 4. c. 45. s. 18, to have his name

retained upon the register of voters for the said parish of Bottesford, in the said division of the said county; secondly, that even if that were not so, the said George Steele was simply a member of an eleemosynary institution, and as such was not entitled to have his name retained upon the said register.

The Revising Barrister accordingly expunged the name of the said George Steele from the list of voters.

Mellish, for the appellant.—The claim is here rested not on the rooms occupied by the inmate of the hospital, but on his freehold interest in the property of the hospital. Notwithstanding what is stated by the Revising Barrister, the deed itself shews that the Duke has no power to remove any of the hospital men at his discretion. It is the grant of an estate to an inmate *quandiu se bene gesserit*, which is a freehold estate. The other side will perhaps contend that the hospital men have no estate at all. But the mere fact that this is a charitable institution does not prevent the members having an estate in the lands of the charity. The whole rents and profits are divisible amongst the hospital men. Each hospital man has a fourteenth share in the profits of certain lands, subject to certain charges, for life, which share is above the value of 10*l*.; that is an equitable estate of freehold which confers the franchise, under the 2 Will. 4. c. 45. s. 18. *Davis v. Waddington* (1) was decided on the ground that the governor of the charity had a general power to remove the inmates. In *Simpson v. Wilkinson* (2), in *Freeman v. Gainsford* (3) and in *Heartley v. Banks* (4), the claim was made for the rooms occupied by the inmates.

Hayes, for the respondent.—There is nothing to shew an equitable freehold of the yearly value of 10*l*. The hospital men, in fact, receive more than 10*l*., but that is by sufferance only. All the payments specified by the deed amount to about 6*l.* a year only. In this respect the case is like

(1) 7 Man. & G. 37.

(2) 7 Id. 65; s. c. 14 Law J. Rep. (N.S.) C.P. 49.

(3) 11 Com. B. Rep. N.S. 68; s. c. 31 Law J. Rep. (N.S.) C.P. 33.

(4) 28 Law J. Rep. (N.S.) C.P. 144; s. c. 5 Com. B. Rep. N.S. 41.

Ashmore v. Lees (5). The judgment in *Freeman v. Gainsford* (3) clearly shews that inmates of an institution receiving payments of this kind have no estate whatever.

Mellish, in reply.—The intention of the grantor clearly was, that the whole income of the hospital should be applied for the benefit of the hospital men. Though certain payments were specified, yet if these do not exhaust the income of the hospital, the residue is divisible among the hospital men. There is no resulting use in favour of the grantor—*The Attorney General v. the Drapers' Company* (6).

ERLE, C.J.—I am of opinion that the revising barrister was right. The claim was for a freehold interest in land in the parish of Bottesford, and it appeared that there was in that parish an hospital founded by the Earl of Rutland about the year 1692. In 1762 the lands belonging to the hospital were re-conveyed to trustees, and the trusts declared were that they should pay and distribute to each of the fourteen poor men who were inmates of the hospital for the time being a payment of 10s. 6d. a month, and a number of other small payments. The legal estate is thereby vested in trustees upon trust to allow the rectors of the parishes of Bottesford and Harley to appropriate in a charitable manner a portion of the income. But the deed is entirely silent as to the disposition of the surplus after the trusts specified are fulfilled; and there is nothing from which it can be inferred that it is appropriated to the inmates of this hospital. The claim here is for a freehold interest. Legal estate the voter has none, and I think he has no equitable interest in the lands of the charity. All he has is a right to certain payments out of the profits of those lands. I cannot see in this deed the least sign of a grant of an equitable estate in the land to the inmates of this hospital. In *Freeman v. Gainsford* (3) the inmate of an hospital claimed the franchise in respect of the chamber in which he lived, but the Court held that he had no property in the room, although it was assigned to his

use. I said, "It seems to me that he (the inmate) is elected as a mere object of charity; and that, when the governor assigns his rooms for his residence, he does not confer upon him any estate which he could enforce by bill in equity." And Williams, J. says, "The language of the constitutions simply is, that the accommodation provided for the recipients of the charity shall be regulated in a certain way. They are to take for their lives, subject to removal for any of the offences specified. But it does not, therefore, follow, that the particular rooms are to be assigned to each of them as owner for his life. It seems to me to be clear that he has not the right of an equitable owner at all." So here I take it to be clear that the inmates of the hospital, having a right to certain payments from the trustees, who collect the profits of the lands of the charity, have no equitable interest in those lands whatever.

BYLES, J.—I am of the same opinion. In order to entitle the voter to retain his name on the list, he must shew that he is entitled to an equitable estate of freehold. Now, this is not a case in which the trustees are to permit certain persons to take the rents and profits of land, or to pay over the rents and profits of land to certain persons, but they are to receive the rents and profits and to distribute a portion of the proceeds in a certain manner. It is admitted that that is not alone sufficient to give the recipients of those payments any equitable interest in the land; but it is contended that, under the provisions of the deed, the surplus, after making those payments, is distributable among the inmates of this hospital, and that, therefore, they have an equitable interest in the lands. But assuming that the trustees are, under this deed, to take the surplus for some purpose or other (about which I express no opinion), it is clear that they are not to dispose of it in any prescribed manner to any prescribed person, but in such manner and to such persons as the Court of Chancery should sanction. Although at one time I entertained some doubt, I now entertain none. I think the reasons on which the judgment in *Freeman v. Gainsford* (3) was decided are applicable.

KEATING, J.—I am of the same opinion. I think it is clear that the voter has only

(5) 2 Com. B. Rep. 81; s. c. 15 Law J. Rep. (N. S.) C.P. 65.

(6) 2 Beav. 508.

an equitable right to a money payment, and no equitable interest in the land itself.

Decision affirmed.

(*Appeal from Revising Barrister's Court.*)

1864. { TEPPER AND OTHERS, appellants, v. NICHOLS, respondent.
Nov. 23, 24.

Parliament — County Vote — Freehold Interest — Shares in a Bridge — Commissioners appointed by Statute for Public Purposes — Limited Authority to convey.

By an act of Geo. 1. Commissioners were appointed for building a bridge across the Thames from Fulham to Putney, after compensating the proprietors of the then existing ferries; and a pontage or toll was granted and vested in the Commissioners, to be applied as directed by the act; and by a subsequent act of Geo. 2. for more effectually enabling the Commissioners to complete such work, they were empowered to convey in perpetuity the tolls and income of the said bridge or ferries to such persons as would undertake to erect and maintain the bridge. The Commissioners accordingly contracted with certain persons, who subscribed the necessary funds, and became the shareholders of the bridge, to build and maintain the bridge and compensate the proprietors of the said ferries; and afterwards, the bridge having been built, the Commissioners, by a deed which recited the above acts of Geo. 1. and Geo. 2. and their powers thereunder, conveyed the said bridge and tolls and all such ground adjacent and belonging to the said ferries and every other matter which they were empowered to convey, by virtue of the said acts, to certain trustees, in fee, in trust to permit the said shareholders to receive the said tolls and income, and have the sole management thereof:— Held, that the Commissioners had no power to convey the land belonging to the bridge, which had become vested in them by virtue of the said acts, and that the said shareholders having knowledge of the Commissioners' title under the said acts, acquired nothing more under the said deed than the Commissioners could lawfully convey, namely, the tolls and income; and, consequently, that none of the shareholders had,

as such, any freehold estate which could qualify him for a county vote.

Appeal against the decision of the Revising Barrister appointed to revise the list of voters for the Eastern Division of Surrey.

David Nichols, on the register of voters for the said eastern division, duly objected to the names of Jabes Tepper and twenty-four other persons being retained on the Putney list of voters for the said eastern division.

The claims of the persons so objected to appeared on the register to be in respect of freehold shares or parts of such shares in Fulham and Putney Bridge. In support of the right of the said several parties to have their names retained on the said list the following documents and facts were duly established in evidence before the revising barrister. In or about the year 1724, the act 12 Geo. 1. c. xxxvi. was passed, entitled 'An act for building a bridge across the river of Thames, from the town of Fulham, in the county of Middlesex, to the town of Putney in the county of Surrey.'

By section 1. of that act certain persons were constituted and appointed commissioners and trustees for designing, directing, ordering and building such bridge, and for maintaining, preserving and supporting the same when built, and they were empowered at any time after the 24th of June 1726 to design, assign and lay out how and in what manner the said bridge should be made and built, from the town of Fulham to the town of Putney aforesaid, and the ways and passages to and from the same, and to preserve and keep in repair such ways and passages, from time to time, and to make contracts and do all matters and things for carrying on and effecting the purposes aforesaid, and to cause the same to be done and perfected accordingly. And to the intent that the navigation of the said river Thames might receive no prejudice, by section 2. it was enacted, "That when the said bridge was built across the said river, there should remain free and open passage for the water to pass and repass through the arches or passages under the said bridge of 700 feet at the least within the then present banks of the said river." By section 5. bodies corporate and others who were seised of ground in Putney or Fulham, which might be required for the

purpose of making convenient approaches to the said bridge, were enabled to convey to the said commissioners and trustees, or to any nine or more of them or their successors, or as they should appoint, any such ground for the purpose of that act. By section 7. it is enacted, "That it shall be lawful to and for his Majesty, his heirs and successors, by letters patent under the Great Seal of Great Britain, to incorporate all and every the commissioners and trustees appointed by this act, or who shall be appointed pursuant thereto, to be commissioners and trustees for putting this act in execution, or such of them as shall be then living and such others as his Majesty, his heirs or successors, shall think fit, to be one body politic and corporate in deed and in name, and they and their successors to have perpetual succession and a common seal, and such seal from time to time to break, change, make new or alter, as shall be found most expedient; and that they and their successors shall be able and capable in law to have, purchase, receive, enjoy, possess and retain to them and their successors messuages, lands, rents, tenements and hereditaments of what kind, nature or quality soever; and also to sell, grant, demise, alien or dispose of the same, or any part thereof, at their free wills and pleasures; to sue and implead, be sued or impleaded, answer and be answered in courts of record or elsewhere, and to choose their successors and officers from time to time, and to do and execute all and singular other matters and things that to them shall or may appertain to do, with such powers and clauses as shall be necessary or requisite for erecting, building, or preserving and supporting the said bridge and the ways and passages thereto, from time to time."

The said commissioners and trustees were never incorporated in pursuance of this act.

By section 8. it is enacted, "That it shall not be lawful to or for the corporation or company, which shall or may be erected or established by virtue of or pursuant to this act, as such corporation or company, to borrow, or take up, or give security for any sum or sums of money payable in less than six months, or to discount any bills of exchange or other bills or notes whatsoever, or to keep any books or cash of or

for any person or persons, bodies politic or corporate whatsoever, other than and except only the proper books, moneys and cash of the said company or corporation."

By section 10. it is enacted, "That a certain pontage or toll shall be paid before any passage over the said bridge shall be permitted, and that the said pontage or toll shall be vested in the said commissioners, to be by them applied, in accordance with the provisions of the said act, towards the expenses of making and maintaining the said bridge, ways and passages, and purchasing the necessary ground for the same."

By section 13. the commissioners, or any eleven or more of them, are empowered, when incorporated, by indenture or writing under their common seal to convey and assure the toll by that act granted, or any part thereof, as a security for any sum or sums of money by them to be borrowed for the purposes of the act, and to grant any annuities for one, two, or three lives, or for twenty-one years, or a less term, such annuities to be charged upon and payable out of the tolls, estates and revenues belonging to such corporation.

And by section 14. it is enacted, that such annuities shall be personal estate.

By section 16. it is enacted, "That it shall be lawful for the said commissioners and their successors, and for such intended company or corporation and their agents or officers, from time to time to remove any shelves in the said river of Thames, and make the same river deeper."

By section 17. it is enacted, "That all stones, bricks, planks, piles and other materials which shall be made use of for or towards building or making the said bridge, or in or about the same, or for maintaining, repairing or supporting the same, or for making the said river deeper as aforesaid, shall always be deemed to belong and appertain to the commissioners and corporation aforesaid."

And by section 18. it is provided, that if the said bridge shall at any time become damaged, it shall be lawful for the said commissioners or corporation to set up ferries across the said river near to the said bridge, and to take certain rates and duties for passages by such ferries over the same.

By section 19. it is enacted as follows: "It shall not be lawful to erect or build the said bridge, or any part thereof, before or until full and ample satisfaction be made for all such prejudice, loss or damage as shall or may be sustained or suffered by any of the owners, proprietors, lessees or others having any property or interest in the present horse or foot ferries between Putney and Fulham aforesaid."

By section 22. it is enacted, "That nothing in this act contained shall extend or be construed to extend to prejudice or take away any right, property or jurisdiction of the mayor, commonalty and citizens of the city of London, to, in and upon the river of Thames aforesaid, other than and except to remove any shelf or shelves, or to deepen or widen the said river, where the said bridge shall be built, and to do every other matter or thing, as shall or may be necessary for the erecting and maintaining the said bridge."

By the 1 Geo. 2. c. xviii. for explaining and amending the act above referred to, it is by section 1, enacted as follows: "The commissioners and trustees appointed by the said recited act, and those appointed by this act, or any nine or more of them, and the commissioners and trustees when incorporated in pursuance of the said former act, shall have, and they have hereby full power and authority to contract and agree with any person or persons whatsoever, as well commissioners and trustees as others, to erect and build a bridge across the said river Thames, from the said town of Fulham to the said town of Putney, and to repair, maintain and support the same when built in such manner as by the said commissioners and trustees or corporation aforesaid shall be judged proper; and the said commissioners and trustees or corporation aforesaid, or any nine or more of them, the said commissioners and trustees, before such incorporation, have hereby power and authority to grant any annuity or annuities in fee out of the profits, incomes, revenues or tolls of the said bridge, in such manner as they may by the said former act grant any other annuity or annuities, all which annuities in fee to be granted pursuant to this act shall be registered, and shall be assignable and devisable as the other annuities are by the said former

act, and such annuities in fee shall be deemed personal estates and shall go as such."

And for the more effectually enabling the said commissioners and trustees and corporation aforesaid, as speedily as may be, to complete and perfect the said work, by section 3. it is enacted, "That it shall and may be lawful to and for the said commissioners and trustees, or any nine or more of them, before incorporated, and also lawful for such corporation when created, at any time or times to convey and assign over in perpetuity or otherwise all or any tolls, revenues, profits or incomes of or belonging to the said bridge or ferries, or which shall in anywise arise, accrue or belong to the same, unto such person or persons as will undertake, contract and agree to erect and build the said bridge, and to preserve and keep up the same in good and sufficient repair, and shall give sufficient security so to do to the satisfaction of the said commissioners and trustees and corporation aforesaid, anything herein or in the said former act to the contrary notwithstanding."

By section 5. it is enacted as follows: "It shall not be lawful for the said commissioners and trustees or corporation to erect or build the said bridge, or any part thereof, before or until ample satisfaction be made for all such prejudice, loss, or damage as shall or may be sustained or suffered by any of the proprietors of the horse-ferries between the said towns of Putney and Fulham, unless the said proprietors of the said ferries, by writing under their respective hands and seals, shall consent and agree with the said commissioners and trustees, or any nine or more of them, or the said corporation, to permit the said Commissioners, trustees, or corporation to build the same before such satisfaction shall be made, and in case such consent of the said proprietors shall be had and obtained in manner aforesaid, that then the said bridge, when built, and all tolls, revenues, profits and incomes belonging or to belong to the same, shall be, and are hereby made chargeable, and charged in the first place with all such sums of money as are by the said former act to be paid to the respective owners, proprietors and persons interested in the present ferries

between Fulham and Putney aforesaid, and that upon payment thereof respectively, or tender and refusal, all ownership, properties and interests of, in, or to the horse and foot ferries between Putney and Fulham aforesaid shall be and are hereby extinguished and determined, and the said ferries and passage over the river of Thames there, and the ground and soil adjacent and belonging to the said respective ferries, shall be and are, by the authority of this act, transferred to and absolutely vested in the said commissioners and trustees and corporation aforesaid, and their successors and assigns for ever."

All such monies and payments for the said horse-ferries have long since been duly paid and made.

The ferries referred to in the said acts on the Putney side of the river were held and were parcel of the manor of Wimbledon, and on the Fulham side were held and were parcel of the manor of Fulham, and previously to the 21st of March 1728 Daniel Pettward and William Skelton had been respectively admitted to, and each of them then held in fee, by copy of the court-rolls of the respective manors, one undivided moiety of the ferries on both the Putney and the Fulham sides of the river; and on that day the commissioners paid to them the sum of 8,000*l.* in full satisfaction for all damages which they, or either of them, should sustain by occasion of building the bridge; the rights and interests of all other parties in the said ferries having been previously satisfied by the commissioners.

On the 19th of November 1728 a contract was duly entered into by the commissioners with thirty persons, who had subscribed 1,000*l.* each for building the bridge, and making the purchases and payments required by the said acts, by which those thirty persons contracted to build and maintain the bridge, and the ways and passages thereto, and make the said purchases and payments; and in pursuance thereof the said thirty persons did build the said bridge, and make the said payments and purchases.

By indenture of bargain and sale, bearing date the 11th of November 1729, duly enrolled in Chancery, made between the said commissioners of the first part, the

said thirty persons therein named and described as being all the contractors and subscribers for building the said bridge of the second part, and certain other persons as trustees of the third part, after reciting the 1st, 2nd, 5th, 7th, 10th, 11th, 12th, 16th, 17th, 18th and 19th sections of the first above-mentioned act, and the 1st, 3rd and 5th sections of the secondly above-mentioned act, and further reciting the said contract of the 19th of November 1728, and that the said thirty persons had paid all monies they had agreed to pay, and built the said bridge, the Commissioners granted, bargained, sold, assigned and set over unto the said persons, parties thereto of the third part, their heirs and assigns for ever, the said bridge and all the materials wherewith the same was erected and built, and all tolls, revenues, profits and incomes of or belonging to the said bridge so built, from the town of Fulham to the town of Putney, or the ferries thereafter to be set up and erected as occasion might be, according to the provisions in that behalf made by the said said recited acts, or either of them, or which should in anywise arise and accrue or belong to the same, with all such ground and soil adjacent and belonging to the then late or then present horse-ferries and passage over the said river between Fulham and Putney as had been, was or should be vested in the said commissioners, and all benefits, advantages, powers, privileges and authorities, and every other matter or thing whatsoever vested in or granted to the said commissioners which they were empowered or capable to assign and convey over, by virtue of the said acts, or either of them, to hold the same unto and to the use of the said trustees, parties hereto of the third part, their heirs and assigns for ever, upon trust to permit and suffer the said thirty persons therein named of the second part, their heirs and assigns, to receive and take the said tolls, revenues, profits and income, and to have the sole management and direction thereof, upon condition that they should thereout pay certain sums of money and expenses specified in the said deed, which condition has been performed; and after payment of such sums of money, should every year thereafter divide all the then rest and residue of the monies to be raised by the said tolls, reve-

nues, profits and income of the said bridge, ferries and other the premises (if any) unto and amongst the said thirty subscribers and proprietors for the time being and their respective heirs and assigns, rateably and proportionably, according to the several sums of money by them subscribed for the purposes aforesaid, and to their several and respective rights, shares and interests of, in and to the same, to have, take and enjoy the same as tenants in common, and not as joint tenants. And by the said deed it was provided that in case the tolls, revenues, profits and incomes of the said bridge or ferries should at any time or times thereafter fall short, and not be sufficient to answer and make good all such sums of money as should be requisite for putting and keeping the said bridge, together with all ways and passages to and from the same, in good repair within a reasonable time to be allowed for making such repairs, or should not be sufficient for the payment of all the matters and things thereinbefore particularly mentioned, and the charges of the trustees in the execution of the trusts, then all such sums of money as should so fall short or be wanting for the said purposes should from time to time be paid and borne by the said thirty subscribers, the parties thereto of the second part, their heirs and assigns, rateably and proportionably, and according to the several sums of money subscribed by them respectively towards the purposes aforesaid, and to their several rights, shares and interests therein.

On the 16th of June 1730, by grant of that date, the Archbishop of Canterbury granted to the proprietors of Putney Bridge 200 superficial feet of land, part of the churchyard of Putney, for the purpose of making the passage to and from the said bridge more commodious, and the same was used for that purpose, and now forms part of the approach to the bridge. There is no other land in the county of Surrey vested in, belonging to, or claimed by the said proprietors, except what is comprised in the before-stated deed of the 11th of November 1729, and the last-mentioned grant, and no evidence was adduced before the Revising Barrister as to the annual value of the said land.

On the 26th of August 1736, by deed of

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that date, the persons then equitably entitled to the tolls, revenues, profits and income of the bridge under the indenture of the 11th of November 1729, covenanted with each other that certain orders and directions given for the arrangement of the affairs of the bridge should stand good until altered at some quarterly general meeting of persons from time to time becoming so equitably entitled by a majority of such persons present at such meeting.

The interest of the present shareholders in the bridge is identical with the interest vested in the said thirty persons or proprietors under the said deed of the 11th of November 1729, and under the grant of the 16th of June 1730, and has always been conveyed and transmitted as and dealt with as freehold estate, and the shareholders in the said bridge are about eighty in number. The proprietors meet once a-year, and select a committee of six out of their own body to manage the affairs.

The said persons objected to are respectively the holders of a share of such interest as aforesaid, and the sufficiency of the annual money value of such share or part of a share is not now in dispute. The bridge is built partly on piles driven into the bed of the river, and at either end upon brick foundations, which stand respectively upon that part of the banks between high and low water-mark whence formerly the ferries used to ply from side to side, and in part upon land which formerly was ground and soil adjacent and belonging to the said ferries.

There are toll-houses at each end of the bridge at which tolls are collected, and each of them is a structure of brick, and stands upon the brick foundations of the bridge referred to in the preceding paragraph thereof.

For the said persons objected to it was contended that they had respectively, under or by virtue of the said acts of parliament and deeds of the 11th of November 1729 and the 16th of June 1730, hereinbefore stated, such equitable freehold estates in the said bridge-tolls and other property comprised in the said acts and deeds as entitled them respectively to be on the list of voters for the said eastern division of the said county; and for the said David Nicholls, the objector, it was contended

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that they had not respectively such equitable freehold estates as would entitle them to vote for the said division of the said county; and also that the shareholders were a company; and that the individual shareholders being only entitled to a share of the receipts and profits were not entitled to be on the said list of voters.

The Revising Barrister decided that the said several persons objected to had not respectively such equitable freehold estates as entitled them respectively to be on the said list of voters, and he accordingly expunged their names from the said list.

Karslake (*Beresford* with him), for the appellants.—An estate and interest in the land belonging to the ancient ferries and on which the bridge was built, vested in the Commissioners, who afterwards conveyed all they had in 1729 to trustees for the shareholders of Putney Bridge. It is submitted that the Commissioners had by virtue of the acts power to so transfer their interest in the property to those trustees. The trustees have now no duty to perform, and therefore the case differs from that of *Bennett v. Blain* (1), and the shareholders here not only have more than a mere interest in the tolls and profits of the bridge, but they take such an equitable estate in the land as to entitle them to be registered. It appears from *Rogers on Elections*, 9th ed. p. 23, that shares in this very bridge have been held by an election committee to give a good vote for Middlesex. This resembles the case of *Baxter v. Brown* (2), where freehold land which was bought, and a mill and machinery erected thereon, out of money subscribed by certain persons who were partners, was conveyed to trustees in trust for the partners as part of their partnership stock-in-trade; and it was held, that each partner had an interest in the realty corresponding with the amount of shares held by him in the partnership, and was entitled to be on the list of voters for the county.

Raymond, for the respondent.—In the first place, it is submitted that no interest in the land passed to the Commissioners. The legislature did not intend to convey

to them anything more than was necessary to enable them to carry out the object of building a bridge across the river. The ownership in the bed of the river would *prima facie* be in the Crown, and section 17. of the 12 Geo. 1. c. xxxvi. shews that it was not intended to convey any part of such ownership to the Commissioners, for if it were, that section would not have been necessary. The case of *Badger v. the South Yorkshire Railway and River Don Navigation Company* (3) is an authority for the Court so construing the act as to enable the Commissioners to acquire only an easement and not an estate in the soil, and the cases of *Wood v. Hewitt* (4) and *Lancaster v. Eve* (5) shew that the piles on which the bridge rests, though let into the soil of the river, might still have remained the property of the Commissioners. In the next place, even if an interest in the land was vested in the Commissioners, it was not conveyed to the shareholders. The act created an interest and duty in the Commissioners for the benefit of the public, and they had no power to convey the land to the shareholders. Next, these are shareholders of a company and have only a right to a share of the profits, and have no such interest in the land as will entitle them to the franchise. *Bennett v. Blain* (1) is in point; so is *Bligh v. Brent* (6).

Karslake replied.

Cur. adv. vult.

ERLE, C.J. now delivered the following judgment.—This was a claim on behalf of the shareholders of Putney Bridge, and the question was, whether they had an equitable freehold interest. The statutes conveyed the bridge and land to the Commissioners, and the Commissioners in 1729 conveyed the bridge and land vested in them to trustees on behalf of the shareholders; and if the Commissioners had power to part with that property, I have no doubt the shareholders have become entitled to the bridge and to the land which

(3) 1 E. & E. 847; s. c. 28 Law J. Rep. (N.S.) Q.B. 118.

(4) 8 Q.B. Rep. 918; s. c. 15 Law J. Rep. (N.S.) Q.B. 247.

(5) 5 Com. B. Rep. N.S. 717; s. c. 28 Law J. Rep. (N.S.) C.P. 235.

(6) 2 You. & C. 268.

(1) 15 Com. B. Rep. N.S. 518; s. c. 33 Law J. Rep. (N.S.) C.P. 63.

(2) 7 Man. & G. 198; s. c. nom. *Baxter v. New-man*, 14 Law J. Rep. (N.S.) C.P. 193.

belongs to the bridge. But I take it to be perfectly clear law, that where land is vested in Commissioners by an act of parliament for public purposes the Commissioners have not, unless there be something in the statute to that effect, any power to convey away and part with such land. The statutes have not given them, I think, any such power. The second of the statutes appears to me to confirm that view, because it enables specifically the Commissioners to convey the tolls to the shareholders; and if the statute intended to enable them to convey the fee simple of the land to the shareholders, it seems to me there would have been an expression used enabling them to convey the tolls as distinguished from the fee simple of the land, but that statute appears to me to be a negation of that right. I think, therefore, the Commissioners have no power to convey the freehold to the shareholders, or to the trustees in trust for the shareholders. Then, they purported to convey it by a deed of conveyance in 1729. But if the law prohibited such conveyance, the shareholders taking it with the knowledge of the title under that act of parliament acquired nothing more than lawfully could be conveyed, and the Commissioners parted with nothing more than could be lawfully parted with. The result is, I think, that the Commissioners have a right over the land, and the shareholders are entitled only to the tolls, and have therefore no qualification. That is all that we affirm.

Decision affirmed.

(*Appeal from Revising Barrister's Court.*)

1864. } POWELL, appellant, BRADLEY,
Nov. 22. } respondent.

Parliament—Borough Vote—Qualification—Occupation for Twelve Months—Full Age—2 Will. 4. c. 45. s. 27.—6 & 7 Vict. c. 18. s. 40.

If a claimant for a borough vote has occupied the premises for which he claims for twelve months previous to the last day of July in the year in which he claims, and is of full age previous to the day of registra-

tion, it is sufficient, though he was not of full age during the whole year of occupation.

Appeal from the decision of the Revising Barrister of the borough of Kidderminster.

Frederick Bradley duly claimed to have his name inserted in the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of the joint occupation of a foundry and premises at Clensmore, in the parish of Kidderminster Borough.

Richard Powell duly objected to the name of the said F. Bradley being inserted in such list of voters.

The said foundry and premises were in the joint occupation of F. Bradley and his brother Samuel Bradley for twelve calendar months next previous to the last day of July in the present year. At the said foundry the trade or business of iron-founders was carried on under the firm of John Bradley & Co.

It was objected, on behalf of the said R. Powell, that the said F. Bradley's name ought not to be inserted in the list of voters for the parish of Kidderminster Borough, insomuch, first, that as the said F. Bradley was only twenty-one years of age in March in the present year, he could not have occupied, as owner or tenant, the said foundry and premises for twelve calendar months previous to the last day of July in the present year. Secondly, that the said F. Bradley was not of full age during the whole of the twelve calendar months previously to the last day of July in the present year.

The Revising Barrister held, that the said F. Bradley having attained the age of twenty-one years in March last did not preclude him from occupying the said foundry and premises for twelve calendar months previous to the last day of July in the present year. He also held, that the minority of the said F. Bradley during a portion of the twelve calendar months previous to the last day of July in the present year did not of itself constitute a disqualification to his name being retained on the list of voters, and, therefore, retained his name on the list of voters.

Keane, for the appellant.—The first objection is abandoned. As to the second,

the 7 & 8 Will. 3. c. 25. prohibited a minor from voting for a member of parliament. The 27th section of the Reform Act, 2 Will. 4. c. 45, enacts, that every male person of full age who shall occupy a house of the value of 10*l.* per annum, if duly registered, shall be entitled to vote, provided that no such person (that is, such person of full age) shall be so registered, unless he shall have occupied the said premises for twelve calendar months previous to the last day of July in such year. This claimant having only attained the age of twenty-one in the previous March, had not, under the necessary condition, occupied for twelve calendar months, and, therefore, could not have complied with the requisites of the statute.

Karslake (*Bourke* with him), contra.—The result of the argument on the other side, if it prevailed, would have the effect to strike off the name of every man who was not of age twelve months previous to the last day of July; in fact, to prevent a man voting until he had attained the age of twenty-two years, and thereby extend the period of non-age until that age. That would be a monstrous hardship.

Keane replied.

ERLE, C.J.—I am of opinion that the decision of the revising barrister was correct. The 2 Will. 4. c. 45. s. 27. enacts, that every male person of full age who shall occupy within a borough any house, warehouse, &c. or other building of the clear yearly value of not less than 10*l.* shall, if registered, be entitled to vote, provided that such person shall have occupied such premises for twelve calendar months next previous to the last day of July in such year. The claimant, therefore, under that statute, in order to be entitled to vote, must be of full age when he comes to vote. And the statute to which I shall hereafter refer says, he must be of full age when he comes to be registered. The meaning of the section of the act of Will. 4. seems to me to be that a person who shall have occupied for twelve months is entitled to vote, and that it does not mean that the person must have been of full age for the whole period of twelve months, but only that he shall have no legal incapacity when he

claims to vote. I think that section ought to be construed in connexion with the 40th section of the 6 & 7 Vict. c. 18, which enacts, that the revising barrister "shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote." It further provides, in cases of persons objected to, that the barrister shall "require it to be proved that the person so objected to was entitled on the last day of July then next preceeding to have his name inserted in the list of voters in respect of the qualification described in such list." It seems to me that section shews that the question for the barrister to decide is, whether the claimant is a person really qualified to vote by sufficient age and occupation. The decisions of the revising barrister's court were substituted for those of the polling-booths, and the clauses I have read from the 40th section of the Registration Act seem to suppose that the revising barrister is to imagine to himself that a parliamentary election is taking place; that a party comes and claims to vote; that the barrister then asks him, "Are you of full age?" If the answer is in the negative, he is to expunge his name. If in the affirmative, he is to inquire into his qualification as to occupation of the premises; if that is insufficient he is still to expunge his name. It, therefore, shews that no man is to be put upon the register unless he is qualified to vote in the election then supposed to be taking place.

If the contention is to prevail that a man's qualification as to occupation is not to commence until he is twenty-one years of age, it would be the means of preventing many men from voting until they were twenty-two, which would be straining the statute; as our law always considers a man to be entitled to all the rights of citizenship when he has attained the age of twenty-one years.

BYLES, J.—I am of the same opinion. The 7 & 8 Will. 3. c. 25. s. 8. enacts that no infants shall vote for a member of parliament; that they shall not be elected to serve in parliament; that if they are so elected their election is null and void; and it also imposes penalties upon them if they shall presume to sit, or vote in parliament.

Unless, therefore, we are obliged, we ought not to extend the incapacity beyond twenty-one years. Now, when a person claims to be put upon the register, we are obliged by the act of parliament to say he shall be of the age of twenty-one years at the time of making such claim. We should be straining the statute were we to say that he must be of full age one year before he claims to be registered. He must occupy for twelve months, and he may occupy having been of full age the whole, or part, or during no portion of that period. Mr. Keane's contention is, that he must occupy for twelve months, being for the whole of that period of the full age of twenty-one years; that would be followed in every instance by the monstrous consequence of continuing a man's minority until he was twenty-two years of age.

KEATING, J.—I am of the same opinion. I think that the 40th section of the 6 & 7 Vict. c. 18. has removed the whole difficulty, as has been shewn by my Lord.

Decision affirmed.

(Appeal from Revising Barrister's Court.)

1864. } POWELL, appellant, v. GUEST,
Nov. 22. } respondent.

Parliament—Borough Vote—Break of Residence—Imprisonment—2 Will. 4. c. 45. s. 27.

G, who claimed to have his name retained upon the register of voters for the borough of K, had been imprisoned for six months in a gaol more than seven miles from the borough, for an assault, without the option of paying a fine. The six months expired on the 25th of August in the year for which he claimed to be entitled to be so registered:—Held, that as G. by his own criminal act had debarred himself of the power of residing within the borough, he had not the necessary qualification.

Appeal from the decision of the Revising Barrister for the borough of Kidderminster.

Richard Powell duly objected to the name of Thomas Guest, junior, being retained on the list of persons entitled to vote in the election of a member for the borough

of Kidderminster, in respect of the occupation of a house in Stourbridge Street, in the parish of Kidderminster Borough, on the ground that the said Thomas Guest, junior, had not resided for six calendar months next previous to the last day of July in the present year within the said borough, or within seven miles thereof.

The qualification of the said T. Guest was duly proved in all other respects.

On the 27th of February in the present year the said T. Guest was convicted of an assault, and committed by the magistrates of the borough of Kidderminster to Worcester gaol for six months' imprisonment, without the option of payment of a fine. He duly served the said term of imprisonment, and returned to Kidderminster on the 25th of August in the present year.

Worcester gaol is situated more than seven miles from the borough of Kidderminster, or any part thereof. At the time of his conviction the said T. Guest, junior, resided at the above-mentioned house, and carried on there the business of a butcher and beerseller, and after his conviction, but before leaving Kidderminster, he made arrangements by which the said businesses were carried on, and the said house was occupied by his servant on his behalf during his absence, to whom he gave the key of the house, and paid 15s. per week to conduct the said businesses. His furniture remained undisturbed in the house during his imprisonment, and immediately on the termination thereof he returned to his said house, and has continued to reside there ever since.

The said T. Guest, junior, is a widower and has no family. It was contended on behalf of the said R. Powell that, under the circumstances stated, the said T. Guest, junior, had not resided for six calendar months next previous to the last day of July in the present year within the said parish of Kidderminster Borough, or within seven statute miles thereof, or of any part thereof.

The Revising Barrister held that, under the circumstances stated, the said T. Guest, junior, had resided for six calendar months previous to the said last day of July in the present year within the said parish of Kidderminster Borough, and therefore retained his name on the list of voters.

Keane, for the appellant.—The statute requires a residence for six months previous to the last day of July; the claimant was in prison during that time, and did not reside. Moreover, the prison was more than seven miles from the borough. He must be able to reside. The cases only go to this, that personal residence is not necessary—*Whithorn v. Thomas* (1). The residence must continue down to the time of polling—*Ex parte Jones* (2). Had the legislature intended that imprisonment should not break the term of residence it would have so stated, as was done in the 9 & 10 Vict. c. 66, s. 1.—*The Queen v. Salford* (3), *The Queen v. Hartfield* (4), *The Queen v. Potterhanworth* (5) and *The Queen v. Halifax* (6). If it was illegal for him to be in the borough, then the six months' residence was not complete; if it was legal, then a man escaping from prison might vote.

Karslake (*Bourke* with him), contra.—The respondent had no other residence than this; he could not be said to be residing in gaol: even if he could, imprisonment would not deprive him of his residence in Kidderminster. In *Nias v. Davis* (7), where a man, whose wife and family were in lodgings in London while he was in gaol at Presteign, was held to have sufficient residence in London to petition the Bankruptcy Court there. Absence on duty with the militia, which is a compulsory legal absence, has been held not to deprive a man of his right to vote—*The King v. Mitchell* (8). Unless it can be said that any compulsory residence out of the borough breaks the residence, then the argument on the other side falls to the ground; but the cases just cited shew it is not. The appellant must contend that any imprisonment, however short, is a break of the residence, and even if the imprisonment be on a false and groundless charge.

(1) 7 Mac. & G. 1.

(2) 2 Ad. & E. 437; s. c. 4 Law J. Rep. (N.S.) K.B. 97.

(3) 12 Q.B. Rep. 106; s. c. 17 Law J. Rep. (N.S.) M.C. 170.

(4) 17 Q.B. Rep. 746; s. c. 21 Law J. Rep. (N.S.) M.C. 65.

(5) 28 Law J. Rep. (N.S.) M.C. 56.

(6) 12 Q.B. Rep. 111; s. c. 17 Law J. Rep. (N.S.) M.C. 158.

(7) 4 Com. B. Rep. 444.

Keane, in reply.—In *The King v. Mitchell* (8) it was expressly found that the militiamen were in the habit of resorting to Norwich upon furlough and also to attend elections; therefore that case does not apply. The decisions under the Bankruptcy Acts are governed by the wish to have the bankrupt in the place where he carried on business and where his creditors are.

ERLE, C.J.—I am of opinion that the decision of the revising barrister was wrong, and that the claimant did not acquire a right to vote. The statute, in respect of the qualification of a borough voter, requires that he should have resided in the borough for a certain period or within seven miles thereof. The voter in the present case was in prison for a misdemeanor for a great portion of the time that the statute required him to reside within the borough in order to qualify him to vote. I will assume that he had a house and family in the borough, and an *animus revertendi* as soon as his imprisonment was over; but during the time he was in prison he was not *sui juris*, and not at liberty to return in consequence of a criminal act of his own. It seems to me that the doctrine is correctly laid down in *Elliot on Registration*, 2nd edit. 204, where it is said, "That in order to constitute residence, a party must possess, at the least, a sleeping apartment, but that an interrupted abiding at such dwelling is not requisite. Absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence. But if he has debarred himself of the liberty of returning to such dwelling, by letting it for a period, however short, or has abandoned his intention of returning, he cannot any longer be said to have even a legal residence there." In this case I think the claimant has debarred himself of the option of returning, because he has been guilty of a criminal act, for which offence he has been put into prison, and his power of returning has been taken from him. The Judges who have had to decide upon the meaning of the word "residence," as it

(8) 10 East, 511.

occurs in different statutes, have put shifting meanings on that word according to the intention of the statute upon which they were deciding. As under the Bankruptcy Acts, where it was decided, in the case of *Nias v. Davis* (7), that a man who had a permanent lodging in London where his wife and family resided, but who at the time of petitioning the Bankruptcy Court in London was a prisoner for debt in the gaol of Presteign, had a sufficient residence in the London district to entitle him to present his petition there. I should say that that statute was passed *alio intuitu* than the statute now under discussion. I think also that a person in prison for a civil debt has not debarred himself from the power of returning to his home, because by paying his debts, or compounding with his creditors he would remove his disability. The case of the militiaman, *The King v. Mitchell* (8), is consistent with his returning to his residence from time to time. But a person who is imprisoned on a criminal charge stands in a different position, he having no power to return and reside until his term of imprisonment be completed. Residence being one of the requisites the statute requires a claimant to possess, if the power of residence be taken away, he is not entitled to have his claim allowed. If an imprisonment for six months would not take away a man's qualification, I do not see why two or any number of years should do so.

BYLES, J.—I am of the same opinion. It is not necessary or convenient to lay down any rule as to what would constitute a break of residence; but I think this is a fair conclusion to arrive at, viz., that a legal inability to reside caused by the voter's own act and not by misfortune would break the residence. This case is distinguishable from that of a man disabled to reside from illness, from that of the militiaman, or of imprisonment under a *capias ad satisfaciendum*, or imprisonment with an option of paying a fine, or under a trumpery charge which is not afterwards proved.

KEATING, J.—I am of the same opinion. I think that a party who, by his own criminal act, debars himself of the power of residing does not reside constructively.

Decision reversed.

(Appeal from Revising Barrister's Court.)

1864.	} POWELL, appellant, v. FARMER, respondent.
Nov. 22.	
1865.	
Jan. 17.	

Parliament — Borough Vote — “Building” — Occupation as Tenant — 2 & 3 Will. 4. c. 45. s. 27.

A, a market-gardener, who claimed to vote for the borough of K, occupied as tenant land of the yearly value of 20l. within the borough. When he first took the land there was no building upon it, but he erected a wooden structure with boarded sides, and a thatched roof supported by wooden posts let into the ground; there was a door to the structure fastened by a padlock, and it was used for storing potatoes. The revising barrister found that this structure was a “building” within the meaning of the 2 & 3 Will. 4. c. 45. s. 27, and that A. occupied it as tenant, and was entitled to be registered as a voter: — Held, upon the principle laid down in Watson v. Cotton (1), that there was nothing in the description as given by the barrister to warrant the Court in disturbing his decision.

Quære—Whether a pig-sty is a “building” within the meaning of the Reform Act.

Appeal from the decision of the Revising Barrister for the borough of Kidderminster.

Richard Powell duly objected to the name of William Farmer being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied within the parish of Kidderminster Borough.

The said William Farmer is a market-gardener, and had rented and occupied under the same landlord five acres of land in the parish of Kidderminster Borough for more than twelve calendar months previous to the last day of July 1864, of the clear yearly value of 20l.

There was no building on the land when the said W. Farmer first took the same of his landlord, but previously to the 31st of July 1863 the said W. Farmer had erected on the land, at his own expense, a wooden structure with boarded sides and a thatched roof, and supported by wooden posts let

(1) 5 Com. B. Rep. 51; s. c. 17 Law J. Rep. (N.S.) C.P. 68.

into the ground. The entrance to this structure was by a door fastened by a padlock, and it was used by the said W. Farmer for storing potatoes, and other things connected with his business. The said W. Farmer had erected in like manner on the said land a pig-sty, with a slated roof, but in other respects it was similar to the structure before mentioned.

The flooring of the pig-sty was made of cinders laid on the ground to keep it dry.

It was objected, on behalf of the said Richard Powell, that the said W. Farmer's name ought to be expunged from the said list, on the following grounds: first, that the structures erected by the said W. Farmer were not, nor was either of them, a building within the meaning of the Reform Act; secondly, that inasmuch as the structures had been erected by the tenant they formed no part of the property for which he paid rent, and could not be said to be occupied by him with the land as tenant under the same landlord.

The Revising Barrister held that the said structures were buildings within the meaning of the act, and that they were affixed to the freehold, and decided to retain the name of the said W. Farmer on the said list.

Keane, for the appellant (2).—The claimant is not tenant of a building. Nor is the building, as described by the Revising Barrister, such a building as was contemplated by the 2 Will. 4. c. 45. s. 27.

[*BYLES, J.*—*Watson v. Cotton* (1) decided, that when the Revising Barrister found that an erection was a "building," his decision must stand, unless the Court is satisfied that the thing described cannot be a building.]

According to that case a market-gardener might put a cucumber-frame in his garden, fill it with spades and hoes, and call it a building. The legislature never intended that a structure of this kind should confer a vote; it cannot be said to be of the nature of a house, shop or warehouse, nor was it of a permanent character. The tenant could remove it at his pleasure; it was a mere chattel—*The King v. Londonthorpe* (3).

[*KEATING, J.*—The barrister finds that it was affixed to the freehold.]

(2) This and the following case of *Powell v. Boraston* were argued together.

(3) 6 Term Rep. 377.

But he has also told us how it was affixed, and it is submitted that is insufficient—*Hellawell v. Eastwood* (4), *Elwes v. Mawe* (5).

Karslake (*Bourke* with him), contra—When the Revising Barrister has specially found that the structure is a "building," the Court will not go into the question. In *Watson v. Cotton* (1), *Maule, J.* said, that "the barrister was right in holding that the structure was a building. The building was affixed to the soil, and became the property of the landlord; the tenant could not remove it." In *The King v. Londonthorpe* (3) the tenant had permission from his landlord to remove the windmill at the end of his term. That is not the case here. The words of the statute are "house, warehouse, counting-house, shop or other building." Not being in trade he did not require a shop or counting-house, and it comes under the last definition, "other building."

[*ERLE, C.J.*—That must mean a building *ejusdem generis* with those previously mentioned.]

It is *ejusdem generis*, because the claimant uses it in his trade as a market-gardener—*Henrette v. Booth* (6), *Dewhurst v. Fielden* (7).

Keane, in reply.—This building is movable, and therefore is a tenant's fixture; he is not tenant of this; he has put it on the land of which he is the tenant, and can remove it at the expiration of his tenancy—*Martin v. Roe* (8), and cases there collected—*Wansborough v. Maton* (9), *The King v. Otley* (10).

Cur. adv. vult.

ERLE, C.J. delivered the judgment of the Court (Jan. 7) (11).—Upon this appeal two questions are raised: first, whether the shed described in the case was a building within the statute; that is, whether it had sufficient permanence, and was *ejusdem generis*

(4) 6 Exch. Rep. 295; s.c. 20 Law J. Rep. (N.S.) Exch. 154.

(5) 2 Smith's Lead. Cas. 141.

(6) 33 Law J. Rep. (N.S.) C.P. 61.

(7) 7 Man. & G. 182; s.c. 14 Law J. Rep. (N.S.) C.P. 126.

(8) 7 El. & B. 237; s.c. 26 Law J. Rep. (N.S.) Q.B. 129.

(9) 4 Ad. & E. 884; s.c. 5 Law J. Rep. (N.S.) K.B. 150.

(10) 1 B. & Ad. 161.

(11) *Erle, C.J., Byles, J. and Keating, J.*

with the buildings specified in the statute, that is, "house, warehouse, shop, counting-house"! The revising barrister found it to be such a building; and according to the principle laid down in *Watson v. Cotton* (1), we do not see sufficient in the description he has given to authorize us to reverse his decision. It is constructed of planks nailed to posts let into the ground, and used for storing potatoes, that being an article in the way of the claimant's trade as a market-gardener.

The second question is, whether this shed was occupied by the claimant in the capacity of tenant. As to this, the facts are, that at the time of the demise there was no shed on the premises, but the claimant placed it there during his term, and used it as above mentioned. The revising barrister found that it was so occupied, and we do not see sufficient in his statement to authorize us to reverse his decision. If the shed had become the property of the landlord, it was occupied by the claimant in his capacity of tenant, although he constructed the shed and placed it there during the term, and the general rule is *quidquid plantatur solo, solo cedit*. It may be that the shed continued the property of the tenant, and was subject to be removed by him at any time during the term; his right to do so might depend on his contract with his landlord, or on the nature of the construction being such as would make it removable as a trade fixture; but whatever may be the right of the tenant, if further facts were added, upon the statement made we act on the general presumption that things affixed to the freehold pass to the landlord, and affirm the decision.

The revising barrister has raised a further question, whether a pig-sty is a building *ejusdem generis* with house, warehouse, shop and counting-house. It is not necessary to answer this question, which is only raised in case the shed was found insufficient; but we would add, that we are by no means prepared to assent to the revising barrister's opinion on this point without further discussion.

We would further add, that the revising barrister has, in our judgment, done good service in sending this and the following case to us for our decision, and giving us

the opportunity of explaining what we considered to be the true meaning of the Court in *Watson v. Cotton* (1), and thereby putting some limitation upon the wide inferences drawn therefrom, contrary in some degree to the intention both of the legislature, expressed in the statute, and of the Judges expounding the same.

Decision affirmed.

(Appeal from Revising Barrister's Court.)

1864.	}	POWELL, appellant, v. BORASTON, respondent.
Nov. 22.		
1865.		
Jan. 17.		

Parliament—Borough Vote—"Building"—Occupation as Tenant—2 & 3 Will. 4. c. 45. s. 27.

The claimant for a vote in the borough of K. occupied, as tenant, land of the yearly value of more than 10l. within the borough. When he first took the land there was no building upon it. In 1862 an electioneering agent, having no interest of any sort in the land, caused to be erected a shed made of boards nailed to posts, and the claimant had used the shed, by keeping therein some of his agricultural implements. There was no evidence that the landlord had any knowledge of the shed having been placed on the land:—Held, first, that though, as a fact, the Revising Barrister had found otherwise, this shed was not a "building" within the meaning of the 2 & 3 Will. 4. c. 45. s. 27, not being used either for residentiary or for commercial purposes. And, secondly, that the claimant did not occupy it in the capacity of tenant; for there was nothing to shew that it had become parcel of the freehold so as to vest in the landlord subject to the interest of the tenant during the term.

Appeal against the decision of the Revising Barrister for the borough of Kidderminster.

Richard Powell duly objected to the name of John George Boraston being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property in the parish of Kidderminster Foreign.

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The said J. G. Boraston is a farmer, and for several years has rented and occupied a farm at Sutton Common, within the said parish of Kidderminster Foreign, but being partly within and partly beyond the limits of the parliamentary borough of Kidderminster.

The greater portion of the farm, including the farm buildings, is beyond the borough limits; but a few acres of land, of more than the clear yearly value of 10*l.*, lie within the borough.

There was no building on the land within the borough when the said J. G. Boraston took the farm of his landlord; but in the summer of 1863 a shed was placed upon the piece of land within the borough.

The said shed was made entirely of wood, having four boarded sides and a boarded roof, and being supported by four posts, let into the ground three feet. It adjoins a public road, and most of the side boards of the shed facing the road have been broken to pieces.

There is no floor to the shed. It is entered by a door, and used by the tenant for keeping agricultural implements in.

It was proved that the shed was erected by a builder of Kidderminster, in accordance with instructions received by him from an active political agent in that borough, who had no interest, either as landlord or tenant, in the land upon which it was erected; but previously to its erection, the permission of the said J. G. Boraston was asked, who replied that he could not give an answer: his landlord must be asked. There was no evidence of the landlord having given such permission; but the said J. G. Boraston gave instructions to the builder as to the size of the door of the shed, and told him that if he required it floored he would do it himself.

It was objected, on behalf of the said Richard Powell, that the name of the said J. G. Boraston ought to be expunged from the said list, on the following grounds: first, that the shed erected as aforesaid was not a building within the meaning of the Reform Act; secondly, that, under the circumstances stated respecting its erection, there was no occupation of the shed by the said J. G. Boraston within the meaning of the Reform Act; thirdly, that the shed formed no part of the property for

which the said J. G. Boraston paid rent, and could not be said to be occupied by him with the land as tenant under the same landlord.

The Revising Barrister held the contrary of these objections, and decided to retain the name of the said J. G. Boraston on the said list.

Keane, for the appellant.

Karslake (*Bourke* with him), for the respondent (1).

Cur. adv. vult.

ERLE, C.J. now (Jan. 17) delivered the judgment of the Court (2).—The respondent occupied a farm, of which a few acres, worth more than 10*l.* annually, were within the borough, and on this part of the farm there was no building at the time of the demise, nor for years after. In 1862 an electioneering agent, having no interest of any sort in the land, caused a shed made of boards nailed to posts to be erected, and therein the respondent had kept some agricultural implements. There was no evidence that the landlord had any knowledge of what was done. The revising barrister decided that this shed was a building within the statute, and that it was occupied by the respondent as tenant. His decision is the subject of this appeal; and we are of opinion that it should be reversed on both points.

The legislature has not defined with clearness the qualification for a vote in a borough. In a county all that is comprised under the term "land" is the principal source of qualification; but in a borough land alone does not qualify; it can only be used as an accessory to a building for the sole purpose of making up the value of 10*l.* The intention of the legislature respecting a qualification for a borough was much considered in *Cooke v. Humber* (3). It is there laid down "that a qualification is compounded of four elements—tenement, value, occupation and estate. There must be for tenement, a house, warehouse, counting-house, shop, or

(1) This and the preceding case of *Powell v. Farmer*, *ante*, p. 71, were argued together.

(2) *Erle*, C.J., *Byles*, J. and *Keating*, J.

(3) 11 Com. B. Rep. N.S. 41; s.c. 33 Law J. Rep. (N.S.) C.P. 73.

other building analogous thereto; there must be for annual value, 10*l.*; there must be occupation, that is, actual exercise of the rights of an owner in possession during the requisite time; there must be an estate in the tenement either of fee or less. If these four distinct elements are combined in the claimant, he is qualified; if otherwise, he is not. Now, although they must exist in combination, in order to qualify, still, in inquiring into the existence of the combination, each element must be separately ascertained. First, is the claimant tenant? Secondly, is he occupier? Thirdly, is the tenement sufficient in value? And, fourthly, in kind?" Again, in pp. 44 and 45 (4) it is said, "The statute required some permanent occupation of, and some independent interest in the property. The permanence prevents the sudden creation of votes; the ownership or the tenancy, with rating, indicates some independence; in other words, the requirement of, at least, a tenancy excludes some occupations of less independence, such as the occupation of servants for their service; for example, porter of the lodge, gardeners dwelling in the garden; and also such as that of the surgeon for the hospital of rooms therein—*Dobson v. Jones* (5); also the occupation of premises by objects of charity, occupying under the permission of the trustees of the charity—*Davis v. Waddington* (6)." And again, "As to the kind of tenement which qualifies, the statute has described two classes of buildings, namely, those used for residential, and those used for commercial purposes—house for residence; warehouse, counting-house, shop or other analogous building for commerce" (7).

To apply these principles to the present case, we think that the so-called building is not of the class specified in the statute;

that is, it is neither in the residuary class, nor in the class connected with commercial industry. We also think that the claimant's occupation thereof was not in the capacity of tenant.

As to the first question, whether the so-called building is sufficient to qualify: We are aware of the impossibility of defining clearly what is included in the class described in the statute by the words "other building," and of the difficulty of affirming that a thing is not in a class when the boundary of a class is unknown. We are also aware of the immense variety of structures which are sufficient buildings, considering the locality, and the use for which they are adapted in that locality. Still we are of opinion that the intention of the legislature would be defeated, and the words indicating the class of buildings which qualify would be without any effect, if anything which could be called a building was held sufficient. It ought to be in some degree adapted both to be used by man, either for residence or for the industry to which the statute relates, and also to have the degree of durability which is included in the idea of a building. The shed in question fulfils neither of these conditions. The boards were nailed to the posts for the purpose of performing the part of a shed to the revising barrister, not for any purpose connected with the interest of the occupier, and the structure was so frail as to have been destroyed in part before the required year had elapsed. The legislature intended that buildings should give the primary qualification, and that land should be a secondary resort if the building was not worth 10*l.* per annum. But land would become the primary qualification if a shed of no value added to land of the required value was held to qualify.

We are aware that the question, whether a building qualifies, is more a question of fact than law, to be answered by the revising barrister, performing the part of a jury, in applying the law to the facts before him. We are also aware of the soundness of the principle laid down in *Watson v. Cotton* (8), that if the

(4) See the report in the *Law Journal Reports*, p. 77.

(5) 5 Man. & G. 112; a. c. 13 Law J. Rep. (n.s.) C.P. 126.

(6) 7 Ibid. 37; a. c. 14 Law J. Rep. (n.s.) C.P. 45.

(7) The passages were read by the learned Chief Justice as quotations, but not exactly as they appear in the report.

(8) 5 Com. B. Rep. 55; s. c. 17 Law J. Rep. (n.s.) C.P. 58.

revising barrister finds the building in question to be within the statute, the Court will make every presumption for the purpose of supporting his finding, and will not reverse it unless the case shews it to be erroneous. We adopt these principles as sound. Still we think that this decision here is shewn to be erroneous. The case of *Watson v. Cotton* (7) has been treated by some text-writers as if it had been decided that a tarpaulin supported by poles, as described in the case, was a building within the statute; and they have drawn wide inferences therefrom, and these inferences are carried to the furthest extent in *Lutwyche's Reports*, 58. The learned reporter, in a note there, speaking of this case, thus expresses himself: "It will not be easy in future to say what is not a building, however slight and unsubstantial the structure may be, provided there be a roof to it;" and he goes on to say, that "if a building be capable of holding any articles, it may fairly be considered to be a warehouse." And he goes on further to say, "that, on these principles, there is no reason why a donkey-shed, a fowl-house, or a pig-sty should not qualify." The report of this case in 5 *Com. B. Rep.* 51, does not warrant the inference thus drawn from it. It appears there that, the Judges, resolving to support the finding of the barrister unless he states facts shewing that he must have been in error, take his description to be incomplete, and assume that the description, if it had been complete, would have shewn that the shed was a building, in the ordinary sense of the word, and was properly included in the same class as warehouse. In page 52, Maule, J. says: "The barrister gives a description embracing some of the incidents of a building; he describes two sides of the structure: the rest may be of solid masonry. He does not profess to give a full description of it." Wilde, C.J. says: "It is possible to conceive sheds of a very substantial and valuable character; for instance, the sheds in the docks which for the most part consist of columns of iron or stone supporting slated roofs." There, in his judgment, Wilde, C.J. says, "The barrister having found it to be a building within the act, we must assume that it has all the requisites of a building, except the incidents he

sets out." And Maule, J. says, "It is not denied that the shed is a building; when once it is established that the thing is a building, the only question which remains is to be decided by the purposes to which the building is, or may be put: if it is or may be applied to the purposes of a building such as is mentioned in the act, it may be said to be a building within the meaning of the act; its being more or less substantial cannot affect the question. Nobody would for a moment doubt that a place constructed at great expense and of great solidity, closed on two sides, and used for the stowage of goods, would be a building within the act. Assume this to be a building, and in what does that differ from this?" It thus appears to us that the Judges do not hold that the shed, as described, is a building within the act, but they declare it to be their duty to assume any possible facts not excluded by the case for the purpose of affirming the barrister's finding. The barrister finds it to be a building: that finding is to stand, unless the case excludes the possibility of its being a building, and the Judges say that, consistently with the case, the shed may have been on two sides of solid masonry, and may have been of a very substantial and valuable character, and may have been used for the stowage of goods. We may remark, that it would have been better if the case had been sent back for re-statement, as Mr. Gray requested.

The argument of that learned counsel, on behalf of the appellant, seems to have been considered by the Court as perfectly sound in law; but it did not prevail, because the facts were assumed to exist which made it irrelevant. Mr. Gray contended that the building must be something substantial, something *ejusdem generis* with those specifically mentioned, and not a mere temporary erection for the more convenient use of the land that could be removed by the tenant, and none of the Judges disputed the correctness of this view of the law. In deciding whether a building is within the act, the revising barrister is bound to give effect to the intention of the legislature expressed in the statute, and in so doing to be assisted by any rule of construction laid down in any of the cases relating thereto: but his

attention should never be turned from the statute which he has to apply; and though general principles of construction laid down by the Judges may help to guide his decision, the specific facts of one case form a very fallacious guide in the decision on other specific facts supposed to resemble them—the specific facts of the tarpaulin on poles seem to have led to unsound conclusions. In the present case we consider that the description of the shed is complete, and according to that description it was not of a substantial character, nor *ejusdem generis* with the buildings specifically mentioned; that is, it was neither adapted to, nor intended for any purpose analogous to the purposes for which warehouses are used, and that, therefore, the decision holding the shed to be a building within the act must be reversed.

Secondly, if the shed is taken to be a building within the statute, then the question is raised whether it was occupied by the respondent in his capacity of tenant, and the answer is in the negative. It is clear that the shed formed no part of the premises demised at the time of the demise, and although it might become parcel of the freehold by being annexed thereto under certain conditions, and so become parcel of the demised premises during the currency of the term, the case does not shew that it was made under such conditions as would vest the property in the landlord, subject to the interest of the tenant during the term. It is an incumbrance brought on the land by the licence of the tenant, and for aught that appears subject to be removed at the will of the incumbrancer, or on the revocation of the licence by the tenant. The building, not the land, is the substance of the qualification; the respondent cannot hold the shed as tenant unless the landlord has the property in it as reversioner. But the landlord is not shewn to have assented to its being brought, neither is there any ground for affirming that he could object to its removal, nor does it appear that either landlord or tenant has the property in the boards, if the maker of the shed carried it away.

Decision reversed.

(*Appeal from Revising Barrister's Court.*)

1865. } FLATCHER, appellant, v.
Jan. 13, 14. } BOODLE, respondent.

Parliament—Borough Vote—Payment of Poor-rate—Payment of Proportionate Part by Incoming Tenant—17 Geo. 2. c. 38. s. 12.—2 Will. 4. c. 45. s. 27.

A person is not disqualified by 2 Will. 4. c. 45. s. 27. from being on a borough register of voters because he has not paid some arrear of a poor-rate in respect of which he was not rated and which had never been demanded of him, but which had been made on the qualifying premises prior to his occupation, and which the 17 Geo. 2. c. 38. s. 12. makes the incoming tenant liable to pay in proportion to the time he occupied—So held by Erle, C.J., Willes, J. and Keating, J. (Williams, J. dissentiente).

This was a consolidated appeal from the Revising Barrister of the borough of Cheltenham.

John Flatcher duly objected to the name of James Bewington being retained on the list of voters for the borough of Cheltenham, on the ground that a portion of the poor-rate for the qualifying year had not been paid. It was proved before the Revising Barrister that the poor-rates of the parish in which the qualifying premises are situated are made half-yearly, and that one was made in April 1863, which extended to the following September, when another was made which extended to March 1864, in which month a new rate was made, which is the existing rate.

The voter went into occupation of the qualifying premises prior to the 1st of August 1863, but paid no portion of the rate then in existence, which was not demanded of him, neither was his name inserted in that rate.

It was contended against the vote that, inasmuch as 2 Will. 4. c. 45. s. 27. requires the payment of all rates payable from the voter, he should have gone to the overseers and paid his proportion of the April 1863 rate, to which he was rendered liable by 17 Geo. 2. c. 38. s. 12, and if any dispute had arisen as to the amount, they could have had it settled by the Justices in the

manner provided by that section, and the voter having failed to adopt this course, he was disqualified, for the omission was not remedied by any provision of the Registration Act, as 6 & 7 Vict. c. 18. s. 75. only applies to a misnomer or inaccurate or insufficient description.

It appeared to the Revising Barrister that, as the act of the 17 Geo. 2. c. 31. does not say that the incoming tenant shall pay, but only that he shall be liable to pay, and as the proportion which he is so liable to pay must before he can pay it be first ascertained, either by agreement between the parties, or in case of dispute, by the decision of two or more Justices of the peace, and as by the 6 Vict. c. 18. s. 75. a person in other respects qualified shall be considered as having paid all rates when he shall have *bonâ fide* paid all sums of money which he shall have been called upon to pay as rates, therefore an unascertained proportion which the voter had never been called upon to pay was not such a rate as had become payable from him in respect of the qualifying premises within the meaning of 2 Will. 4. c. 45. s. 27. The Revising Barrister, therefore, overruled the objection, and retained the name.

Dowdenwell, for the appellant. — The question is, whether the voter is disqualified by reason of the 2 Will. 4. c. 45. s. 27, which provides that no person shall be registered unless he shall have paid all the poor-rates which shall have become payable from him in respect of the qualifying premises previously to the 6th of April. This section is explained by the 6 Vict. c. 18. s. 75, which provides, that no person shall be registered unless he shall have paid "all the poor-rates which shall have become payable from him in respect of the qualifying premises previously to the 6th day of April." It is clear that this was a rate which had become payable by the voter. The 17 Geo. 2. c. 38. s. 12, provides that "where any person or persons shall come into or occupy any house, &c. out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from and every person so coming into, or occupying the same, shall be liable to pay such rate

in proportion to the time that such person occupied the same respectively, in the same manner and under the like penalty of distress as if such person so removing had not removed." The cases clearly shew that the voter must either have actually paid or tendered the rate—*Bishop v. Smedley* (1), *Ford v. Smedley* (2) and *Moss v. Lichfield* (3).

Campbell Foster, for the respondent. — The statute 17 Geo. 2. c. 38. s. 12. states only that the person so coming into or occupying the premises from which the person assessed has removed, "shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively," and the proportion in case of dispute is to be ascertained by two or more Justices. That is only a liability on the contingency of his being called on to pay it. There may be nothing to pay at all; for the outgoing tenant may have paid the whole of the rate. It is not like a rate absolutely payable by him, and which section 27. of the Reform Act requires him to pay as a condition to his being qualified for the franchise. How is the incoming tenant to know what, if anything, he is to pay when no demand has been made on him? Payment of the rate need not be made by the party himself, it may be made by the landlord—*Cook v. Luckett* (4). That case shews that rating a person to a rate which is duly published, is a sufficient calling on such person to pay, and that it will do, though a party was rated in respect of a house, No. 3, which he occupied, and the house was inadvertently described as No. 4. But a claim must be made for each rate—*Wansey v. Perkins* (5). The case of *Bishop v. Smedley* (1), relied on by the appellant, turned on the 30th section of the 2 Will. 4. c. 45. That section requires as a condition on the part of the occupier claiming to be rated with a view to the

(1) 2 Com. B. Rep. 90; s. c. 15 Law J. Rep. (N.S.) C.P. 73.

(2) 12 Com. B. Rep. 622; s. c. 22 Law J. Rep. (N.S.) C.P. 35.

(3) 7 Man. & G. 72; s. c. 14 Law J. Rep. (N.S.) C.P. 56.

(4) 2 Com. B. Rep. 168; s. c. 15 Law J. Rep. (N.S.) C.P. 78.

(5) 7 Man. & G. 145; s. c. 14 Law J. Rep. (N.S.) C.P. 59.

franchise, that he should actually pay or tender "the full amount of the rate or rates, if any, then due in respect of such premises." There are no such words in the 27th section; what he is there required to do is to pay all the poor-rates "which shall have become payable from him in respect of such premises." The statute, 11 & 12 Vict. c. 90, as to the time at which the rates and taxes must be paid to entitle parties to be on the list of voters, is as much in favour of the respondent's argument as that of the appellant; and the case of *Ford v. Smedley* (2), cited on the part of the appellant, was as to the non-payment of the assessed taxes which are fixed and certain in their times of payment, and very different from the poor-rates. The case of *Rogers v. Lewis* (6) is, as to the construction of section 28. of the 2 Will. 4. c. 45, which relates to tenants under successive holdings, and that shews that it is sufficient if such tenant has paid the rate payable by him. The section 75. of the 6 & 7 Vict. c. 18. recites and explains the 27th section of the 2 Will. 4. c. 45, and that 75th section enacts, that where the person who is occupying the qualifying premises has "*bond fide* paid on or before the 20th of July in such year all sums of money which he shall have been called upon to pay as rates, in respect of such premises for one year previously to the 6th of April then next preceding, such person shall be considered as having been rated and paid all rates in respect of such premises within the meaning of the recited act and be enabled to be registered." The respondent relies on that section, and it is submitted that he paid all the rates he was called upon to pay, and is entitled to his qualification. Moreover, it is an inaccuracy in the rate which is cured by the statute.

Dowdeswell, in reply.

ERLE, C.J.—In this case the question for the consideration of the Court is, whether the claimant is disqualified from voting by reason of the non-payment of rates which have become payable from him in respect of the qualifying premises. The revising barrister has held the claimant to be quali-

(6) 7 Com. B. Rep. N.S. 29; s. c. 29 Law J. Rep. (n.s.) C.P. 85.

fied. The facts are, that the claimant came into possession before August 1863, and that the custom in the parish was to make rates half-yearly. The claimant has paid all the rates during the time of his occupation of the premises, but some portion of the rate, from April to September 1863, was left unpaid; and it is contended that that portion had become payable from him within 2 Will. 4. c. 45. s. 27. by virtue of 17 Geo. 2. c. 38. s. 12. It appears that some arrear of that rate had been left unpaid by the outgoing tenant, but what was the amount of arrear has not been fixed, but I assume that something was left unpaid, but, until the sitting of the revising barrister, the claimant believed that everything due from him had been paid. Mr. Dowdeswell contends that there was a liability to pay under the statute 17 Geo. 2. c. 38. s. 12. and that the rate was "payable from" the claimant by virtue of that statute; but I take the words of the 12th section of that statute to mean that the incoming tenant is subject to be made liable to pay a proportion of the rate, and not that he is primarily liable. It is a liability which the parish officer if he chooses may enforce, but it depends on a contingency, because the outgoing tenant may have paid the rate beyond the time that he was in occupation; and until the incoming tenant has been called upon to make good the default of the outgoing tenant to pay the whole rate, I think the amount is not "payable" by him, and that he is not therefore disqualified under the 27th section of the Reform Act because he has not paid such amount. The words in that section are "unless such person shall have paid on or before the 20th of July in such year all the poor-rates and assessed taxes which shall have become payable from him in respect of such premises." I think the words "which shall have become payable from him," involve the idea of a definite sum payable *in presenti*, which he has been called upon to pay, and as to which he has been guilty of some default, and not a sum depending on a contingency, and as to which the claimant had no possibility of ascertaining till called upon to pay it. The words in the section are, "payable from him," not "in respect of what he shall have become liable to," but in respect of "what

shall have become payable"; and until the contingent amount of his liability had been ascertained, he could not know what was payable from him. The disqualifying proviso takes away the franchise in case the claimant has not borne his share of the public burden imposed by poor-rates and assessed taxes. But poor-rates differ totally from assessed taxes, the latter being payable by instalments at certain periods, and their amount can be ascertained, whereas the extent of the poor-rates cannot be foreseen, as they are laid according to the requirements of the parish, and in some cases a peremptory *mandamus* may be made by the Queen's Bench to make and pay them forthwith; moreover they are due the instant the rate is made and not by instalments. Nobody can tell what poor-rate has been left unpaid by the outgoing tenant. It might be, if the tenant were rated at 1s. in the pound, and the rate was collected weekly, that the sum was a halfpenny per week, and the outgoing tenant might have left an arrear of only a week or so; was the election agent to be able to disenfranchise the incoming tenant because these trifling sums had not been paid and of which he could know nothing? It is clear to my mind that the proportionate amount of the rate never became "payable" until the amount had been ascertained and the party had been called upon to pay it. I think, therefore, that the revising barrister was right in his decision.

WILLIAMS, J.—I have the misfortune to differ with the rest of the Court. The franchise is conferred by the act subject to certain conditions, one of which is, that the party claiming to vote shall have paid, before the 20th of July, all rates and taxes which shall have become payable from him in respect of the premises; and the question is narrowed to the point, whether the party now claiming to vote has paid all the poor-rates payable from him in respect of the qualifying premises? Now, it appears to me that he has not. Under the statute of 17 Geo. 2. c. 38. s. 12. the incoming tenant is liable to pay his portion of the existing rate, and the question is, whether the proportionate amount of this rate was payable by him in respect of these premises. It is said that it is not payable

by him, because whether he is liable to pay any given amount depends on a variety of circumstances not ascertained, and until they are ascertained no particular amount is payable. But the statute of 17 Geo. 2. c. 38. s. 12. says, he is "liable to pay," and I am of opinion that he is liable to pay a sum which becomes payable within the meaning of the 27th section of the Reform Act. The question is, whether it is a sum less payable from him because there may be a difficulty in ascertaining the exact amount. When, however, it has been ascertained, it is an exact sum, which cannot be increased by the circumstances under which the amount has been ascertained. I apprehend the claimant was liable for the proportionate amount, whatever that amount might be. That being so, it is impossible to say that he has paid all the poor-rates to which he has become liable in respect of his occupation, inasmuch as he has not paid the proportion of the rate due from him under the statute 17 Geo. 2. c. 38, and which I think he is liable to pay, and is payable from him under the words of that statute.

WILLES, J.—I am of opinion that the revising barrister was right, or at all events I cannot see my way clearly to say that he was wrong. The question, no doubt, is one of very considerable nicety, and turns on the words, "payable from him," in section 27. of the Reform Act. The incoming tenant could not know what portion of the rate was paid, and no claim was made on him by the parish officers. The revising barrister held there was a distinction between non-payment of such a rate, and non-payment of a rate made while the claimant was in occupation. It is easy to see the distinction, but it is difficult to say that that makes any difference in the construction of section 27. of the Reform Act. The incoming tenant cannot be bound to take notice that such a rate was made, unless one goes the length of saying that he was bound to make the inquiry, and that it was not for the parish officers to give him notice of it. I think the statute 17 Geo. 2. c. 38. s. 12. was not intended to regulate generally the rights of outgoing and incoming tenants, but to give the parish officers a remedy in respect of a proportion of the

rate according to the time of occupation; and provision is made in the case of an outgoing tenant not paying the rate. There is a distinction between the ordinary liability to pay a rate, and the conditional liability to pay where the outgoing tenant has not done so. In construing this act it should be borne in mind that the register is but evidence of the right to vote, and that the liability under the statute of Geo. 2. is but a condition imposed upon the right; and I see no reason why the ordinary law respecting conditions should not be applied. The condition should not, I think, be enforced more strictly than a condition regarding any other right than that of voting would be enforced. If the parish officers were like the obligees in an ordinary bond, and if the condition was, that if A. B. has not paid the rates you may hold me liable under section 12. of 17 Geo. 2. c. 38, then there would be no forfeiture of the bond until notice had been given me that A. B. had not paid—see *Com. Dig.* tit. 'Condition' (L. 8). That is the distinction on which the revising barrister has acted, and my impression is, that he was right in doing so. At all events I cannot say that he was wrong.

KEATING, J.—I agree with my Lord and my Brother Willes that the revising barrister was right. The claimant not having himself necessarily any notice of the state of things which would make the existing rate payable by him, when he entered upon his occupation, there was an obligation on some one to give him notice, and I think the parish officers ought to have done so. The statute 17 Geo. 2. c. 38. contemplates the outgoing tenant going away and leaving the rate unpaid, and the rate so unpaid would become payable by the incoming tenant. But it seems to me to be a reasonable construction, that, no demand having been made, nor notice given to the claimant that a proportion of the existing rate was due, it has not been shewn this was a rate "payable" by him within the meaning of section 27. of the Reform Act.

Decision affirmed.

(Appeal from Revising Barrister's Court.)
1865. } SCOTT, appellant, v. DURANT,
Jan. 17. } respondent.

Parliament—Practice on Appeal—Incomplete Appeal—6 & 7 Vict. c. 18. ss. 42, 43, 44.—Consent to waive formal Objections.

At an adjourned Court held by the Revising barrister for a borough, on the 28th of October, he decided in favour of one of several objections taken to certain votes, and expunged the voters' names from the list; but, on application by such voters for a case, he consented to grant one if a point of law could be raised, provided the case were shewn to the objector's attorney, in order that he might raise in it the points which had been decided against the objector. The directions in ss. 42, 43, 44. of 6 & 7 Vict. c. 18. as to giving notice in writing of appeal, reading statement in writing in open court, signing the same then and there by the barrister, and appointing respondent to consolidated appeal, were not complied with, but both parties agreed at such Court to waive all objections in point of form, and that the objector should appear as respondent, and the appeals be consolidated. There was no further adjournment of the Court, but the barrister directed the parties to come to him at his chambers, which were out of the borough. A case was afterwards prepared, and given to the objector on the 4th of November, but as he was then unable to shew it to his attorney, he refused to sign it, and returned it unsigned on the 5th of November; the barrister signed it at his chambers, making the objector respondent, and it was transmitted on the same day to the Masters of the Court, that being the last day for doing so; a copy of the case and notice of appeal were served on the same day on the objector, who refused to be bound thereby:—Held, that there was not a completed appeal, and the Court therefore made absolute a rule to strike the case out of the list of appeals.

J. O. Griffiths had obtained a rule, in Michaelmas Term last, calling on the appellant to shew cause why this appeal should not be struck out of the list of appeals, on the grounds that there was no notice in writing given by or on behalf of the appel-

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lant before the rising of the Revising Barrister's Court; that the Revising Barrister did not state the case or his decision, or read the statement, or indorse or sign it in open court, or as required by the 6 Vict. c. 18. s. 42; and that the requisitions of section 44. of the statute were not complied with; and that no declarations were signed, and no respondent or appellant appointed as required by the said last-mentioned statute, and that Durant was improperly entered as the respondent.

The circumstances giving rise to this rule were as follows: On the 21st of October last, the Revising Barrister for the borough of New Windsor held a Court there for the purpose of revising the list of voters for that borough, at which Court Mr. Rogers, an attorney, appeared for the respondent Durant, in support of certain objections to retaining on the register the names of Scott, the appellant, and others. The barrister took time to consider the objections, and adjourned the Court to the 28th of October, when, the objector and Rogers being present, the Revising Barrister decided on all the objections but one against the objector, and on that one in the objector's favour, and directed that the votes should be expunged. The Revising Barrister was then applied to on behalf of those whose votes had been so struck out to grant a case, which he said he would do if a question of law could be raised, but that if a case were taken it must be shewn to Mr. Rogers for revision, in order that he might raise any of the points decided against the objector; and it was agreed, in open court, by both parties that they would waive all objections in point of form. The objector stated that he would appear as respondent, and that the appeals might be consolidated. There was no further adjournment of the Court, but the barrister directed the parties to come to him at his chambers, in London, which were therefore out of the borough. On the 2nd of November, a case was drawn up by the agent for the appellant, which was sent the next day to the Revising Barrister for approval, whereof the objector was informed on the 3rd of November, when he undertook to take the case to Mr. Rogers. The case as settled by the barrister was delivered to the objector on the morning

of the 4th of November, and he then went to Reading in order to shew it to Mr. Rogers, who lived there. Mr. Rogers, however, was absent from home for the day, and did not, therefore, see the case: and the objector returned it to the claimant's agent, on the evening of that day, having made some alterations in it, but telling him that Rogers was from home and had not seen it. On the said 4th of November, a fair copy of the case, altered as suggested by the objector, was sent to him; and on the morning of the 5th of November it was returned by the objector, with an intimation that he could not sign it. On the afternoon of the 5th of November, the appellant's agent informed the Revising Barrister at his chambers that Mr. Rogers had not seen the case, and that the objector refused to sign it. The barrister told him that he must take the case at his peril, and then signed it, and it was transmitted the same day, with notice of appeal, to the Masters of the Court, that being the last day on which it could be transmitted. A copy of the case and notice of appeal were served, on the same day, on the objector, who refused to consent to the case, and to write his acceptance of the notice of appeal.

Sawyer shewed cause.—The provisions in sections 42, 43. and 44. of the 6 & 7 Vict. c. 18. are directory, and not imperative. There are no negative words in them. In section 64. there are negative words, and they are imperative—*Auley v. Topham* (1). In the case of *In re Knowles v. Holden* (2), which will probably be relied on on the other side, where there had been consent to a reference of a plaintiff in the county court, the Court held that there was no jurisdiction, because there were negative words in the act of parliament to the effect that the Court had no jurisdiction at all. But it is different where there is jurisdiction in the first instance which is extended by the consent of the parties—*Andrews v. Elliott* (3). The other side will say that there was no jurisdiction after the 31st of October.

(1) 5 Man. & G. 1; s. c. 18 Law J. Rep. (N.S.) C.P. 39.

(2) 24 Law J. Rep. (N.S.) Exch. 223.

(3) 5 El. & B. 502; s. c. 25 Law J. Rep. (N.S.) Q.B. 1.

[WILLIAMS, J.—Will not the consent be taken to be that what the Revising Barrister does is to be taken to be *nunc pro tunc*?]

Yes, it is submitted that that is so. By section 33. the power is given to hold Courts between the 15th of September and the 31st of October. Then by section 41. power is given to adjourn; "but so that no such adjourned Court shall be holden after the last day of October in any year." The other side will say that that deprives the Revising Barrister of power after the 31st of October. That section, however, comes before the sections which apply to appeals, and it does not apply to the mere signing of a case. There is a decision in one of the Irish Courts of *Agnew v. Fowler* (4) where the Court held that the Revising Barrister had no power to sign the statement of facts and the appeal after a particular day; but the Irish act differs from the English act; and moreover, in that case, no consent had been given by the parties. It has been decided in this Court, that the case may, by consent, be remitted to the Revising Barrister to be signed—*Burton v. Brooks* (5).

[KEATING, J.—In *Whithorn v. Thomas* (6) I was the Revising Barrister, and signed the amended case in this court.]

Pring v. Estcourt (7) shows that section 42. is directory only as to the signature of the indorsement. In *Freeman v. Read* (8) it was said that there was no power in the Quarter Sessions to tax the costs after the Sessions were over; but it was held that, by consent, there was ample power to tax the costs.—[He also referred to *The Queen v. the Justices of Hampshire* (9), *The Queen v. the Mayor of Rochester* (10), *The King v. Sparrow* (11), *Peacock v. the Queen* (12),

Morgan v. Edwards (13), and *Woodhouse v. Woods* (14).]

J. O. Griffiths, in support of the rule.—There was no consent to the case, as it is now stated. By section 33. of the 6 & 7 Vict. c. 18. the Courts are to be held in the borough, and this must take place between the 15th of September and the 31st of October. Section 44. says that the Revising Barrister may consolidate the appeals; but section 42. expressly states that the statement shall be read in open court. That was not done here, nor was a notice in writing given by the appellant, as required by that section. There was also no signing of the case then and there by the Revising Barrister nor by the appellant, and there was no indorsement on the case, in accordance with that section. With regard to section 43. there was no appointment of any respondent. The 44th section, as to the consolidated appeal, was not complied with. If the respondent declined to sign the case, it would be imperative on the Revising Barrister, by the 44th section, to name the overseers or town clerk to be the respondent. Then, by section 45, the consolidated appeal is to be conducted as a single appeal, and there is a proviso that if the consolidated appeal shall not be duly prosecuted or answered, "it shall be lawful for the Court of Common Pleas, or for the Lord Chief Justice or any Judge of the Court to give to any party or parties interested in such appeal, upon his or their application, the conduct and direction of the appeal or of the answer thereto." That is, if the parties named shall not conduct it in a proper manner. Here the case is not signed by any respondent, and there was not an unqualified consent given by the objector to his being made respondent.

ERLE, C.J.—A great many points have been raised in this case; but we feel obliged to make this rule absolute on the ground that there was not a completed appeal.

WILLIAMS, J., WILLES, J., and KEATING, J. concurred.

Rule absolute.

(4) 1 Irish Com. Law Rep. 462.

(5) 11 Com. B. Rep. 41; s. c. 21 Law J. Rep. (N.S.) C.P. 7.

(6) 7 Man. & G. 1; s. c. 14 Law J. Rep. (N.S.) C.P. 38.

(7) 4 Com. B. Rep. 71; s. c. 16 Law J. Rep. (N.S.) C.P. 10.

(8) 30 Law J. Rep. (N.S.) M.C. 123.

(9) 32 Law J. Rep. (N.S.) M.C. 46.

(10) 7 E. & B. 910; s. c. 27 Law J. Rep. (N.S.) Q.B. 45.

(11) 2 Str. 1123.

(12) 4 Com. B. Rep. N.S. 264; s. c. 27 Law J. Rep. (N.S.) C.P. 224.

(13) 29 Law J. Rep. (N.S.) M.C. 108.

(14) 29 Law J. Rep. (N.S.) M.C. 149.

(Appeal from Revising Barrister's Court.)
 1864. } ROBERTS, appellant, v. PERCI-
 Nov. 19. } VAL, respondent.

Parliament — County Vote — Freehold
 for Life—Bedesmen—Eleemosynary Insti-
 tution—Practice—Decision of Court where
 not Final.

An hospital was founded for certain bedesmen who are appointed for life, and who inhabit separate rooms into which the hospital is divided, and each of which is of the annual value of 4l. The hospital was founded before statute 29 Eliz. c. 5, which enables hospitals for the poor to be incorporated, and it is governed by rules made before that act, which refer to feoffees and their heirs, but none are known, and the warden and bedesmen manage the property without anybody interfering with them, and when a portion of it was lately sold for a railway, they signed the conveyance and received the proceeds, which they expended in erecting buildings on the land for their own benefit. The rules give power to remove a bedesman for certain

offences, but no instance has ever occurred of a bedesman having been removed during his life:—Held, that each bedesman had an equitable freehold estate in his room, which entitled him to be registered as a freeholder.

Simpson v. Wilkinson (1) affirmed, and the case distinguished from those of *Hearley v. Banks* (2) and *Freeman v. Gainsford* (3).

The decision of this Court on appeal, though made final by 6 & 7 Vict. c. 18. s. 66, does not prevent the Revising Barrister from entering into a case in all respects similar to the one so decided, but affecting a different register and a different voter.

The following CASE was stated by the Revising Barrister for the Northern Division of the county of Northampton.

Thomas Wallington, on the register of voters for the parish of Kettering, in the northern division of the county of Northampton, duly objected to the vote of Abraham Bell. The name and description of the voter on the registry were as follow—

Bell, Abraham.	Lord Burleigh's Hospital, St. Martin's, Stamford Baron.	Freehold tenement or room.	Abraham Bell, occupier.
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He also objected to the names of twelve other persons, whose qualifications on the lists were described in like manner, and depended on the like facts; and the appeals were therefore consolidated. The facts as to the appointment of the several claimants, and the nature and mode of enjoyment of the qualifying property, are similar to the facts as stated in *Simpson v. Wilkinson* (1), and the facts of that case are admitted and are to be taken *mutatis mutandis* as if stated as part of this case, as is also the copy of the ordinances printed in the report.

Upon the objections being called on, it was contended on behalf of the respondent, that the Revising Barrister had no power to enter upon the inquiry according to the 66th section of the statute 6 & 7 Vict. c. 18, the judgment of this Court having been given upon facts similar to those which are the foundation of the present claim. The whole of the claimants in the present case have been appointed since the above judgment was delivered.

The Revising Barrister decided to go into the case, and to hear the evidence, being of opinion that the words "the case" in the said section referred only to the current register, or, at any rate, to the particular individual affected.

If the Court should be of opinion that this contention should have prevailed, the names were to be retained, without reference to the remainder of this case.

The following additional facts were then proved: That in 1846 part of the hospital premises not separately used by the then occupiers was sold to the Midland Railway Company for the purposes of a railway. That the sale was conducted by the then wardens and bedesmen as owners without the intervention of any other person. That

(1) 7 Man. & G. 50; s. c. 1 Lutw. R.C. 168; 14 Law J. Rep. (N.S.) C.P. 49.

(2) 5 Com. B. Rep. N.S. 40; s. c. 28 Law J. Rep. (N.S.) C.P. 144.

(3) 11 Com. B. Rep. N.S. 68; s. c. 31 Law J. Rep. (N.S.) C.P. 33.

the warden and each of the bedesmen signed the conveyance to the company, the money was paid to the warden and bedesmen, and expended by them in erecting buildings upon part of the garden attached to the hospital, which buildings are now used for a wash-house by the warden and bedesmen as they have occasion.

It was then contended by the objector that, assuming the legal origin of the foundation, if the claimants had any estate, it was only as members of a corporation aggregate, and that the additional facts above stated led to this conclusion. That they had no freehold estate. That, if they had, it was only a joint tenancy in the whole hospital, and not an exclusive and separate one in each of the rooms, and that this also appeared from the new facts. That they were in receipt of alms. And that, looking at the recent decisions, and especially *Freeman v. Gainsford* (3), the claims were bad.

The Revising Barrister overruled these objections, and retained the several names on the list of voters, being of opinion that the facts were substantially unaltered, and that there was therefore nothing to disentitle the claimants to the benefit of the judgment already given by this Court upon the same foundation, whatever were the reasons of such decision; and also that they did not receive alms within the meaning of section 36. of 2 Will. 4. c. 45.

Hannan (*Underdown* with him), for the appellant.—The first question is, whether the Revising Barrister had power to go into the case after the judgment of this Court in *Simpson v. Wilkinson* (1). The respondent relies on the 66th section of the 6 & 7 Vict. c. 18 (4), which makes the decisions of this Court, on appeals from the Revising Barristers, final. That section, however, only means that the decision is to be conclusive in the particular case in which it is given.—[On this point he was stopped by the Court].—The next question is, whether the claimants have an estate of freehold for

life, within the meaning of the Reform Act, 2 Will. 4. c. 45. s. 18. The only contention on the part of the claimants is, that they have an equitable freehold estate in their rooms; for it is not pretended that they have a legal estate therein. It is submitted that, looking at the rules and constitution of the hospital and its eleemosynary character, the inmates have no such holdings as would constitute them owners of property, either equitably or legally. The case of *Simpson v. Wilkinson* (1) is not conclusive of this point. The objection that the parties were in the receipt of alms was not allowed to be argued in that case, as it had not been raised before the Revising Barrister. Tindal, C.J. says in that case, "The only question open to us is, whether the barrister was wrong, in point of law, in saying that there might be some legal commencement to the estate, not necessarily investing the claimants with a corporate character." It is clear that the decision in *Simpson v. Wilkinson* (1) proceeded on the narrow ground, whether the claimants were a corporation or not, and not on the larger ground, which involved the question as to the nature of their holding; and that was the opinion of this Court in *Freeman v. Gainsford* (3) and *Heartley v. Banks* (2). Now, it is the essence of the decisions in those two last cases that the general character of the holding depends on the general character of the institution. For that purpose it is important to look at the ordinances made for the government of the hospital; it is submitted that they shew that the present occupiers have no legal estate, and that their occupation is of such an eleemosynary character as to prevent their having such a freehold interest in their rooms as to entitle them to vote. There is, in fact, no substantial difference between the character of their holding and that of either the Poor Knights of Windsor—*Heartley v. Banks* (2), or of the inmates of Shrewsbury Hospital—*Freeman v. Gainsford* (3). The respondent will probably rely on the 21st Ordinance, which states, "As these poor men shall have at the first their several rooms allowed them in the almshouse, so shall they, during their lives or their continuance in their places, continue their lodging, and every one as he shall succeed to the void

(4) Section 66. of the 6 & 7 Vict. c. 18. enacts, "that every judgment or decision of the said Court shall be final and conclusive in the case upon the point of law adjudicated upon, and shall be binding upon every Committee of the House of Commons appointed for the trial of any petition complaining of an undue election or return of any member or members to serve in Parliament."

places, so shall he succeed in the lodgings without any change." It is submitted that that is amongst the rules for the government of the institution. According to the statutes of the Shrewsbury Hospital, the inmates were to enjoy their rooms for their lives; and yet, as stated by Williams, J. in *Freeman v. Gainsford* (3), "it does not follow that the particular rooms are to be assigned to each of them as owner for his life." With respect to the facts connected with the sale to the railway company mentioned in the present case, it does not appear that any heir to the feoffees was to be founded, or that there was any person to interfere with what was done by these bedesmen. At the most, such dealing with the property would only shew that they had a joint ownership in the whole of the property; and that would not assist the claimants for the purposes of the present case, which requires them to shew that each has a freehold interest in his particular room.

Field, for the respondent, was not called upon by the Court.

ERLE, C.J.—I think that the revising barrister was right. In *Simpson v. Wilkinson* (1) this Court was then of opinion that the inmates of Burleigh Hospital had a freehold interest in the rooms assigned to them, and I am of opinion now that the inmates of that hospital have a freehold interest in the rooms assigned to them, and that they are entitled to vote. The origin of the hospital is unknown, but in *Simpson v. Wilkinson* (1) the Court were of opinion that the revising barrister might presume that the hospital was established before the 39 Eliz. c. 5, and that it had been created and endowed by Lord Burleigh, by granting the lands to feoffees in trust for the members of that hospital. Now it seems to me that the parties taking under such endowment would have all the rights of property given by the terms of the feoffment, and they might have all the property in the shape of an equitable freehold, just as a corporation for charitable purposes under the 39 Eliz. c. 5. might have, only that in the case of such corporation the whole of the property would be vested in the corporation, and the members would not by reason of their membership

be qualified. The majority of the hospitals are now incorporated, and that is why there is an end of any question about the members of such hospital having a right to vote. But if the lands be conveyed to feoffees in trust for the inmates of the hospital, then the legal interest would be in the feoffees, and the equitable interest in the members of the hospital, and that equitable interest would be according to the terms of the deed: and where the deed is lost, the terms of it would be presumed from the way in which the property has been enjoyed. The way in which the property in the Burleigh Hospital has been enjoyed seems entirely consistent with the supposition I have put forward. Each member is placed in a room, and he occupies that room for life. The warden and bedesmen manage the property as owners, and nobody interferes with them. They get what they can by letting the granary, being part of the hospital they do not occupy, and they act in every respect as persons having the entire beneficial interest in the hospital, and when part of the premises were sold, the additional facts find, that they executed a deed of conveyance of it, and that the proceeds were divided for their own use. Therefore there is ground from user to authorize me to infer, that each man took a separate freehold interest in his own room, and that the rest of the property belonged to the warden and bedesmen beneficially in the manner I have pointed out. There is no doubt that in the ordinances of Lord Burleigh for the time being there is a good deal of language that would imply a supervision, control, and interference in some degree with the rights of the inmates of the hospital. The ordinances are, that Lord Burleigh, or certain persons, should, in case of irregularity of conduct, have the power of removal. That is a power that has never been acted upon, and if an attempt was now made to act upon it, there probably would be found abundance of difficulty in the way. I do not think that the fact of there being such a power makes the conclusion which the Court came to in *Simpson v. Wilkinson* (1) wrong. The strength of Mr. Hannen's argument has been that the Court held, in the case of *Heartley v. Banks* (2), that the Poor Knights of Windsor, and in *Freeman v. Gainsford* (3), that the

inmates of Lord Shrewsbury's Hospital were not qualified to vote, though they were persons taking shares of the profits of the estates with which those hospitals were endowed. But there is a broad distinction in my mind between the present case and each of those cases; for in them there was a governing body, in whom the legal estate was necessarily to continue vested for the purpose of executing the trust to be performed by them, and the profits of the endowment did not belong absolutely, and without any intervening person, to the person who claimed to be qualified by reason thereof. The trustees were to receive the profits, and then the Poor Knights of Windsor were entitled to claim a portion of the money out of those profits; and so the inmates of Lord Shrewsbury's Hospital were entitled to receive a portion of the money from the trustees without themselves having any estate at all; though in each of those cases the trustees were bound to find lodgings for the inmates. But I see that in Lord Burleigh's Hospital the members are, when named, to be placed in certain rooms, and in those rooms they are to continue till they die. In the other case, of *Freeman v. Gainsford* (3), one of the grounds of the judgment of the Court was that the inmates were not to have any estate in their rooms; and the Court assumed that the governing body had the power to shift them from time to time from room to room; whereas in Lord Burleigh's Hospital the inmates are to have an estate for life in the rooms which are assigned to them. In Lord Burleigh's Hospital the feoffees have merely the legal estate, and the equitable estate is in the warden and bedesmen. In Lord Shrewsbury's Hospital the trustees had the legal estate, and continued possessed of the equitable estate subject to the disposing of the profits according to the trusts. A great deal of ambiguity has been brought into these cases by saying, that a man would be prevented from being qualified though he had a legal or equitable freehold, if the mode of occupation was eleemosynary. I have a great desire to avoid introducing anything that is, to my mind, an entirely mistaken notion as to the question whether the party is owner of the equitable freehold or not; in deciding that question it may be very material to see whether the trustees hold

in trust to take the profits and dispose of them in an eleemosynary manner to the objects of the donor's bounty; but if a person have an estate, whether legal or equitable, it matters not whether the motive of the donor of the estate was of a charitable nature, or whether the feelings of the parties who took the estate and enjoyed the profits under it ought to be the feelings of eleemosynary grantees. The motives of the grantor and the motives of the grantees are, in deciding whether there is an estate, absolutely irrelevant, otherwise than to see whether the trustees who hold the legal estate are to hand over the money to the persons entitled to take the money or other benefits under the trust, or whether the persons so taking are to receive the same only in an eleemosynary sense, and to have no estate at all.

KEATING, J.—I am of the same opinion. Mr. Hannen asks us to reconsider the decision in *Simpson v. Wilkinson* (1), upon the ground that since that decision this Court, in the two cases of *Heartley v. Banks* (2) and *Freeman v. Gainsford* (3), have laid down principles which, though not conflicting with the actual decision in that case, would induce the Court to come to a different conclusion upon the facts; but it seems to me he has failed in shewing identity of circumstances between those later cases and the case of *Simpson v. Wilkinson* (1). In those later cases there is the important distinction that has been adverted to by my Lord, namely, that the property was there vested in persons who, as trustees, had active trusts to perform, without the recipients of the bounty in either case having an estate in any particular room; whereas, in *Simpson v. Wilkinson* (1), there is no such body exercising any such active trust, but the management of the property is from the beginning vested in these inmates themselves. Although it is true, as Mr. Hannen says, that an estate in mere joint-tenancy might not qualify each claimant, and that they deal with the granary by letting it, and dividing the profits among themselves as joint tenants, yet with the rooms themselves they deal severally and separately, and when a portion of the property comes to be sold, they are the persons who sell without the intervention of a trustee or any govern-

ing body, and they receive the proceeds of the sale, and expend them upon the land for their own benefit. Under these circumstances, it seems to me that, as my Lord has pointed out, the inmates in the later cases had no equitable estate in the land, but that in the present case as well as in *Simpson v. Wilkinson* (1) they have an equitable estate in the land.

Decision affirmed, with costs.

(*Appeal from Revising Barrister's Court.*)

1864. } *HEELIS, appellant, v. BLAIN,*
Nov. 23. } *respondent.*

Parliament—County Vote—Rentcharge—Statute of Uses, 27 Hen. 8. c. 10. s. 1.—Actual Possession—Possession in Law—Stat. 2 Will. 4. c. 45. s. 26.

Though the grantee of a rentcharge under a grant at common law is not entitled to be registered before he has been in the actual receipt of the rent (since until then he has only a possession in law, and not the actual

possession required by 2 Will. 4. c. 45. s. 26), it is otherwise where the rentcharge is by a conveyance operating under the Statute of Uses; for then the person, to whose use the rentcharge is limited, is by virtue of the Statute of Uses at once in actual possession; and he may be entitled to be registered if the rent be of sufficient value, though he has not received any part of it.

This was a consolidated appeal from the decision of one of the Revising Barristers for the Southern Division of the county of Lancaster.

Frederick Clayton objected to the name of Arthur Heelis being retained on the list of voters for the township of Pendleton, in respect of the following qualification :

"Township of Pendleton, 1864.

"Southern division of Lancaster, to wit.—The list of persons claiming to be entitled to vote in the election of knights of the shire for the southern division of the county of Lancaster, in respect of property situate in whole or in part within the township of Pendleton :

Heelis, Arthur.	Halton-bank, Ecclesold-road, Pendleton.	An undivided sixth part or share of a perpetual chief or fee farm rent of 50 <i>l.</i> per annum.	Issuing out of land and a house and other buildings known as Hopefield Waste Lane, in Pendleton, belonging to and occupied by William Thomas Blacklock.
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The said rentcharge of 50*l.* was created by indentures of lease and release, dated respectively the 9th and 10th of June 1839, whereby certain land in Pendleton was granted, bargained, sold and released by John Robinson and Stephen Heelis to John Spencer and his heirs, to the use, intent and purpose that he said John Robinson and his assigns during his life, and after the determination of that estate by any means in his lifetime, then that the said Stephen Heelis and his heirs during the natural life of and in trust for the said John Robinson, and subject to the aforesaid limitations, then that John Robinson, his heirs and assigns, should and might yearly and every year for ever thereafter have, receive and take from and out of the land thereby released, and the buildings to be erected thereon, one clear yearly rent or sum of

50*l.* by half-yearly payments, on the 24th of June and the 25th of December; and to further uses limiting to John Robinson, his heirs and assigns, or to Stephen Heelis and his heirs, as the case might be, powers of distress and of entry and perception of profits for securing the said yearly rent, and subject to the said yearly rent of 50*l.*, and powers and remedies for the recovery thereof, to uses to bar dower, remainder to the use of John Spencer, his heirs and assigns for ever.

All the estate and interest in the said land so vested in John Spencer became, prior to the year 1862, and still is, vested in William Thomas Blacklock and his heirs in fee.

By an indenture, made and dated the 3rd of November 1862, the said John Robinson granted and released the said rentcharge

of 50*l.* and all his estate therein, with the said powers and remedies for securing the same, unto and to the use of Stephen Heelis, his heirs and assigns for ever.

By indenture duly executed, and dated the 27th of January 1864, and made between the said Stephen Heelis of the first part; John Heelis, a son of the said Stephen Heelis, of the second part; and the said Stephen Heelis and John Heelis, and Thomas Heelis, Arthur Heelis, James Heelis and Edward Heelis, four other sons of the said Stephen Heelis, of the third part; the said Stephen Heelis, in consideration of the natural love and affection which he had and bore for his sons, the other parties to the deed, and for a nominal pecuniary consideration, granted and assured unto the said John Heelis and his heirs the said rent of 50*l.*, with the powers and remedies for the recovery thereof, and all his estate and interest therein, to hold unto the said John Heelis and his heirs to the use of the said Stephen Heelis, John Heelis, Thomas Heelis, Arthur Heelis, James Heelis and Edward Heelis respectively, and their respective heirs and assigns, equally in undivided sixth shares, as tenants in common and not as joint tenants.

The said rentcharge has always been duly paid to the parties entitled.

The half-year's rent which became due on the 24th of June 1864, being the first which became due after the execution of the said indenture of the 27th of January 1864, was, on the 8th of July following, paid by the said William Thomas Blacklock to the said John Heelis, for and on behalf of himself and the five other parties entitled thereto under the last-mentioned deed, to whom he paid over their respective shares at various times between the 8th and the 30th of July. No portion of the said rentcharge was paid after the execution of the said indenture of the 27th of January 1864 until the 24th of June 1864, when the half-year's payment was made as aforesaid.

The land so conveyed in 1839, together with a house and other buildings subsequently erected thereon, are the premises described in the fourth column of the said list of persons claiming to be entitled to vote.

NEW SERIES, 34.—C.P.

The said Arthur Heelis named in the said indenture of the 27th of January 1864 is the claimant Arthur Heelis named in the said list.

When the claim of Arthur Heelis came before the Revising Barrister it was objected that he had not been in actual possession or in receipt of the rent for his own use for six calendar months next previous to the last day of July 1864. On the other hand, the claimant contended that the rentcharge having been originally created, not by grant but by a conveyance to uses, he (the claimant) having, on the 27th of January 1864, become, by virtue of the indenture of that date, an assign of the said John Robinson, he was, by the 4th and 5th sections of the Statute of Uses, to be adjudged and deemed to be in possession and seisin of the share of the said rentcharge in such like estate as he had in the use of the same, and that so being in such possession and seisin, he was in the actual possession and receipt thereof for six calendar months next previous to the last day of July 1864 within the meaning of the 2 Will. 4. c. 45. s. 26. The Revising Barrister considered that the seisin and possession mentioned in the said sections of the Statute of Uses are explained and qualified by the subsequent words in the latter section, viz., "as if a grant or other lawful conveyance had been made and executed to them by such as were or shall be seised to the use or intent of any such rent," and that the statutable seisin and possession were to the same extent and of the same effect only as if a grant of the said share of the said rent had, on the said 27th of January 1864, been made by William Thomas Blacklock to the claimant; and that if such grant had then been made, nevertheless, until the actual receipt of part of his said share of the said rent, the claimant would not have been in the actual possession or receipt thereof within the meaning of the 2 Will. 4. c. 45. s. 26. The Revising Barrister, therefore, disallowed the claim of the said Arthur Heelis, and erased his name from the list of voters.

There were like claims made by James Heelis, John Heelis and Thomas Heelis, whose cases were consolidated with the present appeal.

Joshua Williams, for the appellant.—The rentcharge was created by deeds of lease

and release, operating under the Statute of Uses, 27 Hen. 8. c. 10, and a share of this rentcharge was conveyed to the use of the appellant, by the deed of January 1864, and it is submitted that, under that deed, and by virtue of section 1. of 27 Hen. 8. c. 10, the appellant had at once seisin and possession of such share. A mistake was made by the parties at the hearing before the Revising Barrister, in referring to sections 4. and 5. of the Statute of Uses. The section which alone bears on this point, and on which reliance is now placed by the appellant, is section 1, and not sections 4. and 5. of that statute. By this section 1. it is declared, that the person who has the use of lands, rents, &c. is to be "deemed and adjudged in lawful seisin, estate and possession of and in the same." Now the 26th section of the Reform Act (2 Will. 4. c. 45.) enacts that no person shall be registered in any year in respect of his estate, or interest in any lands or tenements as a freeholder," &c., "*unless he shall have been in the actual possession thereof, or in receipt of the rents and profits thereof, for his own use, for six calendar months at least next previous to the last day of July in such year.*" The words "in receipt of the rents and profits thereof," do not apply to this case, which is a rentcharge. The question, therefore, arises on the words "in the actual possession thereof"; and on behalf of the appellant it is contended, that he had such actual possession on the 27th of January 1864, by virtue of the indenture of that date, and the 1st section of the Statute of Uses, which gave him then seisin in fact, and not a mere seisin in law, of his share of the rentcharge. That this is the effect of that statute is established by the authorities. In *Comyns's Digest*, 'Uses' (I.), it is said "By statute 27 Hen. 8. c. 10. *cestui que use* is immediately seised and in actual possession—*Cro. Eliz.* 46; and therefore shall have assize or trespass against a stranger before entry." With respect to what gives seisin of a rent, it is stated in 3 *Cruise's Dig.* 274, "As to a rentcharge, the only mode of acquiring a seisin in deed of it, when created by grant, is by the actual receipt of the whole or of some part of it; and formerly it was usual, where a freehold estate in a rentcharge was created, to pay the grantee a penny in the name of the rent. But where a rent is

created by means of a conveyance to uses, the grantee immediately acquires a seisin, by the words of the statute." So Mr. Butler, in his note to *Littleton*, section 565, and *Coke on Littleton*, 315 a, which treat of the seisin of rent necessary to maintain an assize, says, "This is only to be understood of a rent at common law; but if the rent is limited as a use under the statute, as if lands are conveyed by lease and release to A. and his heirs, to the use that B. may receive out of them an annual rent, the statute immediately executes the use of the rent in B." To the same effect is *Lord Bacon's Reading on the Statute of Uses*, p. 46, and *Burton on Real Property*, pl. 1116. The respondent will rely on the case of *Murray v. Thorniley* (1), as deciding that the grantee of a rentcharge is not entitled to be registered unless he has been in the actual receipt of it for six months before the last day of July. In that case, however, the rentcharge was a rentcharge at common law, and not by a deed under the Statute of Uses, and the Court gave their decision on the ground that, to satisfy the 26th section of the Reform Act, there must be a possession in fact, as contradistinguished from a possession in law. In *Hayden v. the Overseers of Twerton* (2) Maule, J. correctly states that "the case of *Murray v. Thorniley* (1) proceeded on the ground that the seisin requisite to entitle a party to be registered in respect of a rentcharge, is such as would have been necessary to enable the grantee to maintain an assize." The case itself of *Hayden v. the Overseers of Twerton* (2) was that of the assignee of a rentcharge at common law, who had therefore no possession until receipt of the rent, and the case did not materially differ from that of *Murray v. Thorniley* (1). Had the present case been that of a rentcharge by grant at common law, it is admitted that the appellant would not be entitled to a vote; but as he claims here an actual seisin, by virtue of the Statute of Uses, and not merely a seisin in law, he had sufficient possession to qualify him to be on the register.

Keane, for the respondent.—What has

(1) 2 Com. B. Rep. 217; s. c. 15 Law J. Rep. (N. S.) C. P. 155.

(2) 4 Com. B. Rep. 1; s. c. 16 Law J. Rep. (N. S.) C. P. 88.

been contended for, on the part of the appellant, is contrary to what the legislature intended when it framed the Reform Act. That act requires that the party should be put into actual possession of the rentcharge for six months before he can be thereby qualified. He is not in such possession until he has been in receipt of the rent. There is no authority, that is to say, no decision of any Court, that the effect of the Statute of Uses is to put a person in the actual possession of a rentcharge, where the same is conveyed to his use by a deed operating under that statute. These may be the opinions of Mr. Butler, Mr. Burton, and other conveyancers, on the subject, but there is no decision to that effect.

[ERLE, C.J.—Lord Eldon, in giving judgment in the House of Lords, in *Smith v. Doe d. Jersey* (3), takes notice of the practice of conveyancers.]

The words "lawful seisin and possession" in the Statute of Uses, differ from the words "actual possession" in the Reform Act, and the difference was one well known in the time of Henry the Eighth. In *Bevil's case* (4), "the word seisin," it is said, "should be construed according to the subject-matter, sometimes for actual seisin and sometimes for seisin in law." The 4th and 5th sections of the Statute of Uses are the only sections applicable to a rentcharge. This is shewn in *Sugden's Gilbert on Uses*, p. 193, note 4, where it is stated "The statute has two provisions for the execution of rents: the first, for rents *in case* limited to uses which are executed in the same manner as uses of corporeal hereditaments; the other, for rents limited in use out of the seisin in the land of some other person, *e. g.* where any person stands seised of any lands, to the use that some other person may receive a rent thereout, which the statute executes in the same manner as if a sufficient grant had been made to him by the person seised to the use, and gives the *cestus que use* a power of distress." The result therefore is, that the effect of the statute is to give the appellant such a seisin as he would have had if a grant had been made to him at common

law with a power of distress. Indeed, the object of the Statute of Uses was to give the party to whose use the rentcharge was limited, the same rights as he would have had under a grant at common law. Then the cases of *Murray v. Thorniley* (1) and *Hayden v. the Overseers of Twerton* (2) shew that such grantee of a rentcharge under those circumstances would not be entitled to be on the register of voters, because he was not in actual receipt of the rents and profits. The appellant now relies on the 1st section of the Statute of Uses; but it is submitted that "rents" in that section mean the ordinary rents at common law, and not "rentcharges" created by modes of conveyance not contemplated at the time of that statute. There has been no decision in which a rentcharge granted by A. to B. for the use of C, has by force of the instrument been held equivalent to an actual seisin of the rentcharge by C. Certainly, the intention of the Reform Act was, that the party claiming to be qualified to vote in respect of a rentcharge should be in the manual and actual enjoyment of such rent, and not only in possession of it by force of the Statute of Uses.

Williams, in reply, was stopped by the Court.

ERLE, C.J.—I am of opinion that the revising barrister was wrong, and that the claimant is entitled to vote. The claimant claimed to have been in the actual possession of a share in a rentcharge for six calendar months before the 31st of July, and it appears that more than six months before that time the rentcharge was granted to John Heelis to the use of the claimant and five others as tenants in common. The rentcharge had been created in 1839 by the owners of the land in fee simple, and had come ultimately to the party who, in 1864, conveyed it to John Heelis to the use of the claimant and others. No payment was made and nothing had been received by the claimant under the rentcharge until after the 24th of June, and if the conveyance had been at common law without the aid of the Statute of Uses, it is clear, from the case of *Hayden v. the Overseers of Twerton* (2), that there would have been no actual possession of the rent-

(3) 2 B. & B. at p. 599.

(4) 4 Rep. 10 a.

charge to entitle the claimant to be registered. The conveyance, however, was a conveyance operating by the Statute of Uses, and that statute in section 1. says, that where there is a conveyance of, *inter alia*, rents to one person to the use of another person, in such case the person to whose use the conveyance is made shall from thenceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in such rents. Then the statute of the 2 Will. 4. c. 45. requires that the party shall be in actual possession of the rent, and the Statute of Uses enacts, that when a person is seised of a rent to the use of another, the person to whose use the other is seised shall be deemed to be in lawful possession of the rent. I am of opinion that the legislature in the times of Henry the Eighth and William the Fourth attached the same meaning to the words "possession" and "actual possession," and that the conveyance under the Statute of Uses has given the claimant the actual possession required, in order to comply with the statute 2 Will. 4. c. 45. It is said that this would be an evasion of the statute, which requires actual possession of the rent; but I attach no importance to that. Handing over anything in the name of the rent would, to my mind, afford less facility of proof than the production of a conveyance operating by virtue of the Statute of Uses. Then the authorities which Mr. Williams has brought forward are, I should say, entitled to very great respect. In *Cro. Elis.* 46, there are the resolutions of the Judges. *Lord Bacon's reading upon the Statute of Uses* (5) is entitled to very considerable weight, and Lord Chief Baron Comyns has been held in high opinion in the profession. He says, "By the 27 Hen. 8. c. 10. the *cestui que use* is immediately seised and in actual possession." Then there is the authority of *Coke upon Littleton* and *Butler's note*, p. 315 a, note 1, where the whole of the learning of Tindal, C.J., in *Murray v. Thorniley* (1), is to be found, for it appears to me to be involved in the passage from *Coke upon Littleton*, and *Butler's note* points out the distinction between a conveyance of rent at common law and a conveyance by virtue of the Statute of Uses. Under the latter there

(5) See p. 46.

is actual possession from the time of the conveyance. Then I take notice of what is strictly not an authority, namely, *Cruise's Digest* (p. 274), and also *Barton on Real Property* (pl. 1116), and I think I have authority for so doing, when I refer to the opinion of Lord Eldon in the case of *Smith v. Doe d. Jersey* (3), that the practices of conveyancers must be taken notice of by those who have to administer the law, so as to give effect to the intentions of the parties as shewn by the instruments they have executed. Such persons have been remarkable for ability and learning; and I am happy to think that the mantle of some of the old conveyancers is worn down to the present day, and that we have had the benefit of it in the argument of this case.

KRATING, J.—I am of the same opinion. I think that the revising barrister was wrong, but I am bound to add, that if I had to decide the point, as he had, without the benefit of the argument that we have listened to, I think the great probability is that I should have decided in the same way. But that argument has distinguished the great difference between the grant of a rentcharge at common law and one under the Statute of Uses. The Reform Act, 2 Will. 4. c. 45, requires actual possession for six months; and this Court has decided that a grant of a rentcharge at common law would not give that actual possession which the Reform Act requires. The judgment of this Court in *Murray v. Thorniley* (1) was founded upon many authorities entitled to great weight. Tindal, C.J. quotes the extract from Littleton, sec. 235: "And so it is, if a man grant by his deed a yearly rent issuing out of his land to another, &c., if the grantor thereafter pay to the grantee a penny or a halfpenny, in the name of seisin of the rent, then if after the next day of payment the rent be denied, the grantee may have an assize, or else not," &c. And Lord Coke, carrying out his own statement that there might be great virtue in an *et cetera*, explains what it means, and says, "By this *et cetera* is implied that the grant and delivery of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintain an assize or any other real action,

but there must be an actual seisin." Mr. Williams admits that actual possession, as required by the Reform Act, must be such as would have enabled him to maintain an assize. From *Cro. Eliz.* 46, deriving some authority, at all events, by its being adopted by Chief Baron Comyns, (see *Dig. 'Uses,' l.*) we find that by the 27 Hen. 8. c. 10. a *cestui que use* is immediately seised and in actual possession, and therefore that he shall have an assize or trespass before entry against a stranger. That, therefore, brings this case precisely within the grounds on which the case of *Murray v. Thorniley* (1) was decided in this court, and establishes completely the distinction between the grant of a rent-charge at common law and a conveyance by the Statute of Uses. Upon these grounds I also, agreeing entirely with the observations made by my Lord, am of opinion that the revising barrister took an erroneous view of this case, but, I think, a view which he might be well excused for taking when he had not the advantage of hearing the argument we have heard.

Decision reversed.

(*Appeal from Revising Barrister's Court.*)

1865. } SMITH, appellant, v.
Jan. 12. } FOREMAN, respondent.

Parliament — County Vote—50*l.* Occupation—*Different Holdings*—2 Will. 4. c. 45. s. 20.—6 & 7 Vict. c. 18. s. 73.

*A person who occupies, as sole tenant, land for which he is liable to a yearly rent of less than 50*l.*, and also, as tenant jointly with another, land at a yearly rent of less than 50*l.* for each joint tenant, is not, under 2 Will. 4. c. 45. s. 20. or 6 & 7 Vict. c. 18. s. 73, entitled to a county vote, though both tenancies are under the same landlord, and the share of the rent under the joint tenancy added to that under the sole tenancy exceeds 50*l.* a year.*

Appeal from the decision of the Revising Barrister for the Eastern Division of the county of Kent.

Henry George Allen duly objected to the name of John Rolfe being retained on the list and register of voters for the parish of Brabourne.

The facts of the case are these. The name of John Rolfe appeared on the copy of the register of persons entitled to vote as follows :

John Rolfe.	West Brabourne.	Occupation of House and Land.	West Brabourne.
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And his name had stood on the register thus for several previous years. John Rolfe had during the qualifying period and for several previous years occupied solely as tenant a house and land at West Brabourne, for which he was *bond fide* liable to a yearly rent of 40*l.* He had also occupied during the qualifying period, and for several previous years, as tenant jointly with his father, under the same landlord, other lands, three-fourths of which were also in West Brabourne, and about one-fourth in a neighbouring parish, also within the said eastern division, for which he and his father were *bond fide* liable to a rent of 64*l.* per annum. The hiring of these latter-named lands was at a different and subsequent period from the hiring of the first-mentioned house and land, of which John Rolfe was sole tenant.

The Revising Barrister decided that, inasmuch as the occupation and holding of the joint tenant is *per tout* as well as *per my*, and that John Rolfe was actually *bond fide* liable to pay to one landlord a yearly rent or sum exceeding 50*l.*, that is to say, 40*l.* for his sole occupation and 32*l.* at least as his *bond fide* share of the rent of the joint occupation, for the lands and other tenements holden and occupied by him as aforesaid, he was entitled to be retained on the same list and register of voters by virtue of the 20th section of 2 Will. 4. c. 45, which enacts that "every male of full age who shall occupy as tenant any lands or tenements for which he shall be *bond fide* liable to a yearly rent of not less than 50*l.* shall be entitled to vote," and the Revising Barrister retained his name on the register and list of voters accordingly.

R. Bourke, for the appellant.—The question is, whether the two tenancies can be put together so as to make the yearly rent for which the voter is liable of not less than 50*l*. It is submitted that they cannot be so put together. To be entitled to be on the register, the voter ought either to be liable to a yearly rent of not less than 50*l*., and so be qualified under section 20. of the Reform Act (2 Will. 4. c. 45), or else he ought to be liable, with his father, to a joint rent the moiety of which is not less than 50*l*., and so be qualified under section 73. of the Registration Act (6 & 7 Vict. c. 18). As it is, the voter in the present case comes within neither of these acts. The rent for which he is solely liable is only 40*l*., so he is not qualified by the Reform Act; and the moiety of the rent for which he is jointly liable is only 32*l*., and therefore he is not qualified under the Registration Act, and he cannot unite these distinct modes of qualifying, so as to make up the amount required for qualification. The case of *Gadsby v. Barrow* (1) was a decision on the 20th section of the Reform Act, and this Court held that a tenant who holds under two different landlords two distinct sets of premises, the rent of each being less than 50*l*. a year, though they together amount to that sum, is not, under that section, entitled to a vote for the county. The only difference between that case and the present is this, that there were different landlords, whereas here both properties are held under the same landlord. The principle on which that case was decided equally applies to the present, namely, that the statute requires the claimant to be liable to a single rent of sufficient value.

Hannen (*Underdown* with him), for the respondent. — Where the holdings are under the same landlord there can be no reason why the two may not be tacked together so as to make up the necessary qualifying amount of rent. The case of *Gadsby v. Barrow* (1) is very different, as there the holdings were under different landlords; but where the two holdings are under the same landlord, it has never yet been decided, that if the voter is liable to

pay that landlord, under such holdings, 50*l*. a year, he is not qualified under the Reform Act. The legislature has not said there must be a single rental—*Elliott on Registration*, 2nd edit. pp. 122—124. It has been decided, under a local act, which required the qualification for vestrymen to be “householders rated to the poor-rate on an annual rental of not less than 40*l*., that the rental might be made up of tenements separately held—*The King v. the Churchwardens of St. Pancras* (2). The 73rd section of the Registration Act was intended to enlarge the franchise in the event of the tenant holding the qualifying property jointly with others. The test intended by the legislature as to whether the party is fit to be intrusted with the franchise is, whether he is a man of that substance and character that a landlord will trust him with lands or tenements of the annual value of 50*l*. It cannot matter for this purpose whether the landlord lets him part at one time and part at another time, or part to him solely and part jointly with another, if the aggregate value of the rentals payable by him to such landlord be not less than 50*l*. a year.

R. Bourke was not heard in reply.

ERLE, C.J.—I think that the decision of the revising barrister in this case was wrong. The qualification given under the Reform Act is a yearly rent of not less than 50*l*. The claimant pays, in respect of what he occupies as sole tenant, a rent of 40*l*., and he cannot qualify without the aid of the Registration Act, 6 & 7 Vict. c. 18. s. 73, which provides for the qualification of persons occupying jointly. The words which give that qualification are precisely limited, and I do not feel myself at liberty to say that there is any qualification which is not to be found in the words of the enactment. That section enacts that “where any such lands and tenements shall be jointly rented and occupied by more persons than one, each of such joint occupiers shall be entitled to be registered and vote in such election, as last aforesaid, in respect of the lands and tenements so jointly rented and occupied, in case the yearly rent for which they shall be *bond*

(1) 7 Man. & G. 21; s.c. 1 Lutw. R.C. 142; 14 Law J. Rep. (N.S.) C.P. 51.

(2) 1 Ad. & E. 80; s.c. 3 Law J. Rep. (N.S.) M.C. 90.

sine liable in respect of such lands and tenements shall be of an amount which, when divided by the number of such occupiers, shall give a *bond sine* rent of not less than 50*l.* for each and every such occupier, but not otherwise." Now the claimant occupied, jointly with his father, a tenement, for which they were jointly liable to a yearly rent of 64*l.*, and the claim is to add 10*l.* of the jointly-occupied premises to 40*l.* of the separately-occupied premises, and so to make up the 50*l.* But the words of the statute do not authorize the junction of these two rents. If he claims under the qualification given to the joint occupants, he must shew a joint occupation giving to each of the joint occupiers a rent of not less than 50*l.*, and the statute says he shall not otherwise be qualified. I do not pretend to fathom the intention of the legislature further than the clear words of the enactment guide me. The first statute says, if you are a tenant for 50*l.* you may vote; the second says, if you are a joint tenant, and hold 100*l.* jointly with another person, then each of you may vote; but unless the joint holding is such as to give each joint holder 50*l.*, then there is no qualification. It may be that the difficulty of adding the separate rent to the apportionment of rent under a joint tenancy might be expected to create confusion; but I do not pretend to fathom the intentions of the legislature. It seems to me that this claimant is not qualified under either of the statutes, and that the revising barrister's decision is wrong, and must be reversed.

WILLIAMS, J.—I am entirely of the same opinion. It seems to me impossible

to come to any other conclusion upon the language employed in the 73rd section of the Registration Act.

KEATING, J. concurred.

Decision reversed.

(Appeal from Revising Barrister's Court.)

1865. } FREEMAN, appellant,
Jan. 17. } v. GAINSFORD, respondent.

Parliament—County Vote—Qualification—Freehold Shares in a Music Hall—Interest in Land.

Shareholders of a freehold music hall, who were thereby qualified to be on the register of county voters, vested the fee of the hall by deed in trustees, who were to manage the hall and pay to the shareholders proportionate sums out of the profits:—Held, on the authority of Bennett v. Blain (1), that the shareholders had, after the execution of such deed, no direct interest in the land, but only a right to a share of the profits, and were therefore not entitled to vote as freeholders.

This was a consolidated appeal from the decision of one of the Revising Barristers appointed to revise the list of voters for the West Riding of the county of York.

Thomas Hadfield objected to Charles Stanley as not having been entitled on the last day of July 1864. to have his name retained on the list of voters for the township of Sheffield in and for the West Riding. The name stood on the copy of the register relating to the township of Sheffield as follows:

Christian Name.	Place of Abode.	Nature of Qualification.	Place in Township.
Charles Stanley.	31, Throgmorton Street, London.	Freehold Shares.	Music Hall, Surry Street.

By a deed, made on the 2nd of October 1828, certain persons became entitled to undivided freehold shares in the Sheffield Music Hall, and claimed to be on the register of voters, and it was admitted that the provisions of that deed were such as to qualify them to be there. A subsequent

deed, dated the 13th of June 1864, was prepared, a copy of which was appended to and was to be read and taken as part of this case.

(1) 15 Com. B. Rep. N.S. 518; *a.c.* 33 Law J. Rep. (N.S.) C.P. 63.

It was agreed that the income received by the claimant, and by each of the other four claimants, is in annual amount sufficient to qualify, if the Court should be of opinion that he and they are in other respects qualified and entitled to remain on the register. This deed was, previous to the 31st of July last, executed by but 32 of the proprietors of shares in the music hall, they being proprietors of 110 out of the whole 184 shares. There are 25 other proprietors by whom it was not then executed: by some small number of whom it has since been executed. The present claimant and the four other claimants had, however, all executed this deed previous to the 31st of July last, as also had all the new trustees.

It was contended, for the claimant, that the second deed of the 13th of June last had not yet come into operation so as to constitute a new body of trustees; and inasmuch as 25 proprietors, representing the 74-184th shares, have not yet executed the deed, that until the whole had signed no trustees thereunder are effectually appointed, and the rights of those who have not are not affected by its provisions. It was also urged that the said deed could not operate in any way until it had been executed by all the shareholders, and that the only deed before the Court was the original deed of 1828.

It was also argued, on behalf of the claimant, that even if the effect of the deed of the 13th of June was to create a body of trustees for the purposes therein named, such creation would not destroy the equitable freehold interests of the claimant and his co-proprietors in the music hall.

For the respondent, it was argued that the proprietors, being resident in various distant places, and inasmuch as it would, in all probability, be long before the deed of 1864 could be executed by all of them, clause 32 of that deed was inserted for the very purpose of making the deed valid and effectual as to the shares of those who from time to time executed it, even although not executed by all of the proprietors, but that all the present claimants had executed the deed of 1864, and that their shares were therefore liable to the operation of it; that each proprietor of an undivided 184th share was competent to execute the deed

declaring trusts respecting his share, and that, on the execution of such deed, his share would be liable to such trusts; that what one could do without the concurrence of any intermediate number of proprietors, he could do without the concurrence of all, and bind his own shares as effectually as all the shares would be bound by the execution of all; and that in this instance a majority of the shareholders holding a majority of the shares, and all the new trustees, had executed the deed of 1864, and they had therefore practically the power and control in their hands.

Under the circumstances the Revising Barrister was of opinion that the claimant ought not to have been on the register, and expunged his vote. If the Court should be of opinion that the said Charles Stanley and the other claimants were not disqualified under the provisions of the said deed of the 13th of June 1864, the register should be amended by the insertion of the names of the said Charles Stanley and the other claimants; but if the Court should be of opinion that they were disqualified by that deed, then the register should remain as amended by the Revising Barrister.

The deed of the 13th of June 1864 was made between the proprietors of the music hall, whose names and seals were affixed, of the first part, and certain persons therein mentioned, who were the trustees, of the second part; and,—after reciting the deed of October 1828 vesting the fee of the music hall in one Offley Shore, as trustee for the proprietors, and a subsequent mortgage for 2,500*l.* under the powers of that deed, and which mortgage debt had become ultimately assigned to Marcus Smith and James Henry Barber,—contained a mutual agreement between the parties thereto, that the said music hall, land and hereditaments, and the shares, estates and interests therein of the parties of the first part, and which said hereditaments were thereafter referred to by the designation of “the Sheffield Music Hall,” should be governed by the rules thereafter appearing numbered 1 to 33.

The following are the material rules:

1. The parties hereto of the second part, their heirs, assigns and successors in office, shall be trustees of the Sheffield Music Hall, and shall have the several powers herein-

after appearing and distinguished by the letters A. to L.:

A. To vest or cause to be vested the fee-simple and inheritance of the Sheffield Music Hall in themselves or any of their body for the time being or in such person or persons as the trustees shall think proper.

B. To give directions to the said Offley Shore, his heirs and assigns, or other the person or persons for the time being entitled to the fee-simple and inheritance of the said Sheffield Music Hall, and to the said Marcus Smith and James Henry Barber, or their executors, administrators and assigns, or other the person or persons for the time being entitled to the term of years mentioned in the said indenture of the 26th day of August 1853, with regard to any lease, mortgage, sale, agreement, deed, conveyance or assurance, action, suit or other proceeding, matter or thing which the trustees may think it proper that the persons receiving such directions should make, begin, do, or concur in.

C. To grant or cause to be granted any lease, or create any tenancy for any period not exceeding a tenancy from year to year, and subject to any provision.

D. With such consent as is mentioned in rule 7, to grant or cause to be granted any lease, or create any tenancy for any period exceeding a tenancy from year to year.

E. With such consent as aforesaid to enlarge or alter the existing buildings, and to acquire any additional land, buildings, easements or rights.

F. To pay off, transfer, or otherwise deal with any mortgage for the time being existing, or to make, or cause to be made, any new mortgage either in fee or for any term of years, or otherwise, for any sum or sums not exceeding the amount of such existing mortgage.

G. With such consent as aforesaid to make, or cause to be made, any new mortgage either in fee or for any term of years, or otherwise, for any money exceeding 2,500*l.*, or other existing principal mortgage-money.

H. With such consent as aforesaid to sell.

I. To execute, and cause to be executed, such agreements, mortgages, conveyances,

deeds and assurances, as they shall think proper, and to receive or direct the payment or receipt of any money, and generally to do all acts necessary for effectually exercising the foregoing powers, or any of them, and especially to confer on any mortgagee or mortgagees any powers of sale or lease or other powers, and upon any sale to make any reservations, especially with regard to minerals or easements.

J. Generally in all matters not hereinbefore specified to deal with and manage the Sheffield Music Hall, as if the trustees were the absolute beneficial owners thereof.

K. To receive the rents and annual profits, and all income and capital monies arising from the Sheffield Music Hall, or the exercise of the powers aforesaid.

L. To make from time to time by-laws for regulating their proceedings as amongst themselves, and especially to name a quorum for meetings of their own body.

4. In confirmation and extension, but by no means in curtailment, of the powers and privileges arising expressly under the wording of these presents, the trustees shall be entitled to all powers and privileges incident to their office, especially under the provisions of the 22 & 23 Vict. c. 35. and 24 Vict. c. 145.

5. Out of the rents and annual profits, and money in the nature of income and not capital, the trustees shall annually, or oftener if they think proper, declare a dividend and such dividend shall be divided amongst the proprietors, according to their respective shares in the Sheffield Music Hall. The trustees may, from time to time, set aside such money (if any) as they shall think proper, as a reserved fund, to meet contingencies and in aid of future dividends, and such reserved fund shall rank as capital until it is otherwise appropriated. The reserved fund shall never, however, exceed 500*l.*; it may be invested by the trustees upon any securities allowed by law for trust-money, or upon mortgage of freehold, copyhold, or leasehold hereditaments, or upon the mortgages or debentures, or preferential stocks or shares of any municipal or other corporation or company incorporated by special act of parliament, and the income therefrom

shall rank as income from the Sheffield Music Hall.

6. All capital monies from time to time in the hands of the trustees, and not otherwise applicable under the provisions of these presents, shall belong to the proprietors according to their respective shares in the Sheffield Music Hall and shall be accordingly divided amongst them as early as may be after the receipt thereof.

7. The several powers hereinbefore given to the trustees, and respectively distinguished by the letters D, F, G. and H, shall be exercised by the trustees with the consent of the proprietors, testified by the resolution of a special general meeting of them, or by writing under the hands of such number of the proprietors as shall represent two-thirds of the shares.

8. The said Offley Shore, his heirs and assigns shall not, nor shall the said Marcus Smith and James H. Barber, their executors, &c., nor shall any lessee, mortgagee, purchaser or other person, be bound to inquire whether such consent as aforesaid has been obtained by the trustees whose directions and receipts shall in all cases be as effectual as if they were absolute beneficial owners.

13. Every transfer *inter vivos* of a share or shares shall be in the form following, or in such other form as the trustees for the time being shall approve, and shall be signed by, &c. &c.

Form of Transfer.

"I, _____, of _____, being the proprietor of the share No. _____ in the Sheffield Music Hall, in consideration of the sum of £ _____ sterling, paid to me by _____, of _____, do hereby grant the same share to the said _____, his heirs and assigns, subject to the provisions of the association deed, dated the 13th day of June 1864, and to any rules in force in pursuance of such deed; and I, the said _____ do hereby accept the said share, subject to such provisions and rules.

"As witness our hands and seals this day of _____."

32. If all the proprietors of shares in the Sheffield Music Hall shall not execute these presents, the same shall, nevertheless, bind all the parties who do execute the same, and the same proportion of majorities of the parties who do so execute shall bind

the whole of them as are hereinbefore appointed to bind the whole body of proprietors.

Cleasby, for the appellant.—The deed has not the effect of depriving the owners of their real estate so as to disfranchise them. It merely has the effect of creating a better management of the company. Here the shareholder has an equitable interest in the thing itself. The question will be, whether this case is within the principle of *Bennett v. Blain* (1). There the point was made and decided against the claimant, that the effect of the deed was to take away the interest in the realty. That case is distinguishable from the present one, for there the shares of the members were agreed to be considered as personalty, and the members had in fact no interest whatever in the land. In *Myers v. Perigal* (2), a bequest of the proceeds of shares in a joint-stock banking company, which possessed freehold and copyhold property, was held not to come within the Statute of Mortmain. But there by the deed of settlement the property of the company was to be deemed personal estate. Also, the deed could not come into operation until it had been executed by all the proprietors.

Hannen, for the respondent.—The legal estate was originally in a trustee with power to mortgage, and it was mortgaged; so that the legal estate is in the mortgagee. The nature of the interest will be what the *cestuis que trust* have agreed on. They cannot under the deed call on the trustees to hand over to them any specific part of the rents, but only their proportionate share of the profits. The only point of difference between this case and that of *Bennett v. Blain* (1) is, that the deed there contained a clause that the shares should be considered as personalty, which this deed does not; but that clause would not make them personalty—*Watson v. Spratley* (3). The 32nd rule renders the deed binding on all the shareholders that have executed it, and is an answer to the objection that the deed did not operate until executed by all the shareholders.

(2) 11 Com. B. Rep. 90; s. c. 21 Law J. Rep. (N.S.) C.P. 217.

(3) 10 Exch. Rep. 222; s. c. 24 Law J. Rep. (N.S.) Exch. 53.

Cleasby, in reply, referred to *Baxter v. Brown* (4).

in principle from the case of *Bennett v. Blain* (1).

Decision affirmed.

ERLE, C.J.—I think the decision of the revising barrister ought to be affirmed. Looking at the provisions of this deed and of that in the case of *Bennett v. Blain* (1), it appears to me that the two deeds operate substantially to produce the same interest, that is, the interest in the profits which are made by the management of the concern; and I take the principle laid down by my Brother Williams, in *Bennett v. Blain* (1) to be sound in law, that under deeds like this the shareholder has no direct interest in the land, but only a right to a share of the profits. The point about the whole of the shareholders not having executed, I think, is not available for the appellant, because the 32nd clause has made a provision that the deed shall be binding on every one who executes it, which precludes the appellant from any benefit on that point.

WILLIAMS, J.—I am also of opinion that we are bound in this case by the case of *Bennett v. Blain* (1). The principle on which that case was decided is applicable to the present. That principle I understand to be, that the trust, on which the equitable claim in question is founded, gives no direct right to any portion of the receipts of the music hall, but only to a proportionate share of the profits. That is a principle that has governed a very long series of cases on a question of, whether this sort of property is real or personal estate within the Statute of Mortmain. On that principle all the cases have been based, and it seems to me that it is impossible to say that that principle is wrong.

WILLES, J.—I am of the same opinion, and I give judgment in the words of my Brother Williams, in *Bennett v. Blain* (1), where he says, "A shareholder in a company of this description has no direct interest in or right to any specific portion of the property of the company, but only a right to receive a share of the profits."

KRATING, J.—I am of the same opinion, and I am unable to distinguish this case

(Appeal from Revising Barrister's Court.)
1864. } BENESH, appellant, v. BOOTH,
Nov. 23. } respondent.

Parliament—Borough Vote—Notice of Objection—Proof of Service by the Post—6 & 7 Vict. c. 18. s. 100.—Duplicate Notice.

Service of notice of objection, addressed to a borough voter, and sent by the post, pursuant to section 100. of the 6 & 7 Vict. c. 18, is proved by producing a duly stamped notice signed by the objector, although it be headed with the word "copy"; such heading not vitiating the document as a duplicate, if in all other respects it corresponds with the notice left with the postmaster.

Appeal against the decision of the Revising Barrister appointed to revise the list of voters for the City of London.

Thomas Woodzell Booth, on the list of voters of the Livery of the Company of Distillers, objected to the name of Maurice Benesh being retained on the list of voters for the parish of St. Botolph Without, Aldersgate. The objector being called upon to prove that he had given the notices of objection required by the Registration Act, duly proved the requisite notice given to the overseers, as to which, therefore, no question arises in this case; and the person who posted the notice directed by the act to be served on the party objected to, produced before the Revising Barrister the notice duly stamped with the stamp of the London Post Office, of which the following is an exact transcript :

(COPY.)

"To Mr. Maurice Benesh.

"I hereby give you notice that I object to your name being retained on the list of persons entitled to vote in the election of members for the City of London. Dated this sixteenth day of August one thousand eight hundred and sixty-four.

"Thomas Woodzell Booth,

"12A, Manor Place, Walworth, S.,
(on the list of voters of the Livery
of the Company of Distillers.)"

It was admitted that the word "copy"

(4) 7 Man. & G. 198; s. c. nom. *Baxter v. Newman*, 14 Law J. Rep. (N.S.) C.P. 198.

on the notice produced before the Revising Barrister was on the notice before it was taken to and stamped at the post-office; and that the words "Thomas Woodzell Booth," subscribed thereto, were in the proper handwriting of the objector. An objection was thereupon made before the Revising Barrister to the reception of any parol evidence to explain the state of the notice retained by the postmaster to be forwarded to the address thereon; but he admitted the party posting the said notice to supply such explanation, and he proved on oath to the satisfaction of the Revising Barrister that the word "copy" was not on the notice retained by the post-office to be forwarded to its address.

The Revising Barrister thereupon held that it had been duly proved that the objector had given the notices of objection required by the Registration Act, and called upon the party objected to, to prove that he was entitled to have his name inserted in the list of voters in respect of the qualification described in the list, and on his failure to do so he was expunged from the list.

For the appellant it was, *inter alia*, contended before the Revising Barrister: First, that parol testimony was inadmissible to prove the contents of the notice retained to be forwarded by the postmaster, the same being a judicial instrument required by statute to be in writing, and which in this case, by the express words of the 100th section of the Registration Act, must explain and prove and be complete in itself. Secondly, that while the Registration Act allows a certain latitude in the forms of notices for counties and for claims and also of notices of objection to overseers in cities and boroughs, provided the words employed be "to the like effect" of the statutory form, it admits of no such deviation in the case of borough notices to be served on parties objected to; and therefore the notice now in question was not according to the form numbered (11) in the schedule B., in which the word "copy" does not appear. Thirdly, that a statutory judicial written instrument must be held in law to be what on the face of it it purports to be, and that, inasmuch as the notice produced before the Revising Barrister purported to be a "copy," it could not be adduced by its author as

the original notice required by the act. That the word "copy" was not surplusage, because it was a term which assigns a distinctive and specific negative character to the document to which it is affixed, amounting in fact to a protest on the part of its utterer that, as against him, such document is not to be allowed to have the effect and authority of an original—not to have the effect, in short, in the present instance, of proving that the objector gave the notice required by the act without evidence of which the party objected to would not be *in foro*, or entitled to the costs of a groundless objection. That the notice was not the less a "copy" because the words "Thomas Woodzell Booth" were in the actual handwriting of the objector, inasmuch as it was as competent for himself as for any amanuensis to make copies of his own notices; and the case was likened to that of a foreign bill of exchange (which requires no stamp) if it bears the word "copy" on it before it is issued, and which would not become an original in the hands of an indorsee merely because the transcription was made in the handwriting of the acceptor. Fourthly, that if the notice left with the postmaster to be forwarded to its address did not bear the word "copy," it was not a duplicate of the notice produced before the barrister, and could not therefore be the notice required by the act.

On the part of the respondent it was contended, *inter alia*, first, that the word "copy" was not part of the contents of the notice, and might be treated as surplusage; secondly, that the notice was constituted an original duplicate by having been signed by the objector *propria manu*; and, thirdly, that it was proved that the alleged duplicates were essentially alike.

Hannen (Underdown with him), for the appellant.—The notice of objection is required by section 17. of 6 & 7 Vict. c. 18. to be given to the party objected to. The ordinary proof of service was not given in this case, but the notice was sent by the post, and therefore the requisites of section 100. of that act ought to have been strictly complied with, and parol evidence as to whether the word "copy" was in the notice retained by the postmaster to be forwarded by him was not admissible by the Revising Barrister. The legislature only intended the

postmaster to execute the mechanical office of comparing the notice and duplicate in order to see whether they corresponded with each other, word for word, and there is no authority to supplement the statutory proof with any other evidence. If the appellant is right as to this, then the word "copy" must be assumed to have been in what was forwarded to the voter, and consequently the voter had a right to disregard it, as he is entitled by the statute to receive an original notice. If, however, the Court are of opinion that such parol evidence was admissible, then the two documents were shewn not to be in all respects alike, and consequently not duplicates, as required by the statute. In *Toms v. Cuming* (1) the notice sent by the post was signed by the objector, and the duplicate by an agent in his name, and it was held that the notice was not proved by the production of the latter; and in *Birch v. Edwards* (2) it was held that the service by the post under this section 100. was not proved by a stamped duplicate similar in all respects to the notice left with the postmaster, save that it had no external address. These cases shew that to satisfy the statute, the two documents must be in such a state that the postmaster may use either as an original.

Fawcett, for the respondent, was not heard.

ERLE, C.J.—I think that the objection made to the notice of objection in this case cannot be held valid. The statute contains a provision for sending the notice by the post where the objector chooses to avail himself of that means, and in that case there must be a duplicate original kept by the objector, and a duplicate original sent by the post to the party objected to. Now, I think, if one notice was headed "duplicate" and not the other, and both in all other respects corresponded, there would still be a compliance with the statute. In common parlance, when there are two duplicate notices, one is called the copy of the other. In law, all notices are originals, and yet I am sure I have witnessed innumerable instances in

which the server of a notice has produced a duplicate and said, "I served a copy of this notice on the other party." I think, therefore, that heading a duplicate original notice in this case with the word "copy" has not in the smallest degree affected its validity.

KEATING, J.—I am also of opinion that this is a good notice, and that the word "copy" has not at all vitiated it. The case *Mr. Hannen* has referred to of *Birch v. Edwards* (2) is one in which the Court held that the variance was very material, because what the Court really decided there was, that the external address was part of the notice; as soon as that was decided, an essential variance between the two documents was established by shewing that one of them omitted the external address. The external address might be very essential, and *Wilde, C.J.* says, in terms, the postmaster could only act upon the information given to him by the external address. It may be, no doubt, not only material but very material. It seems to me that the present case does not come at all within that principle, and that the revising barrister was quite right.

Decision affirmed, with costs.

1864. }
Nov. 11. }

TAYLOR v. HUMPHRIES.

Sunday Trading—Refreshment to Travellers—11 & 12 Vict. c. 49. ss. 1, 3, and 4.

The word "travellers" in the 11 & 12 Vict. c. 49, which prohibits the sale of refreshment on Sunday by persons licensed to sell beer or other fermented liquors "except to travellers," includes any persons who go abroad for purposes of business or pleasure, and who need refreshment.

As the exception is contained within the section of the act which creates the offence, the onus of shewing that the persons supplied with refreshment are not within it is on the informer.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 1.]

(1) 7 Man. & G. 88; s.c. 14 Law J. Rep. (N.S.) C.P. 67.

(2) 5 Com. B. Rep. 45; s.c. 17 Law J. Rep. (N.S.) C.P. 32.

1864. }
June 17.* } EDMONDSON v. NUTTALL.

Action for Conversion of Goods—Measure of Damages.

The defendant had obtained a judgment in the county court against the plaintiff. At the time the judgment was obtained he had in his possession goods belonging to the plaintiff, which he had no right to retain. After judgment in the county court the plaintiff demanded his goods, which the defendant refused to deliver up. After the demand, the defendant issued execution on the judgment in the county court, seized and sold the goods in his possession, and applied the proceeds in satisfaction of the debt:—Held, that the plaintiff was entitled to recover, in an action for conversion, the full value of the goods, and that the jury ought not to take into consideration, in mitigation of damages, the fact that the goods had been subsequently applied in satisfaction of the plaintiff's debt to the defendant.

This was an action tried, before Blackburn, J., at the last Spring Assizes for the county of York.

The declaration contained a count for the conversion of seven looms, the property of the plaintiff, upon which count the present question turned.

It appeared that the plaintiff had taken standing room and power for twelve looms in the defendant's mill, for which he was to pay 9½d. a week for each loom. The looms were placed in the mill; but the weekly payments having fallen into arrear, an arrangement was made that the defendant should take five of the looms in satisfaction of his claim. The other seven looms remained in the mill, and the weekly payments fell again into arrear.

On Friday the 29th of January 1864 the defendant obtained judgment in the county court against the plaintiff for 28l. debt and 11l. 15s. costs, on account of the arrears, and an order was made that this amount should be paid by the plaintiff on the Monday following.

On Saturday the 31st of January the plaintiff came to the mill with the intention of removing the looms, but the defendant

made an excuse for not letting him have the looms on that day, and desired him to come again on Monday. The plaintiff came on the Monday, but the defendant refused to let him have the looms. On the following day the defendant caused the looms to be seized and sold under an execution issued upon the judgment of the county court, and received the proceeds.

The learned Judge told the jury that, in estimating the damages to which the plaintiff was entitled for the conversion of the looms, they might take into consideration that the proceeds of the sale had been applied in reduction of the plaintiff's debt to the defendant, and the probabilities at the time of the conversion that they would be taken in execution under the county court process. He also requested them to find the value of the looms, in case it should subsequently be held that the plaintiff was entitled to recover their full value.

The jury found for the plaintiff with damages one farthing, and they also found the value of the looms to be 35l.

Leave was reserved to the plaintiff, to move to increase the damages to 35l., if the Court should be of opinion that the plaintiff was entitled to recover the full value of the looms at the time of the conversion.

Overend having obtained a rule accordingly,—

Seymour shewed cause.—The plaintiff is only entitled to nominal damages. The looms would have been certainly seized. This is not unlike the case of *Brierly v. Kendall* (1). There the goods of the plaintiff were seized by the defendant under a power created by contract, but there was an informality in the execution of the power; and it was held that the plaintiff might maintain an action of trespass, but was not entitled to recover the full value of the goods. The recent case of *Johnson v. Stear* (2) affirms the same principle to the fullest extent. It shews that the real damage is to be looked to. In *Chinery v. Viall* (3) it was held, that where an unpaid vendor sold goods the property in which had been transferred to the vendee, the vendee in an action

(1) 17 Q.B. Rep. 987; s. c. 21 Law J. Rep. (N.S.) Q.B. 161.

(2) 15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130.

(3) 5 Hurl. & N. 288; s. c. 29 Law J. Rep. (N.S.) Exch. 180.

* Decided in the Sittings after Trinity Term.

of trover could recover only the difference between the price agreed on and the value of the goods. If the plaintiff recovers the full value of these goods, he will in fact escape payment of his debt to the defendant. This transaction amounts to a re-delivery of the goods to the plaintiff, the proceeds having been applied to his use. — [He also referred to *Cameron v. Wynch* (4) and *Mayne on Damages*, p. 215.]

Overend and Row, contra. — The plaintiff is entitled to full damages. The case of *Attark v. Bramwell* (5) is very like the present. There the landlord, though entitled to rent, had distrained wrongfully, and was a trespasser *ab initio*. It was held, that the tenant was entitled to recover the full value of the goods distrained, although the proceeds were applied in satisfaction of the rent. *Keen v. Priest* (6) is to the same effect. There would be an end to all distinction between remedies, and creditors could take the law entirely into their own hands, if the doctrine contended for were acceded to.

WILLIAMS, J. — I am of opinion that this rule ought to be made absolute to enter the verdict for the plaintiff for 35*l*. The damages upon the count in trover, which was found for the plaintiff, were entered for a nominal amount, and the learned Judge reserved leave to the plaintiff to move to increase them, if we should think he was entitled to recover the value of the looms at the time of their conversion, and if the judge was wrong in telling the jury that they might take into consideration, in assessing the damages, the probability that the looms would be taken in execution, and so their value be lost to the plaintiff. I think the plaintiff is entitled to recover the full value of the looms, and that the jury ought not to have been told to consider the probability of their being taken in execution. The defendant committed a wrong by dealing with the goods in a manner which clearly amounted to a conversion. There can be no doubt of that. But it is said that the rule, which *prima facie* undoubtedly applies, namely, that the plaintiff in trover

is entitled to recover the full value of the goods, is not applicable in this case, because the defendant can shew mitigating circumstances, which will justify the jury in giving a less sum.

The circumstances which the defendant relies on for this purpose are, that he caused the goods to be sold, and the proceeds to be applied in satisfaction of a debt due to him by the plaintiff, of which the plaintiff has had the full benefit; and that, therefore, inasmuch as the amount of debt cancelled is equal to the full value of the goods, and the goods would, in course of legal process, in all probability, have been seized and sold to satisfy this very debt, the defendant has really suffered only a nominal injury, and that he ought to recover only nominal damages. But I entirely deny the soundness of this reasoning. A man who suspects that his goods are about to be taken in execution, is fully entitled to remove them out of the way in order to apply them to any lawful purpose; and a creditor who has got possession of the goods of his debtor cannot apply them to the satisfaction of his debt; for if he might, why may he not also apply them in satisfaction of a debt due to his friend, who, he knows, is going to issue execution? In either case, it might be urged that the debt is satisfied, and the debtor not injured. This is likened to the case of a re-delivery; but it is no such thing. *The Countess of Rutland's case* (7) is, no doubt, an authority that, in an action of trover, a re-delivery of the chattel, though no answer to the action, goes in mitigation of damages. *Moon v. Raphael* (8) also shews that acceptance of the goods after action brought could be shewn in mitigation of damages. But those cases have no application here; for the goods never were re-delivered to the plaintiff at all. He never had the slightest power or control over them, nor were they disposed of in accordance with his wishes. They were kept from him, and were, in spite of him, appropriated to the payment of this debt.

It is urged that if we allow the plaintiff to recover full damages in this action, he will, in fact, get his money twice over; for that he will not only have the full value of the goods, but also the advantage of

(4) 2 Car. & K. 264.

(5) 32 Law J. Rep. (N.S.) Q.B. 146; s.c. 3 B. & S. 528.

(6) 12 Q.B. 236; (N.S.)

(7) Moore, 266.

(8) 2 Bing. N.C. 310.

having had his debt cancelled. But that is not so; for when this judgment in the plaintiff's favour for the full value of the goods is recorded, the property in the looms will vest in the defendant, and there will no longer be any satisfaction of the plaintiff's debt to the defendant, who may at once issue fresh process upon the judgment in the county court.

I therefore think that the circumstances relied on afforded no ground for mitigating the damages, and the learned Judge ought so to have told the jury. The result is, that in accordance with the arrangement made at the trial, the verdict will be entered for the plaintiff for the full value of the goods converted.

WILLES, J.—I am of the same opinion. Ordinarily, in cases of this kind, the measure of damages is the full value of the goods converted, and the jury ought so to have been told, unless there were in the case some circumstances of mitigation which the jury ought to take into consideration. Such as if the plaintiff had a lien on the goods, as in *Brierly v. Kendall* (1), and the other similar cases which have been referred to. Or, as in *Harvey v. Pocock* (9), where the landlord, in distraining for rent, took goods which were not, in law, liable to be distrained. There the tenant who brought the action for illegal distress had had, in fact, part satisfaction by the return of the goods, and it might be used in mitigation of damages. Another case is that of an executor *de son tort*, who can set up the payment of debts owing by the deceased in answer to an action by the real executor to recover the assets. That is a very peculiar case; but I may observe, that there the act is done in due course of administration, and ought to have been done by the real executor, and the latter is only prevented from recovering the assets when they have been properly applied. Here the defendant at the time of the conversion had no right at all to the goods; nor any right to dispose of them; nor has he disposed of them in a way which can operate as any satisfaction of the plaintiff's claim. Subsequently to the conversion, the defendant acquired a right to the goods; but this is a right which he could not have exer-

cised but for a wrongful act of his own in taking possession of the goods; and it would be against the plainest principle to allow a man to take advantage of his own wrong. As to there being a re-delivery, it would be contradicting the plain facts of the case to say there was anything like it. The defendant has here acted without the authority of the law, and much violence and illegality might occur, if it were left to the jury without any guidance by rules of law, to say, in each particular case, what damages the injured party had suffered. In conclusion, I would refer to the somewhat similar case of *Gillard v. Brittan* (10). It was there contended that in an action by the buyer against the seller of goods for wrongfully retaking possession of them after delivery, the plaintiff was not entitled to recover the full value of the goods because the buyer had never paid for them; and that the jury might treat the value of the goods retaken as a satisfaction *pro tanto* of the plaintiff's debt to the defendant. But the Court of Exchequer, for reasons which are equally applicable to this case, refused to accede to this contention, and held that the plaintiff was entitled to recover the full value of the goods.

BYLES, J.—At first I entertained some doubts in this case, but they are now entirely removed. There is a great distinction between the re-delivery of goods to the owner and the application of them in a manner which may be to the owner's benefit but is not in accordance with his wishes. It is true the goods here have been applied in satisfaction of a debt due from the plaintiff; but then it is one which the plaintiff was unwilling to satisfy. This difficulty also occurred to me: that the defendant's debt was satisfied, and if the plaintiff recovered the full value of the goods he would be a great gainer. But that is not so, because the effect of our judgment will be, that the property in the goods is changed, and that the defendant can get fresh satisfaction of his claim against the plaintiff. I have no doubt whatever that the jury ought to have given the full value of the goods.

Rule absolute.

(9) 11 Mee. & W. 740; s.c. 12 Law J. Rep. (N.S.) Exch. 434.

10) 8 Mee. & W. 575.

1864. }
Nov. 17. } EICHHOLZ v. BANNISTER.

Sale of Chattel—Warranty of Title.

On the sale of goods there is a warranty of title, if the seller, at the time of the sale, either by words or conduct, affirm the goods to be his.

Where goods are sold in a shop, by a shopkeeper in the ordinary course of his business, such shopkeeper is understood by his conduct to affirm that he is the owner of such goods, and to warrant the title, and therefore, in case of defect of title and of the purchaser being deprived of the goods by the true owner subsequently claiming them, the money paid for the purchase may be recovered back from such shopkeeper.

This was an action brought in the court of record for the trial of civil actions within the city of Manchester, and which was tried before the Deputy Recorder of that city.

The declaration contained the common indebitatus counts, for money received for the use of the plaintiff, and for money paid; and the only plea was, never indebted.

The plaintiff claimed 19*l.*, as money received to his use by the defendant under the following circumstances: The defendant is a job-warehouseman, at Chorlton Street, Manchester, and on the 18th of April 1864 the plaintiff went to the defendant's warehouse and bought of him certain pieces of print, which the defendant represented as a job-lot just received by him. The following is a copy of the invoice which was made out at the time of the purchase:

" 20, Chorlton Street, Portland Street,
Manchester, April 18, 1864.

" Mr. Eichholz Bought of R. Bannister, job-warehouseman. Prints, grey fustians, &c., job and perfect yarns, in hanks, cops and bundles:

" 17 pieces of prints, 52 yards,
at 5½*d.* per yard . . . £19 6 0
1½ for cash . . . 0 6 0

£19 0 0"

The price, 19*l.*, was thereupon paid by the plaintiff, and the goods were afterwards duly delivered.

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The goods so bought by the plaintiff had, in fact, been stolen from the warehouse of John Krauss, by one Richard Aspinall, who was subsequently convicted of the offence; and the plaintiff, being ultimately obliged to restore the goods to Krauss, required the defendant to return the money he had paid for them. The defendant refused to comply with such request, and, therefore, the present action was brought.

At the trial, it was submitted, on behalf of the defendant, that the plaintiff could not maintain the action, as there was no warranty of title upon the sale in question. A verdict, however, was found for the plaintiff for the amount claimed, with leave reserved to the defendant to move to enter a nonsuit, or a verdict for the defendant if the Court should be of opinion that there was no such warranty.

Holker afterwards obtained a rule nisi to that effect, citing *Morley v. Attenborough* (1), *Crosse v. Gardiner* (2) and *Hall v. Conder* (3).

C. Pollock now shewed cause.—This was a sale by the defendant under such circumstances as would amount to a warranty of title, or at all events, as would entitle the plaintiff to recover back the price paid for the goods, as upon a total failure of consideration. It is stated in *Addison on Contracts*, 5th edit. p. 224, that "wherever a man sells goods as owner, he impliedly undertakes and promises that the goods are his own goods, and that he has a right to make the sale and transfer he professes to make; and if he was not the owner at the time of the sale, and was not selling his own goods, but the goods of a third party, who subsequently claims them and deprives the purchaser of them, he is responsible in damages for the breach of such implied undertaking." In support of this, reference is there made to the French *Cod. Civ.* art. 1599. There is the authority of Mr. Justice Blackstone to shew that there is such implied warranty of title where the seller sells the article as his own—2 *Black. Com.* 451. Such, also, is the American law—2 *Kent's Com.* 478. *Crosse v. Gardiner* (2) was an

(1) 3 Exch. Rep. 500; a.c. 18 Law J. Rep. (N.S.) Exch. 148.

(2) Carth. 90.

(3) 2 Com. B. Rep. N.S. 22; s.c. 26 Law J. Rep. (N.S.) C.P. 288.

action against a seller for falsely affirming that the goods were his own, and the action was held to lay on this bare affirmation. In *Medina v. Stoughton* (4) Lord Holt says, "Where a man is in possession of a thing, which is colour of title, an action will lie upon a bare affirmation that the goods sold are his own." Lee, C.J., in *Ryall v. Rowles* (5), referring to the case *L'Apostre v. L'Plastrier* (6) says, that it was there "held by the Court that offering to sell generally was sufficient evidence of offering to sell as owner." The decision of *Morley v. Attenborough* (1) was this: In a sale by a pawnbroker of an article described as a forfeited pledge, there is no implied warranty of an absolute title, for all that the pawnbroker undertakes is, that the article so sold is a pledge, and irredeemable; but in delivering the judgment of the Court in that case Lord Wensleydale said, "We do not suppose that there would be any doubt if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased." The case of *Chapman v. Speller* (7) does not militate against the plaintiff, as there the articles were sold at a sheriff's sale, where it is always understood that there is no warranty of title. In *Sims v. Marryat* (8) it was not necessary to determine whether there was an implied warranty of title, as there was there evidence to satisfy an express warranty; but Lord Campbell states there are many exceptions to the rule of *caveat emptor*, "which well nigh eat up the rule. Executory contracts are said to be excepted, so are sales in retail shops, or where there is a usage of trade; so that there may be a difficulty in finding cases to which the rule would practically apply."

Holker, in support of the rule.—In the sale of a specific chattel, such as the sale was in this case, there is no implied warranty of title, and in the absence of any

fraud or knowledge of defect of title the seller is not responsible—*Chandelor v. Lopus* (9), *Noy's Maxims*, c. 42. s. 209, *Hall v. Conder* (3) and *Ormrod v. Huth* (10). The case which is perhaps nearest to the present one is that of *Springwell v. Allen* (11). That was "an action upon the case for falsely and fraudulently selling a horse to the plaintiff as the proper horse of the defendant, *ubi revera*, it was the horse of Sir J. L. because the plaintiff could not prove that the defendant knew it not to be his own horse (for the declaration must be that he did it fraudulently or knowing it to be not his own horse), for the defendant bought the horse in Smithfield, but not legally tolled; the plaintiff was nonsuited."

[ERLE, C.J.—Is there any case in which where goods have been sold as if they were the vendor's own, it has been decided that the purchaser cannot get back the money he paid for them on its turning out that the goods were not the vendor's?]

In *Waller's case* (12), it is said, "If a man sells goods for money to be paid at several days, in such case although the goods be taken by one who hath right before the day, yet the seller shall have an action of debt in respect of the contract."

[ERLE, C.J.—That is not a decision, but only the dictum of a Judge,]

The case of *Morley v. Attenborough* (1) is a decision in support of the proposition, that on the sale of personal chattels there is no implied warranty of title. In *Early v. Garrett* (13), Littledale, J. says, "It has been held that where a man sells a horse as his own, when in truth it is the horse of another, the purchaser cannot maintain an action against the seller, unless he can shew that the seller knew it to be the horse of the other at the time of the sale." And in *Ormrod v. Huth* (10), Tindal, C.J. states, "That although the cases may in appearance raise some difference as to the effect of a false assertion or representation of title in the seller, it will be found on examination that in each of those cases there was either

(4) 1 Raym. 593.

(5) 1 Ves. sen. 352.

(6) 1 Wms. Saund. 318.

(7) 14 Q.B. Rep. 621; s.c. 19 Law J. Rep. (N.S.) Q.B. 239.

(8) 17 Ibid. 281; s.c. 20 Law J. Rep. (N.S.) Q.B. 281.

(9) Cro. Jac. 4.

(10) 14 Mee. & W. 651; s.c. 14 Law J. Rep. (N.S.) Exch. 366.

(11) Aley, 91, and in the note to *Williamson v. Allison*, 2 East, 448.

(12) 3 Rep. 22 a.

(13) 9 B. & C. 928.

an assertion of title embodied in the contract or a representation of title which was false to the knowledge of the seller." All the authorities are collected in *Broom's Maxims*, 3rd edit. p. 718, and it is there said in the words of the judgment of the Court in *Hall v. Conder* (3), "Upon the whole, we may safely conclude that with regard to the sale of ascertained chattels there is not any implied warranty of either title or quality, unless there are some circumstances beyond the mere fact of a sale from which it may be implied." If that be so, can it make any difference whether the sale is in a shop or not? In almost all sales the seller sells the article as if he was the owner; and if the sale itself is not sufficient to raise the inference of such warranty being intended, the mere circumstance of the sale being in a shop ought not to alter the matter. With respect to the question, whether the money paid by the purchaser can be recovered back as on a failure of consideration, it depends on the first question, viz., whether there has or has not been a warranty of title, for if there has been such warranty, and the same has been broken, it is admitted that such action would be maintainable. In *Morley v. Attenborough* (1), Parke, B. says in delivering the judgment, "The purchaser may recover back the purchase-money as on a consideration that failed, if it could be shewn that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title; but if there is no implied warranty of title, some circumstances must be shewn to enable the plaintiff to recover for money had and received." Indeed, if there was no such warranty, the purchaser got what he bought, and he took upon himself the risk of want of title.

ERLE, C.J.—I think that this rule should be discharged. The plaintiff has brought an action to recover back the money which he paid for goods which he bought in the defendant's shop. The goods were afterwards taken from him by the true owner, they having in fact been stolen; and this action is brought to have the price which the plaintiff paid for such goods returned to him by the defendant. The verdict was for the plaintiff, and this rule was obtained by Mr. Holker, to set the same aside and to enter

a verdict for the defendant, on the ground that in point of law a vendor of personal chattels does not enter into a warranty of title, but that the purchaser takes them at his peril, and the rule of *caveat emptor* applies. The matter has been well argued before us; and I decide, in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirm that he is the owner, or by his conduct give the purchaser to understand that he is such owner, then it forms part of the contract, and if it turn out that in fact he is not the owner the consideration fails, and the money so paid by the purchaser can be recovered back. Lord Wensleydale, in *Morley v. Attenborough* (1), so puts the law as I now decide, and he there says, "We do not suppose that there would be any doubt if the articles are bought in a shop professedly carried on for the sale of goods that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor 'sells as his own,' and that is what is equivalent to a warranty of title." I think where the sale is as it was in the present case, the shopkeeper does by his conduct affirm that he is the owner of the article sold, and he therefore contracts that he is such owner; and if he be not in fact the owner, the price paid for the purchase can be recovered back from him. So much for the present case; but Mr. Holker has contended that he is warranted by the dictum to be found in several of the authorities, that there is no implied warranty of title on the sale of personal chattels. I advert to the following passage in *Noy's Maxims*, p. 209: "If I take the horse of another man and sell him, and the owner takes him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, and *caveat emptor*." This at first sight would shock the understanding of ordinary persons, but I take the meaning of the principle which it enunciates to be that where the transaction is of this nature: that I have the manual possession of a chattel, and without my affirming that I am the owner or not, you choose to buy it of me as it is, and to give me the money for it, you the purchaser taking it on those terms, cannot afterwards recover back from me the price

you have paid because it turned out that I was not the true owner. The case of *Morley v. Attenborough* (1) was decided on that principle. A pawnbroker in selling a forfeited pledge gives notice that it is not his own, and that his title is only a right to sell by the statute, and therefore in that case it was held that upon the real owner recovering the article from the purchaser, the pawnbroker was entitled to keep the money. So in *Chapman v. Speller* (7), where goods had been bought at a sheriff's sale, which were afterwards claimed by the true owner, it was held that the price paid for them could not be recovered back. That was because a sheriff when he sells under an execution gives notice to all who may choose to buy at his sale that they take what they so buy at their own peril. And in *Hall v. Conder* (3) there was a sale of a share of a patent right, and it seems to me, therefore, that the subject of the sale was not matter, but a right which had not any material existence, and that the patent right (which was all that was so bought) was there transferred to the purchaser according to the contract. In all these cases I think the conduct of the vendor expressed that the sale was a sale of such title only as the vendor had; but in all ordinary sales the party who undertakes to sell exercises thereby the strongest act of dominion over the chattel which he proposes to sell, and would therefore, as I think, commonly lead a purchaser to believe that he was the owner of the chattel. In almost all ordinary transactions in modern times the vendor, in consideration of the purchaser paying the price, is understood to affirm that he is the owner of the article sold. That is so put by Mr. Justice Blackstone, and is also recognized by Lord Wensleydale in *Morley v. Attenborough* (1). I think the proposition in the passage quoted from *Noy's Maxims* is merely a dictum, and has been always so treated, and though often repeated, I can never find more than a repetition of such dictum. The present case shews, I think, the wisdom of Lord Campbell's remark on the judgment of Parke, B. in *Morley v. Attenborough* (1), when he said in *Sims v. Marryatt* (8), "It may be that the learned Baron is correct in saying that on a sale of personal property the maxim of *caveat*

emptor does by the law of England apply, but if so, there are many exceptions stated in the judgment which well nigh eat up the rule."

BYLES, J.—I am of the same opinion. It has been stated over and over again that the mere sale of chattels does not involve a warranty of title, but certainly, such statement stands on barren ground, and is not supported by one single decision, and it is subject to this exception, that if the vendor by his acts or by surrounding circumstances affirm the goods to be his, then he does warrant the title. Thus, it is stated in 2 *Kent's Commentaries*, p. 478, "If the seller has possession of the article and he sells it as his own and not as agent for another, and for a fair price, he is understood to warrant the title;" but in the passage just before this it is said by the same learned author "In every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril." With respect, however, to such distinction between the vendor's being in and out of possession, which is founded on a dictum of Holt, C.J. in *Medina v. Stoughton* (4) Mr. Justice Buller says that, in his opinion, if there be any difference, the case in favour of a warranty is strongest against the vendor when he is out of possession—*Pasley v. Freeman* (14). Lord Campbell was right when he said that the exceptions to the application of *caveat emptor* had well nigh eaten up the rule.

KEATING, J.—I also am of the same opinion. Whether the present case be an exception to the general rule, or form part of it, we do not controvert any decision nor even dictum, when we say that under the circumstances of the present case there was a warranty of title, because the goods here were bought in a shop and the seller drew up an invoice, in which it was represented that he was selling the goods in the ordinary course of business. There was, therefore, here a sale in a shop, which is mentioned by Parke, B. in *Morley v. Attenborough* (1) as one of the circumstances which would shew a warranty of title. We have been asked by the learned counsel for

the defendant what, if any, is the distinction between a sale of goods in a shop and a sale of goods out of a shop. The distinction may certainly be fine, and there may be a sale out of a shop by a person exercising a right of ownership over the article sold in the same way as by a sale in a shop, but it is not necessary to decide that point, because here the circumstances of the sale were such as to shew that the defendant sold the goods as owner.

Rule discharged.

1864. }
Nov. 21. } HARRISON v. BLACKBURN.

Bill of Sale—Assignment of Personal Estate—Term of Years—Possession to maintain Trespass.

B, who was yearly tenant of the dwelling-house which he occupied, being indebted to the plaintiff, executed a bill of sale, by which he assigned to the plaintiff "all the household goods, furniture, stock-in-trade and other household effects, and all other goods, chattels and effects in or about the said dwelling-house," "and all other the personal estate whatsoever," of the said B, with power to the plaintiff to sell the same in case of default in payment of the debt due to him from B, and to stand possessed of the monies to arise from such sale, upon trust to satisfy the expenses and debt, and to account for the surplus, if any, to the said B:—Held, that notwithstanding the general words used, B's term or interest in the said dwelling-house did not pass under such bill of sale to the plaintiff.

Held, also, that even if the term did pass, the plaintiff could not before entry maintain an action of trespass in respect of such dwelling-house.

Trespass for breaking and entering the plaintiff's dwelling-house and premises, called the Bull's Head Inn, and seizing and converting to the defendant's use divers trade and other fixtures and goods of the plaintiff, and ejecting the plaintiff from the said dwelling-house and fixtures.

Pleas—first, not guilty; secondly, a traverse that the said dwelling-house, fixtures and goods were the plaintiff's; and thirdly, leave and licence.

The action was brought in the Common Pleas at Lancaster, and was tried before Williams, J., at the Liverpool Winter Assizes for 1863, when it was agreed that the facts should be stated for the opinion of the Court in the following SPECIAL CASE.

Prior to the month of July 1863, John Battersby was tenant of the Bull's Head Inn, in the declaration mentioned. In the month of December 1861 the said John Battersby was indebted to the plaintiff, and on the 20th of the same month Battersby executed a bill of sale to the plaintiff, which was duly filed on the 3rd of January 1862. The said John Battersby was tenant from year to year of the said Bull's Head Inn, under the trustees of the will of the late Duke of Bridgwater, who were the owners of the Bull's Head Inn, his tenancy commencing in the month of November many years ago. On the 21st of July 1863 the said trustees distrained for two years' rent in arrear of the said Bull's Head Inn, viz., for the sum of 54*l.* 11*s.* 4*d.* On the 27th of July 1863 a sale took place at the Bull's Head Inn under the said distress, at which sale the whole of the movables, including furniture, stock-in-trade and tenant's fixtures, were sold and disposed of. The goodwill, if any, was not put up for sale, and was not, nor was professed to be, dealt with at the said sale. The sale did not realize sufficient to satisfy the arrears of rent and expenses. On the same day, viz., the 27th of July 1863, the said John Battersby signed the following memorandum, and gave up possession of the Bull's Head Inn and premises to his landlords, the said trustees to the late Duke of Bridgwater. The memorandum above referred to is in the words and figures following:

Bull's Head Inn, Township of Bedford, in the county of Lancaster.

I, James Battersby, occupier of the house known by the sign of the Bull's Head, in Bedford, and all premises, buildings, stabling and bowling-green connected therewith in my occupation as tenant to the trustees of the late Duke of Bridgwater. This agreement, made this day, witnesseth that I do hereby give up peaceable possession of all the aforesaid house and premises this day into the hands of Mr. Richard Higgins, the agent of the aforesaid premises for the trustees of the late Duke of Bridg-

water. As witness my hand this 27th day of July 1863. (Witness)

James Battersby (his + mark).

(Witnesses)

William Wilson,

Richard F.

On the same day, the 27th of July 1863, the said trustees let the said Bull's Head Inn and premises to the defendant, at a rent of 20*l.* per annum, who entered into possession on the same day, and still remains in possession. His tenancy commenced as and from the 12th of May 1863, but the payment of rent commenced from the said 27th of July 1863. The plaintiff by himself and by his agent has demanded of the defendant possession of the said Bull's Head Inn and premises, and has requested him to withdraw from the same, but the defendant has refused so to do. The goodwill of the said Bull's Head Inn and premises is of no value whatever.

The pleadings in this action on both sides, together with the said bill of sale which was in the words and figures following, formed part of this special case.

"This indenture, made the 20th day of December 1861, between James Battersby, of Bedford, in the county of Lancaster, innkeeper, of the one part, and John Harrison of Horwich in the said county of Lancaster, common brewer, of the other part. Whereas the said James Battersby is now indebted to the said John Harrison in the sum of sixty pounds for ale supplied by the said John Harrison to the said James Battersby between the 1st day of January 1858 up to the date of these presents, and the said James Battersby has agreed to secure the repayment thereof in manner hereinafter mentioned. Now this indenture witnesseth that, in pursuance of the said agreement in this behalf, and also in consideration of five shillings sterling to the said James Battersby now paid by the said John Harrison, the receipt whereof is hereby acknowledged, he the said James Battersby doth by these presents grant, bargain, sell and assign unto the said John Harrison, his executors, administrators and assigns, all and every the household goods and furniture, stock-in-trade and other household effects whatsoever, and all other goods, chattels and effects now being, or which shall hereafter be, in, upon, or about the

message or dwelling-house and premises occupied by the said James Battersby and known as the Bull's Head, situate in Bedford aforesaid, and all other the personal estate whatsoever of or to which the said James Battersby is now and from time to time and at all times hereafter, so long as any money shall remain due and payable to the said John Harrison, his executors, administrators and assigns, by virtue of these presents (1). And all the estate, right, title, interest, claim and demand of the said James Battersby, of, in, to, or upon the said several premises hereby assigned or intended so to be assigned, together with full power and authority which the said James Battersby doth hereby give and grant unto the said John Harrison, his executors, administrators and assigns, at the costs and charges of the said James Battersby, his executors or administrators, to use the name or names and act as the attorney or attorneys of the said James Battersby, his executors or administrators, in or about recovering, receiving, obtaining and giving effectual receipts and discharges for the same. To have, hold, take, receive and enjoy the said premises hereby assigned unto the said John Harrison, his executors, administrators and assigns, absolutely: provided, nevertheless, that in case the said James Battersby, his heirs, executors, or administrators, shall, on demand made thereof in writing by the said John Harrison, his executors, administrators or assigns, well and truly pay or cause to be paid unto the said John Harrison, his executors, administrators or assigns, the said sum of 60*l.*, the said payment to be made without any deduction, then these presents shall be absolutely void, anything hereinbefore contained to the contrary notwithstanding. And the said James Battersby doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said John Harrison, his executors, administrators and assigns, that he, the said James Battersby, his executors, administrators, and assigns, shall and will, on demand made thereof as aforesaid, pay or cause to be paid unto the said John Harrison, his executors, administrators, or assigns, the said sum

(1) So in the deed.

of 60*l.* in manner aforesaid, without any deduction and without fraud or further delay; but it is hereby expressly declared and agreed that, after default shall be made by the said James Battersby, his executors, administrators or assigns, in payment of the said sum of 60*l.*, contrary to the tenor and effect of the before-mentioned proviso, then and in such case it shall be lawful for the said John Harrison, his executors, administrators or assigns, to sell and dispose of the same premises, and every or any part thereof, for such price or prices as can be reasonably had or gotten for the same; and to receive and take the monies to arise from such sale or sales thereof, and to stand possessed of such monies upon the trusts following, that is to say, upon trust in the first place to retain, satisfy and discharge all costs charges and expenses incidental to these presents, and in the next place to satisfy, pay, deduct or return unto the said John Harrison, his executors, administrators or assigns, the said principal sum of 60*l.*, and from and after full payment and satisfaction of such costs, charges and expenses, and principal sum of 60*l.*, to render to and account for the surplus, if any, of the money arising from such sale or sales aforesaid, unto the said James Battersby, his executors, administrators or assigns. And it is hereby lastly declared and agreed, by and between both the said parties to these presents, that the receipt or receipts of the said John Harrison for any money payable to him under these presents shall be a good and sufficient receipt and discharge to any purchaser or purchasers.

"In witness, &c.

"James Battersby (his mark + and seal).

"John Harrison."

The question for the opinion of the Court was, whether, upon the true construction of the said bill of sale and on the state of facts above appearing, any right or interest in the Bull's Head Inn and premises, and the goodwill thereof, passed to the plaintiff sufficient to sustain the declaration against the defendants.

Edward James (*Baylis* with him), for the plaintiff.—The bill of sale passed the term in the Bull's Head Inn, which was then vested in Battersby; the words "and all other the personal estate whatsoever" of

Battersby, "and all the estate," &c. of Battersby "of, in, to or upon the said several premises hereby assigned," being large enough to pass his interest in the Bull's Head—*Ringer v. Cann* (2). The surrender to the landlord had no operation, as Battersby at that time had nothing to surrender.

Manisty, contra.—No sufficient interest in the inn has passed to the plaintiff to enable him to maintain this action. The plaintiff never entered, but only demanded possession of the premises; he cannot therefore maintain this action of trespass—*Litchfield v. Ready* (3) and *Turner v. Cameron's Coalbrook Steam, &c. Company* (4).

[*ERLE*, C.J.—*Williams v. Bosanquet* (5) shews that the assignee of a lease may be made liable for the rent, though he has never entered and taken actual possession.]

That case is cited by Pattenon, J. in *Ryan v. Clark* (6), as an authority "that entry is not necessary to the vesting of a term of years in the lessee"; "though," says that learned Judge, "for the purpose of maintaining an action of trespass, the lessee must enter; since that action is founded on the actual possession." As to the necessity of such entry before bringing trespass, many authorities are to be found cited in *Roscoe on Evidence*, 10th edit. p. 608. Moreover, there is nothing on the face of the bill of sale in this case to shew an intention to pass the term, or anything more than the personal goods and chattels of Battersby; and in that respect it differs from the case of *Ringer v. Cann* (2).

Edward James replied.

ERLE, C.J.—I am of opinion that the verdict in this action ought to be entered for the defendant. The plaintiff has brought an action of trespass for breaking and entering his dwelling-house and premises, known as the Bull's Head Inn, and he claims to be entitled to the term Bat-

(2) 3 Mee. & W. 843; s. c. 7 Law J. Rep. (N.S.) Exch. 108.

(3) 5 Exch. Rep. 939; s. c. 20 Law J. Rep. (N.S.) Exch. 51.

(4) 5 Ibid. 932; s. c. 20 Law J. Rep. (N.S.) Exch. 71.

(5) 1 Brod. & B. 228.

(6) 14 Q.B. Rep. 65; s. c. 18 Law J. Rep. (N.S.) Q.B. 267.

tersby had therein as having been assigned to him by Battersby by the deed of December 1861; and the first question is, whether such term was assigned to the plaintiff by that deed. That deed recites that Battersby had agreed to repay a sum of 60*l.*, which was due from him to the plaintiff. It afterwards assigns to the plaintiff all the household goods, chattels and effects in or about the dwelling-house and premises occupied by Battersby, and known as the Bull's Head, "and all other the personal estate whatsoever of the said James Battersby," "and all the estate," &c. "of the said J. Battersby of, in, to or upon the said several premises thereby assigned." Now, I think that leads me to the conclusion that the parties to that deed intended that it should be an assignment of chattels, as ordinarily understood by that expression, and not chattels real. General sweeping words have been often held to mean only things *ejusdem generis* with those which have been previously specified in the deed, and here they are confined to chattels, strictly so called; and such, I think, is the meaning of the deed. It is not likely that a creditor would take an assignment of a lease, by which he would make himself liable for the rent; and, at all events, if it had been meant that he should take the term, it is very reasonable to suppose that the deed would have contained some express provision about it. This deed provides that in case of default by Battersby in payment of the debt, the plaintiff may sell the premises—that is, the things assigned—and receive the money from such sale, upon trust to retain and satisfy the expenses and debt, and to render the surplus, if any, to Battersby; but there is no provision for paying the rent, which ordinarily would have been the case had it been intended that the plaintiff should become assignee of the term. Rent is always due from the assignee of a lease because of the covenant with the landlord; and it is therefore reasonable in such a case as this, had it been intended to pass the term, that some provision should have been made for the payment of the rent out of the proceeds of the sale. The case of *Ringer v. Cann* (2) was a decision upon a deed, in which there were terms like those in the present one; but there are two strong distinctions between that case and

the present, for there the assignment was for the benefit of creditors, and in former days the rule was for a debtor to assign in such case all his property, and in the next place, there the trust to sell contained a provision for the payment of the rent out of the proceeds of the sale. I therefore think the term did not pass under the general words in this deed.

I am also of opinion that an assignee of a term cannot maintain trespass unless he has actually entered on the premises. The law is so stated by Patteson, J. in *Ryan v. Clark* (6) and in *Roscoe on Evidence*. The mere assignment will prove the averment of the premises being vested in the assignee in an action on the covenant; but that, according to the authorities, is not sufficient, without actual entry, to enable the assignee to maintain trespass.

BYLES, J.—I am of the same opinion. No doubt, the personal estate of a person would include a term of years, whether such term was beneficial or not; but whether the term would pass under an assignment of the personal estate would depend on the intention of the parties, to be collected from the instrument. In *Payler v. Homersham* (7) the general words of release were restrained by the particular recital; and in *Rawlings v. Jennings* (8) the word "effects" in a will was restrained to articles *ejusdem generis* with those specified. The only difficulty I have felt has been occasioned by the case of *Ringer v. Cann* (2); but my Lord has well distinguished that case from the present one. I observe also that Parke, B., in *Ringer v. Cann* (2), refers to the clause as to the payment of the rent, and says that "it is not confined to the future, but applies to the bygone rent as well," and that "the provision enables the trustees to pay it, whether they take possession of the property or not." In the present case, if the intention had been to pass the term, the first directions of the trust would have been to pay the rent; but that is not so, and the plaintiff is to apply the proceeds to other purposes. There is also this further distinction, that in the case of *Ringer v. Cann* (2) growing crops were assigned, which made it more necessary that the

(7) 4 M. & S. 423.

(8) 13 Ves. 39.

term should have been also assigned. With respect to the other point, I overlooked at first the distinction between "ejectment" and "trespass"; but my Brother Keating has pointed that out to me, and that the objection against bringing ejectment before entry was obviated by the party defending being obliged to enter into an admission confessing the entry and ouster.

KEATING, J. — Not having heard the whole of the argument, I can only say that, as far as I have heard, I concur in the judgment of the Court as expressed on both points.

Judgment for the defendant.

1864. }
Nov. 21. } MITCALFE v. WESTAWAY.

Deed, Construction of—Reservation out of Lease—Assigns—Easement—Licensee.

To trespass for entering the plaintiff's land, described as land on each side of a certain slip, the defendant pleaded that before the plaintiff was possessed of the land, in which, &c., a certain railway company were the owners in fee of the said land and slip, and that they demised the land in which, &c., "excepting and reserving thereout the said slip, and the dues payable for the use thereof, and excepting and reserving to the said company, their assigns, officers, servants and workmen, free access to and from the said slip, for the purpose of using and working the same or otherwise," and that the said company granted their licence to the defendant to work and use such slip, and the plea justified the trespass as being committed in the exercise of such licence:—Held, a good defence, as the reservation in the demise enabled the company to use the slip by themselves or their licensees, and the word "assigns" was not to be construed as limited to persons taking an estate in the land.

Trespass for breaking and entering land of the plaintiff, described as land on each side of a certain slip, and placing and keeping on the plaintiff's land, on each side of the said slip, divers tools, &c.

Plea—That before the plaintiff was possessed of, or had any title, estate or interest in the said land, the then Eastern Counties

Railway Company, now called the Great Eastern Railway Company, were and still are seised in their demesne as of fee of and in the said land, and also of and in certain land and premises called and used, and to be used as a slip; and being so seised they, by a deed made between them of the one part, and William Stephen Andrews of the other part, demised and leased the said land, in which, &c., to the said W. S. Andrews, to hold the same to him for a certain term therein mentioned, and not yet expired, the said company excepting and reserving out of that demise the said slip, shewn and distinguished by the letter A in a map or plan drawn in the margin of the said deed, and the machinery and apparatus connected therewith, and the site thereof, and excepting and reserving unto the said company, their successors and assigns, officers, servants and workmen, free access at all times to and from the said slip for the purpose of working and using, or repairing the same or otherwise, and which said deed was and is in the words and to the tenor following: "This indenture, made the 25th day of March 1856, between the Eastern Counties Railway Company of the one part, and William Stephen Andrews, of Lowestoft, in the county of Suffolk, Esquire, of the other part, witnesseth that, in consideration of the rent hereinafter reserved, and of the covenants, stipulations and agreements hereinafter contained on the part of the said W. S. Andrews, his executors, administrators and assigns, to be observed and performed, the Eastern Counties Railway Company do hereby demise and lease unto the said W. S. Andrews, his executors, administrators and assigns, all that piece or parcel of land, situate, lying and being at Lowestoft aforesaid, adjoining or near to the harbour there, now and for some time past used as a ship-yard, together with the buildings, workshops, sheds and other erections now standing and being therein, as the same are particularly delineated and shewn on the map or plan in the margin of these presents, and thereon coloured pink, together also with all and singular the rights, members, easements and appurtenances to the said piece of land, ship-yard and premises belonging, or in anywise appertaining, as the same

are now in the occupation of the said W. S. Andrews, *except and always reserved out of this demise the patent slip, shewn and distinguished by the letter A in the said map or plan, and the machinery and apparatus connected therewith, and the site thereof, and the dues and payments payable for the use thereof, and except and always reserved unto the said company, their successors and assigns, officers, servants and workmen, free access at all times to and from the said slip for the purpose of using and working, or repairing the same or otherwise, to have and to hold the said piece of land, yard, erections, buildings and premises hereinbefore demised, or expressed and intended so to be, unto the said W. S. Andrews, his executors, administrators and assigns, henceforth for and during and unto the full end and term of twenty-one years, computed from the 25th day of March 1856, yielding and paying therefore yearly and every year during the said term the annual rent or yearly sum of 80*l*." by the quarterly payments therein mentioned.*

(The deed contained a covenant by the said W. S. Andrews to pay the company the said rent, also to build on the demised land and premises further buildings fit for a ship-building yard, and to insure and keep the premises in repair, and that the same should not be used otherwise than as a ship-building and repairing yard without the consent of the said company, their successors or assigns. There was also a proviso against the said W. S. Andrews being entitled to use the Lowestoft Harbour or works for loading or shipping materials (except for his own private use in the said demised yard), or for any other purpose than for launching or hauling up vessels from or to the said yard, and for the said W. S. Andrews to indemnify the said company against any injury occasioned by such launching or hauling up. And the deed further contained a proviso for re-entry by the said company for non-payment of rent or breach of any of the covenants before contained, and also a proviso for determining the said lease on giving certain notice therein mentioned, and a stipulation that if the lease should be so determined by the said company, in pursuance of such proviso, they should pay to the said W. S. Andrews, his executors, administrators or

assigns, the amount of the working value to an incoming tenant, at the determination of the lease, of all workshops, sheds, erections, buildings or improvements which should have been erected or made by W. S. Andrews in the said demised premises in pursuance of his covenant.)

The plea then averred that the said company, before and at the said times when, &c., gave and granted to the defendant their licence and permission to work and use the said slip, and he at the said times when, &c., worked and used the same under such licence and permission, and the trespasses complained of were a use and exercise by him of the said right and power so excepted, reserved and given by the said deed. The plea then justified the committing the trespasses complained of for the purpose of using the said slip under the said licence.

Demurrer to the plea, and joinder therein.

Keane (Douglas Browne with him), in support of the demurrer.—The plea does not justify committing the trespass on the plaintiff's land on the ground of the defendant being a servant or workman of the railway company, and as such exercising on behalf of the company the right of free access reserved to them by the deed for the purpose of enabling them to use the slip; neither does the plea shew that any estate in the slip had been assigned by the said company to the defendant, so as to constitute the defendant an assign of the company within the meaning of the reservation, and as such entitle him to have free access over the plaintiff's land; but it only states, that the company granted to the defendant their licence to work and use the said slip; and it is submitted that a mere licensee is not entitled under this reservation to exercise the right of easement which is claimed over the plaintiff's land. The right of a licensee may be seen with reference to commons. In *Com. Dig. tit. 'Common,'* (F. 2), it is said, "But he who has common appendant or appurtenant for cattle levant and couchant, cannot use the common with the cattle of a stranger."—"Nor can he license his tenants at will to put their cattle there," citing 1 *Roll. Abr.* 402, l. 36. It is admitted that the company themselves, and the assignees of the reversion, have the

right of access claimed in this plea. But that right ought not to extend to the licensees of the company, for they might license any number of persons, and the consequence might be most serious to the plaintiff and fatal to the enjoyment of his property if the right of access over the plaintiff's land could be claimed by every such licensee. The following passage in the judgment of Vaughan, C.J., in *Thomas v. Sorrell* (1), is quoted with approval by Alderson, B. in delivering the judgment of the Court of Exchequer in the case of *Wood v. Ledbitter* (2): "A dispensation or licence properly passes no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful." This subject is discussed in *Whaley v. Laing* (3), and in a note to *Armory v. Delamirie* (4). If this be so, then no estate whatever passed to the defendant under the licence granted to him by the company, and he consequently had no right to any easement over the plaintiff's land, and the plea is no answer to the action.

Bovill (*O'Malley* with him), contra.—The question depends on the construction of the deed set out in the plea. The reservation of the slip to the company would, without anything more in the deed, have carried with it all things necessary for the convenient use of the slip by the company. The exception is to be construed as a grant, and in 1 *Shep. Touch.* 89, it is said, "Touching things granted, these rules are first to be known: where anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass inclusive together with the thing by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words."—"By the grant of trees is granted withall (unless the right of cutting be restrained, and it may be restrained so as to preserve them for ornament, &c.) power to cut them down and take them away. By the grant of mines is granted the power to dig them, and by the grant

of fish in a man's pond is granted power to come upon the banks and fish for them." In a note thereto by Mr. Preston it is added, "and he may justify doing so, but he cannot justify the digging a trench to let the water out to take the fish, for he may take them by nets and other devices; but if there were no other means to take them, he might dig a trench—*Finch's Law*, 63." The case of *Dand v. Kingscote* (5) also supports the construction now contended for, and shews that what is necessary for having the right reserved by the reservation is also reserved with it to the owner of the soil, and in *Richard Liford's case* (6) it was resolved, "that when the lessor excepted the trees and afterwards had an intention to sell them, the law gave him and them who would buy power as incident to the exception to enter and shew the trees to those who would have them, for without sight none would buy, and without entry they could not see them." To the same effect is 1 *Wms. Saund.* 323, note 6. Therefore, without the word "assigns," under the mere exception of the slip, all that would be necessary for the use of it by the company and their servants would pass; but the exception in this case goes further: it excepts and reserves to the company the dues and payments payable for the use of the slip, which necessarily contemplates dues and payments payable by other persons than the company, shewing that it was contemplated that the slip might be used by other persons than the company, and who would have to pay the company for being allowed by them to so use it. There is, lastly, the express reservation of free access to and from the slip to the company, their assigns and servants.

Keane, in reply, cited *The Durham and Sunderland Railway Company v. Walker* (7), *The King v. Tardebigg* (8) and *The King v. the Inhabitants of Mellor* (9).

ERLE, C.J.—I am of opinion that our judgment should be for the defendant.

(5) 6 *Mee. & W.* 174; s. c. 9 *Law J. Rep.* (N.S.) Exch. 279.

(6) 1 *Rep.* 52, s.

(7) 2 *Q.B. Rep.* 940; s. c. 11 *Law J. Rep.* (N.S.) Exch. 442.

(8) 1 *East*, 528.

(9) 2 *Ibid.* 189.

(1) *Vaughan*, 351.

(2) 13 *Mee. & W.* 838; s. c. 14 *Law J. Rep.* (N.S.) Exch. 161.

(3) 2 *Hurl. & N.* 472; s. c. 26 *Law J. Rep.* (N.S.) Exch. 327.

(4) 1 *Smith's L.C.* 304, note, 5th ed.

This is an action of trespass on land, and the case turns on the meaning of the exception in the demise of the land under which the plaintiff claims to be entitled to the same. The demise is a demise by the Great Eastern Railway Company, excepting and reserving thereout a certain slip, and excepting and reserving to the said railway company, their successors and assigns, officers, servants and workmen, free access at all times to and from the slip for the purpose of using and working or repairing the same. Now the effect of such exception and reservation was, I think, that the slip was retained by the grantors and owners in fee simple, and that they were at liberty to make any use of it, by themselves, their servants or licensees, which they pleased. The company might so use the slip themselves or they might pass their interest therein for any part of the term demised to any person, who would then be an assignee thereof. The intent of the reservation was, I think, to enable the company to make the slip available for earning dues, or for being used in any other manner in which an owner might choose to exercise his right of dominion over it.

BYLES, J.—I am of the same opinion, and I should have come to the same conclusion if the word "assigns" had been absent from this part of the deed. The case of *Harrison v. Blackburn* (10), which we have just decided, is an instance in which a deed should be construed, not strictly, but according to the apparent intention of the parties. Now, in this case the company, who have been in the habit of receiving dues in respect of this slip and ship-yard, demise the ship-yard, excepting therefrom this slip, and they reserve to themselves, their assigns, officers, servants

and workmen free access to and from such slip. It may be admitted that these words, "officers, servants and workmen," exclude a licensee, but they would be satisfied if the persons exercising such right of access were the officers, servants or workmen of a licensee of the company. It is plain that if the company lent the slip by assigning it to any one for a week, such assignee would be a licensee for that purpose, and his officers would be those of an assignee to which the reservation extends. Are we then to give the word "assign" the strict literal interpretation of only such persons as have an estate in the premises sufficient to maintain trespass, or are we to construe it as meaning those who have a right to use the slip, by which means the company are able to earn dues in respect of it? I think that the latter is within the true meaning of the deed.

KEATING, J.—It is impossible, I think, that the word "assigns" can be limited to persons taking an estate in the land; for, as has been pointed out by Mr. Bovill, the subject-matter of the exception is not merely the slip, but extends also to dues and payments payable for the use of the slip, and it is therefore clear that it was contemplated there would be a use of the slip by others than the company, and by persons who would render dues and payments to the company for the privilege of having such use. But if that be the case, then the construction which has been contended for by Mr. Keane would preclude the company from enjoying what they have by this deed expressly reserved to themselves, namely, dues for the use of the slip by persons whom they may license for such purpose, and who are not persons coming within the strict legal meaning of assignees.

Judgment for the defendant.

(10) *Ante*, p. 109.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF COMMON PLEAS.

HILARY TERM, 28 VICTORIÆ.

1865.
Jan. 30. }

HOBBS v. HENNING.

*Marine Insurance—Contraband of War
—Foreign Judgment—Estoppel.*

The declaration was on a policy of insurance on goods from London to a port not alleged to be neutral. It was in the usual form, and alleged a loss by a peril insured against. The defendant pleaded that the goods were contraband of war, and were shipped for the purpose of being sent to and imported into a belligerent port, and also that the ship was carrying goods and papers which rendered her liable to be seized, and that she was seized accordingly, which was the loss complained of; of all which the defendant, at the time of signing the policy, was ignorant:—Held, a bad plea, as, upon the true interpretation of the first allegation, it was consistent therewith that the ship was on her voyage to a neutral port, in which case there was no breach of neutrality; and that the allegation that the ship was carrying goods and papers which rendered her liable to be seized was insufficient, because it was not shown that the goods were the plaintiff's goods, or that he was responsible for the state of the ship's papers.

The defendant also pleaded, by way of estoppel, a judgment, by a foreign Court, of condemnation of the ship and cargo, in which it was found, as a ground of condemnation, that the ship was laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea; and that she was not truly destined to the port of Matamoras, but to some other port, and in aid and for the use of persons then at war with the United States, and in violation of the law of nations; and that the ship's papers were simulated and false as to her real destination:—Held, that this judgment did not conclusively find that the ship had not sailed for Matamoras, or that she had deviated from her voyage, but only that the ultimate destination of the ship, or goods, or both, was some other port than Matamoras, and that upon this interpretation of the judgment the facts conclusively found were insufficient.

Held, also, per Erle, C.J. and Byles, J., that such a judgment could not be pleaded as an estoppel.

Declaration against an underwriter, on a policy of insurance made by him with the plaintiff, who was agent for Messrs. Weatherell & Co., on goods on board the

Peterhoff, at and from London to Matamoras, with leave to call at any intermediate port or ports, valued at 600*l*. The perils were the ordinary perils, and a loss was alleged by a peril insured against.

Third plea, that the said ship, with the said goods on board thereof, did not sail on the voyage covered by the said policy, as in the declaration alleged.

Seventh plea, that the said goods were contraband of war, and were shipped by the plaintiff and the said Messrs. James Weatherell & Co. for the purpose of being sent to and imported into a port in North America, situate in a State then and now engaged in hostilities with the United States of America, and were liable to be seized by the cruisers of the United States as contraband of war; and that the ship in the policy mentioned was, during the continuance of the risk, and at the time of the loss, carrying goods and papers which rendered her liable to be seized by such cruisers; and that the said ship and goods were seized accordingly, which is the loss complained of; of all which the defendant, before and at the time of making the said insurance and subscribing the said policy, was totally ignorant.

Eighth plea, that before action brought the said ship and goods were, during hostilities between the United States of America and the Confederate States, seized by the cruisers of the United States of America, and carried into a port of the said United States, and such proceedings were thereupon duly and according to the law of nations had, that afterwards and before action brought it was duly adjudged and determined by a United States Prize Court, held at New York, in the said United States, and then having competent jurisdiction in that behalf, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in act of transportation at sea; and that the said ship, with her said cargo, was not truly destined to the port of Matamoras, but, on the contrary, was destined to some other port or place, and in aid and for the use of persons then at war with the said United States, and in violation of the law of nations; and that the ship's papers were

simulated and false as to her real destination; and thereupon it was considered and adjudged by the said Court, then having competent jurisdiction in that behalf, that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly, which is the loss complained of. And the defendant says, that before action brought all things had happened and all times had elapsed necessary to make the said judgment binding on the plaintiff, and to entitle the defendant to plead the same as an answer to this action; and the said judgment so pronounced was absolutely final and conclusive, and is still in full force and effect, not reversed, annulled or otherwise vacated.

First replication, taking issue on all the pleas.

Second replication, to the seventh plea, that the voyage in the declaration and in the policy of insurance mentioned was a voyage to a certain port in Mexico, to wit, to Matamoras, and not a voyage to any port in North America situate in a state then or now engaged in hostilities with the United States of America; and that the said ship and goods, while proceeding on the said voyage to the said port of Matamoras, were seized as in the declaration alleged.

The plaintiff also demurred to the seventh and eighth pleas.

First rejoinder—The defendant, as to so much of the plaintiff's first replication as relates to the defendant's third plea, says, that the plaintiff ought not to be admitted to take issue on the third plea, and deny the truth thereof, because he says that before action brought the said ship and goods were, during hostilities between the United States of America and the Confederate States, seized and carried into port as in the eighth plea mentioned, and such proceedings were thereupon had, and such adjudication made as in that plea mentioned, and that before action brought all things had happened, and all times had elapsed necessary to make the said adjudication binding on the plaintiff, and to entitle the defendant to rejoin the same as an estoppel to the plaintiff's said replication to the defendant's third plea,

and that the said judgment was absolutely final and conclusive, and still is in full force and effect, and not reversed, annulled, or otherwise vacated.

Third rejoinder—And for a further rejoinder to the plaintiff's second replication to the defendant's seventh plea, the defendant says, that the plaintiff ought not to be admitted to plead the second replication to the seventh plea, because he says that before action brought the said ship and goods were, during hostilities between the United States of America and the Confederate States, seized by the cruisers of the said United States, and carried into a port of the said United States, and such proceedings were thereupon duly and according to the law of nations had, that afterwards and before action brought it was duly adjudged and determined by a United States Prize Court held at New York, in the said United States, and there having competent jurisdiction in that behalf, that the said ship was knowingly on the voyage aforesaid, laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea, and that the said ship, with her said cargo, was not truly destined to the port of Matamoras, a neutral port, and for the purpose of trade and commerce within the authority and intentment of public law; but, on the contrary, was destined for some other port or place, and in aid of and for the use of the enemies of the said United States, and in violation of the law of nations; and that the ship's papers were simulated and false as to her real destination; and that it was considered and adjudged by the said Court, then having competent jurisdiction in that behalf, that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly. And the defendant says, that before action brought all things and times had happened and elapsed necessary to make the said judgment binding on the plaintiff, and to entitle the defendant to rejoin the same as an estoppel to the plaintiff's second replication to the seventh plea; and the said judgment of the said prize court was and is absolutely final and conclusive, and still is in full force and effect, and not reversed, annulled, or otherwise vacated.

There were also demurrers to the second replication, and to the first and third rejoinders.

The case was argued in last Michaelmas Term (Nov. 16) by—

S. Temple (*Hannen* with him), for the plaintiff.—The seventh plea is bad. The allegation that the goods were liable to be seized is immaterial; the policy would not be void unless the voyage was commenced or carried out with the fixed purpose of the goods being sent to an enemy's port. But the declaration alleges that the goods were shipped for Matamoras, and that allegation is not traversed. It is probable that the market at Matamoras attracted this with many other cargoes, and that it would ultimately be bought for the use of belligerents; but that is not such a purpose as is contemplated by the rule of law which avoids policies as above stated — *Arnould on Insurance*, s. 279 (1).

The eighth plea is also bad. The judgment of the foreign prize court is not conclusive, unless the grounds of the judgment are set out and they are sufficient — *Dalglish v. Hodgson* (2). *Tindal, C.J.* there says, "The general law upon this subject is well known, that the sentence of a foreign Court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears on the face of the sentence free from doubt and ambiguity. But it is at the same time well established, that in order to conclude the parties from contesting the ground of condemnation in an English Court of law, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty, whether the ship was condemned upon one ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country." In *Bernardi v. Motteux* (3), it was held, that in an action on a policy of insurance, a condemnation by a foreign Court of Admiralty was not conclusive evidence

(1) The passage in *Arnould* referred to, speaks only of the violation of the laws of blockade.

(2) 7 Bing. 495.

(3) Dougl. 575.

that the ship was not neutral unless it appeared that the condemnation went upon that ground. Moreover, the judgment is only conclusive as to the express ground of the sentence, and not as to any of the considerations which may have led to it—*Christie v. Secretan* (4), *Calvert v. Bovill* (5), *Fisher v. Ogle* (6). The case of *Saloucci v. Woodmas* (7), cited and commented on in 2 *Smith's Lead. Cas.*, 5th edit. 691, has been relied on as an authority for the position that the sentence of condemnation must be presumed to be on the ground that the ship was lawful prize. But that position is contested by Mr. Smith in his remarks on that case, and it is shewn that the cases above cited are at variance with it. The allegation that the ship's papers were simulated and false as to her real destination cannot affect the shipper of innocent goods; *Arnould on Insur. s. 264*. The other side will probably rely on *Bell v. Carstairs* (8), *Oswell v. Vigne* (9), *Bell v. Bromfield* (10), *Horney v. Lushington* (11), *Steel v. Lacy* (12). But there is nothing in any one of those cases to shew that carrying simulated papers alone is a breach of neutrality. It is only evidence from which it may be inferred that the ship or goods are liable to seizure.

Lush (*Honyman* with him), for the defendant.—The seventh plea is good. The several allegations of the plea must be borne in mind. Shipping contraband goods for a belligerent port is a breach of neutrality; *Wheat. Int. Law*, ed. 1863, p. 737; *Kent's Com.* 139, 142, and this is, in effect, what is alleged by this plea to have been done. By the allegation that the goods were "liable to be seized," is meant that they were exposed to an increased risk of capture, which is not covered by the insurance. The intention of the insured is important in considering the liability of the insurer. There is more than an expectation; there is a purpose that the goods shall be sent into a belligerent port.

[ERLE, C.J.—I understand the distinc-

tion between purpose and attempt, but how do you distinguish between purpose and expectation?]

If a man knows the purpose for which he is required to do a certain act, and he does it, he is a participator in the ultimate act also—*The Gas Light Company v. Turner* (13).

[ERLE, C.J.—There it is pointed out by Lord Abinger that the lease in question was alleged by the plea to have been granted expressly for an illegal purpose. The plea here does not go nearly to that length.]

The fair meaning of the plea is, that contraband goods were shipped for the express purpose of being carried into a belligerent state. That is a breach of neutrality, and exposes the goods to a risk not contemplated by the insurer. This view is supported by all the authorities—*Lightfoot v. Tenant* (14), *Langton v. Hughes* (15), *Waymell v. Reed* (16).

Secondly, as to the effect of the foreign judgment. The total loss here is the seizure—*The Franklin* (17). The proposition contended for is contained in the passage of the judgment of Tindal, C.J., in *Dalglish v. Hodgson* (2), which is quoted in 2 *Smith's Lead. Cas.* 692, and in which it is said that "the general law upon the subject is well known, that the sentence of a foreign Court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which such condemnation proceeded." Now, what is "the question upon which the condemnation proceeded" in this case? Clearly that the goods were not destined for Matamoras, but for a belligerent port. That was the very ground of condemnation.

Temple, in reply.

Cur. adv. vult.

ERLE, C.J. now (Jan. 30) delivered the judgment of the Court (18).—The declaration is on a policy of insurance on goods from London to Matamoras in the usual form, and alleges a loss in the course of that voyage, by a peril insured against. The seventh

(13) 5 New Cases, 666; in error, 6 New Cases, 324.

(14) 1 Bos. & P. 551.

(15) 1 M. & S. 593.

(16) 5 Term Rep. 599.

(17) 3 Rob. Adm. 217.

(18) Erle, C.J., Byles J. and Keating, J.

(4) 8 Term Rep. 192.

(5) 7 Id. 523.

(6) 1 Campb. 418.

(7) Park, 362.

(8) 14 East, 374.

(9) 15 Id. 70.

(10) Id. 364.

(11) Id. 46.

(12) 3 Taunt. 285.

plea alleges that the goods were contraband of war, and were shipped by the plaintiff for the purpose of being sent to, and imported into a port in a state engaged in hostilities with the United States, and were liable to be seized by the cruisers of the United States as contraband of war, and that the ship was carrying goods and papers which rendered her liable to be seized by such cruisers; and that the ship and goods were seized accordingly, which is the loss complained of; of all which the defendant, at the time of subscribing the policy, was wholly ignorant.

The demurrer to this plea raises the question, whether the facts alleged shew a defence, and our answer is in the negative.

The plea was probably intended to be a defence, on the ground of the concealment by the plaintiff of material facts, but we do not find sufficient averments to establish that defence, as we read the plea. We take it to be consistent therewith that the goods of the plaintiff were sent from a neutral port to a neutral port in a neutral ship. The allegation in the declaration that the goods were sent from London to Matamoras is admitted by the plea, and although we cannot notice judicially the situation of Matamoras, so neither can the defendant rely on its proximity to the Confederate States, or make any unfavourable inference therefrom against the plaintiff. If the goods were in the course of transport from a neutral port to a neutral port the better opinion (see the authorities collected in *Ortolan's Diplomatie de la Mer*, vol. ii. p. 181) seems to be, that war does not give to a belligerent any right to seize them on account of their quality (19). The allegation that the goods were shipped for the purpose of being sent to an enemy's port, is an allegation of a mental process only; we are not to assume, therefore, either that the plaintiff had made any contract, or provided any means for the further transmission of the goods into the enemy's state, or that the shipment to Matamoras was an unreal pretence. If the goods were in

a course of transmission, not to Matamoras, but to an enemy's port, the voyage would not be covered by the policy, and that defence is raised in direct terms by the third plea. Here the allegation does not deny the destination to the neutral port to which the insurance relates, but introduces a purpose existing in the mind of the assured, after the termination of the voyage insured for, as to the ulterior disposition of the cargo and ship. It is consistent with that purpose, as here alleged, that the plaintiff made the consignment for mercantile profit, as the end to be attained by him; in other words, that he knew of an effective demand for warlike stores at Matamoras, and was induced to send a supply by the expectation of a high price, and that he expected that the purchase would probably be made on behalf of the Confederate States, and in that sense had the purpose that the goods should pass into those States. In this sense, price was the ultimate end which he purposed to attain, and Federal and Confederate were alike indifferent as means, provided he attained that end; and in a neutral territory he might lawfully sell to either. The distinction between a mere mental purpose that an unlawful act should be done, and a participation in the unlawful transaction itself, is made more clear by referring to the cases of *Holman v. Johnson* (20) and *Lightfoot v. Tennant* (14). In the first, the plaintiff in a foreign country sold goods to the defendant, knowing that he purposed to smuggle them into England, and in one sense, the plaintiff there sold them with the purpose that they should be so smuggled; but as he did not participate in any way in the unlawful transaction, the mere mental purpose did not avoid the contract of sale. In the second case, *Lightfoot v. Tennant* (14), the plaintiff sold goods to the defendant, to be delivered abroad, in order that they should be sent unlawfully to the East Indies. After a verdict for the defendant, on a plea alleging this fact, on motion for judgment *non obstante veredicto*, the objection was raised, that the mere mental purpose of the vendor did not avoid the contract of sale; but the objection was answered by suggestion of the fact that

(19) This reference is perhaps to the 3rd edition of M. Ortolan's work. In the 2nd edition the prohibited commerce is somewhat loosely described as "le transport chez l'ennemi des marchandises ayant un rapport direct aux opérations militaires," vol. 2, p. 166.

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(20) Cowp. 341.

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the plaintiff's participation in the unlawful transaction went beyond the mere mental purpose, that he was taken to be a party to the whole project, and to be acting in the execution thereof, in the sale which was the cause of action; and upon these facts the contract was held void.

For these reasons we think the averment "that the goods were shipped for the purpose of being sent to an enemy's port," construing those words as we have done, is insufficient to establish that they were liable to seizure for a breach of neutrality.

The effect of the other allegations in the plea depends much on that which we have last considered.

If goods fit for immediate use in war, and therefore of the quality denoted by the term "contraband of war," are passing between neutrals, it seems that they are not liable to seizure by a belligerent. The right of capture, according to Sir William Scott's opinion, expressed in the case of *The Imina* (21), attaches only where they are passing on the high sea to an enemy's port; they must be taken *in delicto*, that is, in the actual prosecution of a voyage to an enemy's port. The liability, therefore, of these goods to lawful seizure, although their quality was such as might make them contraband of war, depended on their destination, and they were not liable unless it distinctly appeared that the voyage was to an enemy's port. The further allegation, that the ship was carrying goods and papers which made them liable to be seized, is immaterial as a ground of defence; for these goods are not alleged to be the plaintiff's goods, and the plaintiff is not shewn to be responsible for the ship's papers, nor for any other goods than his own; also, if the voyage was to a neutral port, and the law be as above stated, the facts alleged do not shew that the ship and goods were liable to seizure. Furthermore, the allegation that the ship was carrying papers which made it liable to be seized, is not strictly accurate in reference to the law of nations. The papers alone are not a breach of neutrality so as to work a forfeiture of the ship; they are only evidence from which a cause of forfeiture may be inferred; they may be evidence either of enemy's property,

or of destination to a blockaded port, or to an enemy's port with contraband, and so be evidence on which the Judge may find a cause of forfeiture proved; but they are, in themselves, no cause of forfeiture. The language of Sir William Scott, in the case of *The Franklin* (17), speaking of simulated papers, and saying that "this fraudulent conduct justly subjects the ship to confiscation," must be taken with reference to the question before him, whether the ship should be confiscated as well as the contraband cargo; and his decision is in the affirmative, and rightly, if the shipowner was knowingly conveying contraband to an enemy's port, of which knowledge papers indicating a false destination would raise a presumption. These being the premises alleged in the plea, the allegation that the defendant was ignorant of them is of no avail. If the defence is, that the plaintiff has concealed a fact which he was bound to disclose, the plea should have been framed accordingly. As it stands, it shews no wrongful act on the part of the plaintiff towards the insurer. If the proper construction of the premises in the plea be different from that which we have come to, still the allegation of the defendant's ignorance of those premises would not make the plea a good defence on the ground of concealment. The insurance is against capture, lawful and unlawful; and the defendant, in order to discharge himself, must shew a concealment by the assured. Mr. Phillips (vol. 1, p. 531) says: "Concealment is where one party suppresses or neglects to communicate a material fact." It is quite consistent with anything appearing on this record that a letter from the plaintiff may have miscarried, or that the defendant may have remained in ignorance without any default of the plaintiff. The allegation, therefore, of the ignorance of the defendant is, of itself, immaterial, and has no effect in avoiding the policy; and the result is, that we consider the seventh plea to be bad.

We proceed now to the eighth plea, which, in substance, alleges that the ship did not sail on the voyage covered by the policy. The third plea pleads the same ground of defence, as a fact, in direct terms; the eighth plea pleads it by way of estoppel, setting out a judgment, in which the fact is supposed to be stated as a matter whereon

the Court had adjudicated, and then relying on the judgment to estop the plaintiff from denying that fact. The same estoppel is the ground of two rejoinders to two replications, and the eighth plea and the two last rejoinders may be considered together.

The defendant, in support of these pleas, relied on the rule that sentences of foreign Courts deciding questions of prize are to be received as conclusive evidence in actions on policies, on every subject immediately and properly within the jurisdiction of the Court, on which it has professed to decide judicially—see the opinions of the Judges in *Henderson v. Lothian* (22); and he contended that the judgment, as pleaded, shewed that the voyage on which the ship was captured was not a voyage from London to Matamoras.

The plaintiff in answer contended, first, that the decision does not profess to decide the matter of fact on which the defendant relies; secondly, that if it had decided that matter of fact, still the decision could not be pleaded as an estoppel; and we are of opinion that the plaintiff is right. The rule making the decision of a Court, which creates the status of a person or thing, conclusive upon all persons as to the existence of that status, has been regarded as salutary. Sentences of nullity of marriage in the Ecclesiastical Courts, of forfeiture in the Exchequer, of settlement of paupers by the Quarter Sessions, and of prize in Prize Courts, are examples. In *Hughes v. Cornelius* (23) the rule was applied within salutary limits, where, in trover for a ship by the former owner, the sentence of a prize court was held conclusive to shew that the property had been changed. (See *Doe v. Oliver* (24), where the whole subject is fully considered with much learning and lucid arrangement.) But the rule making the finding of a Judge upon any matter of fact upon which he professed to form his judgment conclusive upon all the world has been supposed to be anomalous, and to produce pernicious results—see Lord Eldon's opinion in *Henderson v. Lothian* (22) to that effect. Also in *Geyer v. Aquilac* (25) Lord Kenyon speaks of the rule as a

source of the grossest injustice. So in *Donaldson v. Thompson* (26), Lord Ellenborough, speaking of this rule, says, that the doctrine rests on a case in *Shower* (23) which does not fully support it, and the practice of receiving these sentences often leads in its consequences to the grossest injustice. We would further refer to the rule in *Dalgleish v. Hodgson* (2), where Tindal, C.J. says that the sentence of the prize court is not conclusive as to the ground of condemnation, if there be any ambiguity as to what the ground is. It must not be left in uncertainty whether the ship was condemned on a ground which would be justified by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. Although these sentences must be received in evidence, still the precedents shew that they have been carefully examined for the purpose of seeing whether the matter of fact, in proof of which they are adduced, was clearly and certainly found by the Judge whose sentence is relied on. *Bernardi v. Motteux* (3) and *Calvert v. Bovill* (5) are two amongst numerous cases which might be cited to this effect.

We now proceed to examine the judgment set out in the eighth plea. The condemnation appears to us to have been for carrying contraband of war intended to be for the use of the enemy of the United States, and the sentence, so far from deciding that the ship with the said goods did not sail on the voyage from London to Matamoras, appears to us to express that she was on that voyage when she was taken. The first matter of fact found by the Judge is, that the ship was knowingly on the voyage aforesaid (that is, from London to Matamoras), laden with contraband. The second is, that the said ship with the said cargo was not truly destined to Matamoras, a neutral port, and for the purpose of trade and commerce within the authority and intendment of public law; but was destined for some other port or place, and in aid and for the use of the enemy and in violation of the law of nations, and that the ship's papers were simulated and false. If the Judge meant to find that

(22) 3 Bos. & P. 499.

(23) 2 Show. 232.

(24) 2 Smith's Lead. Cas. 5th ed. 634.

(25) 7 Term Rep. 695.

(26) 1 Campb. 429.

the ship was not bound to Matamoras, but on the contrary to a port of the enemy, the finding would have been so expressed. But if he meant to find she was bound to Matamoras, not for the purpose of commerce with the inhabitants thereof, but for the purpose of such a sale or transfer there as that the Confederates should get the use of the cargo, all the words of the judgment have their usual meaning and effect. We have no jurisdiction to inquire into, nor are we at all considering the validity of the legal grounds of the judgment; our task is to ascertain what matter of fact the Judge found to exist. He may have considered that trading with the Confederates was not within the authority and intentment of public law, and was a violation of the law of nations, and that a voyage to Matamoras, in order that the plaintiff's goods and cargo should be transferred from thence to some port or place for the use of the Confederates, was a destination of the cargo for such port or place, and made it liable to confiscation, and that the papers were simulated and false because they represented Matamoras as the final destination, and concealed a purpose of ulterior destination.

By this examination of the judgment set out in the plea, we are led to the conclusion that the learned Judge did not intend to find as a matter of fact, either that the ship had not sailed on a voyage to Matamoras, or that after having so sailed she had deviated from that voyage. But on the contrary he condemned her as lawful prize, because she was in prosecution of that voyage, with an ulterior destination either for the cargo or the ship, or both, as above explained.

The judgment therefore does not sustain the inferences of fact which the defendant seeks to establish thereby, nor does it sustain his claim of right to prevent the plaintiff from shewing the truth in respect of this fact, and the plea is therefore bad. So far this is the judgment of myself and my Brothers Byles and Keating: the other answer to that plea is the opinion of my Brother Byles and myself; and my Brother Keating does not assent or dissent.

We are further of opinion that the eighth plea, and the same rejoinder as last mentioned, are bad, because the finding of a

matter of fact in the course of the adjudication of a prize court cannot be pleaded as an estoppel, in the cases where, if adduced in evidence, the judgment would be received as conclusive evidence of the fact so found. Although the cases are numerous in which the evidence has been admitted, still there is no precedent for the plea of the fact as an estoppel that we have been able to find. The principle on which the evidence was held admissible is not clear. Lord Eldon, in *Henderson v. Lothian* (22), says, it was introduced at first against the insurers to prove the loss, and was afterwards used by the insurers for their defence. Lord Ellenborough, in *Fisher v. Ogle* (6), speaks of it as a matter of comity between the two Courts. Such evidence does not fall within any legal description of matter of estoppel, nor is it guarded by the safeguards against abuse which restrict matters of estoppel in respect of parties and of subject-matter. In *Brain v. Jackson* (27) Knight Bruce, V.C., gives an elaborate judgment on estoppel, and lays down the principle thus: "Generally neither the judgment of a concurrent nor of an exclusive jurisdiction is conclusive evidence of any matter which came collaterally in question before it though within the jurisdiction, or of any matter incidentally cognizable, or of any matter to be inferred by argument from the judgment;" and that a judgment is final only for its proper purpose and object. The admissibility of the judgments of prize courts upon matters of fact is not restricted within these limits; and although we are bound here to hold that they are admissible as far as the decided cases have established their admissibility, yet beyond that limit we would not go, and we consider that the attempt to use the judgment as an estoppel does transgress that limit, there being no precedent for it. In relying upon the absence of any precedent, we do not consider that this objection is confined to a matter of form; it restricts in some degree the tendency of such evidence to defeat real truth by technical proof, and it may have the effect of preventing the foreign judgment from being misunderstood or misapplied. If the judgment can only be adduced in evidence, and is not pleadable as an estoppel, the mean-

(27) 1 You. & C. C.C. 58; cited in *Doe v. Oliver*, 2 Smith's Lead. Cas. 428.

ing may be ascertained by adducing in evidence the preliminary proceedings and other matters referred to in the judgment. In *Bernardi v. Motteux* (26) Lord Mansfield admitted a French *arrêt*, and expressed his opinion that the *procès verbal*, on which the judgment was founded, ought to have been given in evidence at the trial by the plaintiff to shew the meaning of the judgment; that is, to shew whether the Court intended to find enemy's property, and so to prove a breach of warranty of neutrality, or to condemn by reason of *arrêt* against throwing papers overboard. So in *Christie v. Secretan* (4), the Court by the special case had power to refer to the proceedings before the Tribunal de Commerce, and also to a printed copy of a treaty between France and America to shew the meaning of the judgment. So in *Pollard v. Bell* (28), the Court referred for the same purpose to judgments in the Tribunal de Commerce at Bordeaux, in the Tribunal Civil de la Gironde, and in the Cour de Cassation at Paris. So in *Dalgleish v. Hodgson* (2), the circumstances under which the ship entered the River Plate were admitted in evidence to shew the meaning of the judgment; that is, to shew whether she was condemned for breaking blockade, or for disobedience to municipal law of Brazil. These are the considerations which induce us to adhere to precedent, and reject the plea of estoppel. If the judgment here in question should be hereafter adduced in evidence in support of the third plea, it may be that it would be found to refer to pleadings and doctrines of public law, and to various classes and items of proof relating to acts and declarations of parties on board, and so forth; and if the judgment was given in evidence these matters so referred to therein might be also adduced in evidence, and might shew that the fact was not found by the Judge as supposed by the defendants. This inquiry would not tend to impeach the conclusive effect of the judgment upon the question of prize, but might prevent a mistaken assumption from prevailing over the truth. For these reasons we give our judgment on these demurrers for the plaintiff.

We consider the eighth plea open to the further objection that it does not plead the

issuable fact in respect of the voyage, but the evidence which might prove that fact; it pleads the *probans* and not the *probandum*, but as this objection would not apply to the rejoinder to the replication to the third plea, we do not further advert to it.

Judgment for the plaintiff.

1865. }
Jan. 13. } COX v. BOCKETT AND OTHERS.

Practice—Common Law Procedure Act, 1852, s. 7.—Plaintiff's Name and Abode.

Though it is a matter of discretion whether a Judge at chambers will order an attorney to disclose the name and place of abode of his client, under the Common Law Procedure Act, 1852, s. 7, the motives of the party making the application ought not to be narrowly inquired into; and it is not sufficient to deprive the party of his right to such information, that he will thereby be enabled to enforce some other right against the party whose name and abode he seeks to obtain.

Keane applied for a rule calling upon the defendant to shew cause why an order of Willes, J., at chambers, should not be rescinded. The order in question was made on the plaintiff's attorney, requiring him to give the name and place of abode of his client, under the provisions of the Common Law Procedure Act, 1852, section 7.

The plaintiff had made an affidavit that a writ of attachment had been issued against him by the defendants to enforce obedience to an order for the payment of costs in certain Chancery proceedings, and that one of the defendants had avowed that his object in requiring the plaintiff's name and address was in order to execute this writ. He relied on *Harris v. Holler* (1), where Patteson, J. refused a similar application on the ground that the object was to take criminal proceedings against the plaintiff. He also referred to *Pearson v. Turner* (2).

(1) 19 Law J. Rep. (N.S.) Q.B. 62.

(2) 33 Law J. Rep. (N.S.) C.P. 224; s. c. 16 Com. B. Rep. N.S. 157.

ERLE, C.J.—I am of opinion that there ought to be no rule in this case. We are not to scan narrowly the motives of the party making this application. He has a right to know the name and place of abode of the plaintiff for the purposes of this action, and he ought not to be deprived of that information because he has also some right which that information may enable him to enforce.

WILLIAMS, J. concurred.

WILLES, J.—I am of the same opinion. I do not at all mean to say that a Judge has no discretion in such a case, and it by no means follows that the decision of Mr. Justice Patteson was wrong in the case before him; on the contrary, I think a Judge at chambers ought not to allow himself to be made the mere instrument of bringing a man to answer a criminal charge.

KEATING, J. concurred.

Rule refused.

1865. }
Jan. 23. } FESSARD v. MUGNIER.

Debtor and Creditor—Composition Deed—Bankruptcy Act, 1861—Tender of Composition—Creditor abroad—Pleading.

To a declaration for a debt due on a foreign contract entered into with the plaintiff abroad, a plea of a composition-deed made and registered under the Bankruptcy Act, 1861, whilst the plaintiff resided abroad, by which the defendant covenanted to pay a certain composition in the pound to his creditors on a day since passed, must shew that the defendant paid or tendered such composition to the plaintiff, notwithstanding the plaintiff was abroad when it became payable.

The want of an averment in such plea of payment or tender of the composition was held to be not cured by an averment that the defendant was always ready and willing to pay to the plaintiff the said composition according to the provisions of the deed, and that all conditions having been performed and all things having happened necessary in that behalf, the plaintiff became bound by the deed, as if he had executed the same.

Declaration containing a count on a foreign bill of exchange drawn by the

plaintiff, at Paris, upon and accepted by the defendant, with counts for goods sold and delivered, and for money due for interest, and on accounts stated.

Second plea, stating a deed of composition, signed by three-fourths in number and value of the creditors of the defendant who had become bankrupt, made under sections 185, 186. and 187. of the Bankruptcy Act, 1861, and that the further proceedings in the bankruptcy had been stayed in consequence of a resolution of such creditors, confirmed by the Bankruptcy Court, that the defendant's estate should be wound up under a deed of composition. The deed as set out in the plea was as follows:

"This indenture, made the 2nd day of April 1863, between James Julius Mugnier, of 10, Westbourne Grove, Bayswater, in the county of Middlesex, watch and clock-maker, a bankrupt, of the one part, and the several persons whose names and seals are hereunder subscribed and set, and all other persons who at the date hereof are respectively creditors of the said James Julius Mugnier, a bankrupt, of the other part. Whereas the said James Julius Mugnier was on the 17th day of March last duly adjudged a bankrupt; and whereas the estate of the said James Julius Mugnier is not sufficient to pay his debts and liabilities in full; and whereas the said James Julius Mugnier has proposed to pay his creditors a composition of 5s. in the pound on the amount of their respective debts, to be paid on the 8th day of May next, and three-fourths in number and value of the creditors of the said James Julius Mugnier have agreed to accept the said proposal and to execute the release hereinafter contained, and have agreed to sign a resolution to be passed at a meeting of creditors of the said James Julius Mugnier, that the estate of the said James Julius Mugnier ought to be wound up under a deed of composition, and to consent to an application to the Court of Bankruptcy to stay all further proceedings under the said adjudication: Now, this indenture witnesseth that, in consideration of the release hereinafter contained, he, the said James Julius Mugnier, doth hereby for himself, his heirs, executors and administrators, covenant with the parties hereto of the second part, and each

and every of them, their and each and every of their heirs, executors and administrators, that he, the said James Julius Mugnier, will, on or before the 8th day of May next, pay unto each and every of them, the said parties hereto of the second part, a composition of 5s. in the pound on the amount and in full discharge of their respective debts and claims. And this indenture also witnesseth that, in consideration of the said covenant, they, the said several creditors, parties hereto of the second part, do and each and every of them doth by these presents acquit, release, and for ever discharge the said James Julius Mugnier, his executors and administrators, and his estate and effects, of and from all actions, suits, claims and demands whatsoever, which the said parties hereto of the second part, or either of them, now have against the said James Julius Mugnier. Provided always, and it is hereby agreed and declared, that these presents shall not extend to invalidate, prejudice, or in any manner affect any mortgages, charges, or other securities or liens which any of the said parties hereto of the second part may have upon any of the real or personal estate of the said James Julius Mugnier, or any bonds, bills, notes, or other securities given or payable by any other person, by way of security for any debt due and owing by the said James Julius Mugnier to either of the said parties hereto of the second part, but that all such several mortgages, charges, securities, liens, and also all such bonds, bills, notes and other securities, from third parties, shall be and continue available in the hands of the several creditors, parties thereto, holding the same, in the same manner, to all intents and purposes, as if these presents had not been made. Provided always, that if the said James Julius Mugnier shall make default in payment of the said composition on the said 8th day of May next, and such composition shall remain unpaid for the space of fourteen days next after that day, the release hereinbefore contained shall be void and of none effect. In witness," &c.

The plea then alleged that the said Court of Bankruptcy, after the said production, and after the making, of the said deed, and after hearing the defendant, and upon reading the affidavit of the defendant verifying the execution thereof,

duly considered the said deed, and being satisfied that it had been duly entered into and executed, and that its terms were reasonable and calculated to benefit the general body of the creditors under the said estate, did order and declare that such deed had been completely executed, and also directed that the same be, and it was thereupon, registered with the chief registrar of the said Court of Bankruptcy. And further, that all the matters aforesaid happened before this suit, and that before and at the time of the happening thereof the plaintiff was a creditor of the defendant in respect of the sums of money and the causes of action herein pleaded to, within the meaning of the Bankruptcy Act, 1861. And also that he, the defendant, had always been and still was ready and willing to pay to the plaintiff the said composition or sum of 5s. in the pound on the amount of the said sum herein pleaded to, according to the provisions of the said deed of composition. And also that all conditions having been performed, and all things having happened necessary in that behalf, the plaintiff became, and was, bound by the said deed of composition as if he had been a party thereto and had duly executed the same.

Demurrer thereto.

Also replication that the defendant made default in payment of the said composition, on the said 8th of May 1863, and the said composition still remained unpaid to the plaintiff, and had never been paid or tendered to the plaintiff.

Rejoinder—That the plaintiff was not, on and during the said 8th day of May, and for the space of fourteen days next after that day, within the realm of England, but was out of the realm of England.

Surrejoinder—That he the plaintiff was a native of the empire of France, and that long before the accruing of the said debt in the declaration mentioned was and has always thence hitherto been resident and carried on his business at Paris in the said empire, and not in England; and that the plaintiff was not in England at the time of the contracting or accruing of the said causes of action, and that the said bill of exchange in the declaration mentioned was drawn by the plaintiff at Paris aforesaid, and the said accounts were

stated for and in respect of the price of certain goods which were supplied by the plaintiff to the defendant; and the said goods mentioned as sold and delivered were also supplied and sent by the plaintiff from his said place of business at Paris to the defendant; and that the plaintiff was not in England at the time of the making of the said deed by the defendant; of all which premises the defendant had notice at the time of the executing of the said deed by him; and that the plaintiff had not notice of the making thereof at the time or on the said 8th of May 1863, or within fourteen days after that day.

Demurrer thereto.

Dowdeswell, for the plaintiff.—The plea is bad. In the first place, the deed contains a proviso that it shall not prejudice or affect any mortgage or other security of the defendant's creditors; therefore, in order to give effect to such a reservation, the deed must operate, not as a release, but as a covenant not to sue, and so it cannot be pleaded in the present form—*Solly v. Forbes* (1), *Willis v. De Castro* (2) and *Price v. Barker* (3).

[WILLIAMS, J.—The cases are reviewed by Turner, V.C. in *Squire v. Ford* (4).]

Secondly, payment of the composition was the act necessary to be done by the defendant in order to discharge him, and therefore it was incumbent on him to have averred in his plea that he had either paid or tendered the composition to the plaintiff. In the notes to *Cumber v. Wane* (5), with reference to composition-deeds, it is said, "Nor will the debtor be entitled to the benefit of it if he neglect to perform accurately what is to be done on his part. Thus he must tender the composition-money on the appointed day, for, as Lord Ellenborough said, in *Cranley v. Hillary* (6), the party to be discharged is bound to do the act which is to discharge him." It is not enough to aver, that the defendant was always ready and willing to pay the

composition, the plea must shew either a payment or tender—*Hasard v. Mare* (7). Thirdly, it was the duty of the defendant to have sought out the plaintiff and to have tendered to him the composition, and the facts stated in the surrejoinder afford an answer, if an answer be necessary, to the rejoinder. According to section 340. of *Littleton*, with reference to feoffment in mortgage and the payment of the money to the feoffee at the day appointed, it is laid down that the feoffor is bound to seek the feoffee if he be then within the realm of England; and Lord Coke remarks thereon, that "if he be out of the realm of England he is not bound to seek him or to go out of the realm unto him; and for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor should enter into the land as if he had duly tendered it according to the condition."

[WILLES, J.—That passage in *Co. Litt.* applies only to a person who was in England at the time of the contract and afterwards goes out of the realm.]

Yes—no doubt if the plaintiff had been in England at the time, and had afterwards prevented the tender being made to him by going out of the realm, the defendant would have been excused from tendering the money, because the plaintiff had by his own act disabled the defendant from making the tender in England; but where, as here, the debt is contracted abroad, and the creditor resides abroad, it is the duty of the debtor to pay the debt there, and he cannot in that case excuse himself from making the tender because the creditor is abroad. *Shep. Touch.* 8th edit. p. 378, is also the same as *Co. Litt.* as to the duty of the debtor to find out and pay his creditor wherever he be if *extra quatuor maria*. To the same effect is *Haldane v. Johnson* (8).

Tapping, contra.—With regard to the first point, the deed operates as a sufficient release, and not as only a covenant not to sue, there not appearing here to be any joint debtor or surety who was liable for this debt to the plaintiff. The case of *Keyes v. Elkins* (9) is precisely in point, and establishes the

(1) 2 Brod. & B. 38.

(2) 4 Com. B. Rep. N.S. 216; s. c. 27 Law J. Rep. (N.S.) C.P. 243.

(3) 4 E. & B. 760; s. c. 24 Law J. Rep. (N.S.) Q.B. 180.

(4) 9 Hare, 47; s. c. 20 Law J. Rep. (N.S.) Chanc. 308.

(5) 1 Smith's Lead. Cas. 295, 5th edit.

(6) 2 M. & S. 120.

(7) 6 Hurl. & N. 434; s. c. 30 Law J. Rep. (N.S.) Exch. 97.

(8) 8 Exch. Rep. 689; s. c. 22 Law J. Rep. (N.S.) Exch. 264.

(9) *Ante*, Q.B. 25.

validity of this deed. Then as to the other objections, it is said the plea is bad, because it does not aver a payment or tender of the composition to the plaintiff. It avers that the defendant has been always ready and willing to pay it to the plaintiff, and although that is not an offer to pay, and insufficient in the case of a direct condition precedent, as said by Crompton, J. in *Roberts v. Brett* (10), yet the general averment at the end of the plea, of performance of all things necessary in that behalf, is sufficient since the Common Law Procedure Act, 1852, s. 57.—*Bentley v. Dawes* (11). The onus is therefore on the plaintiff to shew in his replication that there has been a non-performance of such condition precedent.

[*Dowdeswell*.—The general averment in the plea is limited to the performance of all that might be necessary to make the deed binding on the plaintiff. It is quite consistent with this that the defendant did not afterwards tender the composition.]

At all events, the objection (if any) has been cured by the plaintiff pleading over. The passages from *Sheppard's Touchstone* and *Coke upon Littleton* shew that the duty imposed on the obligor to seek out the obligee is limited to where the obligee is *intra quatuor maria*, and in *Cranley v. Hilary* (6) Dampier, J. refers to the passage from *Littleton* as shewing that the obligor is bound to seek the obligee "if he be in England." The case of *Haldane v. Johnson* (8) does not carry the rule of law any further; and there is no authority for saying that if the creditor is out of the realm at the time of payment, the debtor is still bound to seek him out. Then the plaintiff's surrejoinder is bad as containing no answer to the rejoinder. The allegation in it, that the plaintiff was not in England at the time of the contracting or accruing of the causes of action, is immaterial. The time of payment is the material time—*Rothschild v. Currie* (12), which decides that the place where a bill of exchange is payable determines whether it is a foreign bill or not. Then

the allegation that the plaintiff was not in England when the deed was made is also immaterial, for section 187. of the Bankruptcy Act, 1861, gives the binding effect to the deed only after registration; therefore the plaintiff should have shewn he was not in England at the time of registration of the deed.

Dowdeswell, in reply, cited *The London Dock Company v. Sinnott* (13) to shew that excuse would not do, but that the defendant must plead performance.

ERLE, C.J.—I think that judgment in this case should be for the plaintiff. The question whether the deed which has been pleaded amounts to a release or a covenant not to sue, it is not necessary to decide, because I consider the plea is bad for not shewing a payment or tender of the composition to the plaintiff. The plea states that the defendant was always ready and willing to pay to the plaintiff the said composition, but it contains no averment that the composition was paid at the time when it was stipulated to be paid, or anything equivalent to averring that it was tendered, but it only states that the defendant was ready and willing to pay it. We think that is not enough. The averments at the end of the plea of general performance of conditions only relate to such as are necessary to make the deed binding on the plaintiff as a non-executing creditor, but do not relate to conditions which may have to be performed subsequently to the deed having become binding on the plaintiff. Then, as for the excuse for not tendering the composition because the plaintiff was in Paris when it became payable,—I think the authorities establish that if the plaintiff was in England when the contract was made, and he had afterwards gone abroad, it would not have been the duty of the defendant to follow him out of the realm in order to pay or tender him the money. But here it appears that the contract was a French contract, made when the plaintiff was residing in Paris, and who was living there when the composition-deed was executed and registered. I therefore think that the plaintiff's absence abroad is no excuse for the

(10) 6 Com. B. Rep. N.S. 611; s. c. 28 Law J. Rep. (n.s.) C.P. 323. (Exch. Ch.)

(11) 10 Exch. Rep. 734; s. c. 23 Law J. Rep. (n.s.) Exch. 220.

(12) 1 Q.B. Rep. 43; s. c. 10 Law J. Rep. (n.s.) Q.B. 77.

(13) 8 E. & B. 347; s. c. 27 Law J. Rep. (n.s.) Q.B. 129.

defendant not tendering the composition-money to him.

WILLIAMS, J., WILLES, J. and KEATING, J. concurred.

Judgment for the plaintiff.

1864.	}	ELLWOOD AND OTHERS v. CHRISTY AND OTHERS.
Nov. 5.		
1865.		
Jan. 27.		

Patent—Assignment—Registration—Account of Profits—15 & 16 Vict. c. 83. ss. 35, 42.

The executors of a patentee assigned the patent, and registered the assignment, but the probate was not registered until afterwards:—Held, that the assignment was good, and that the title of the assignee was completed in accordance with the 15 & 16 Vict. c. 83. s. 35.

The Court, in making an order for an account under the 15 & 16 Vict. c. 83. s. 42, will only direct an inquiry into the profits actually made by the defendant, and will not direct a general inquiry into any other damages alleged to have been sustained by the plaintiff in consequence of the infringement.

The assignee of a patent is only entitled to an account of profits from the time that his title is complete, that is, when the assignment is completely registered.

This was an action for the infringement of a patent relating to the manufacture of a new kind of hat or helmet to be used in hot climates.

The plaintiffs claimed an account of the profits made by the defendants from the 5th of February 1864, and during the pendency of the suit, and also a writ of injunction to restrain the defendants from further using the patent.

The action was tried, before Erle, C.J., at the Sittings at Westminster, after last Trinity Term, when it appeared that the person to whom the patent was originally granted was dead, and that his executors had assigned the patent to the plaintiffs. Probate of the will was granted on the 3rd of December 1863. On the 5th of February 1864 the executors assigned the patent. On the 10th of April, probate of the will was entered upon the register, and on the

14th of that month the assignment to the plaintiffs was also registered.

The verdict was found for the plaintiffs, and an order was made by the learned Judge for an account to be kept by the defendants from the date of the verdict, without prejudice to any application for a further account which the plaintiffs might think fit to make.

An objection was, however, taken at the trial that the plaintiffs were not entitled to maintain the action, inasmuch as the provisions of the 15 & 16 Vict. c. 83. s. 35. had not been duly complied with at the time the executors assigned the patent to the plaintiffs. The learned Judge overruled the objection, but reserved leave to the defendants to move to enter the verdict for them on this ground.

Bovill (Nov. 5) moved accordingly.—He contended that the executors had no power to assign the patent until they had perfected their own title. The 15 & 16 Vict. c. 83. s. 35. provided that until the entry shall be made in the register, "the grantees or grantees of the letters patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters patent."

Per Curiam (1).—Registration will complete an inchoate title. Upon this point there will be no rule.

Rule refused.

Aston (Nov. 25), for the plaintiffs, obtained a rule calling on the defendants to shew cause why the Master should not take an account of all profits made by the defendants by means of the infringement of the plaintiffs' patent, and why the defendants should not pay to the plaintiffs the amount of such profits, and why a writ of injunction should not issue to restrain the defendants from continuing to infringe the plaintiffs' patent. Against this rule

Murray shewed cause (Jan. 27).—He contended that there was no necessity for a reference to the Master, as the defendants were ready to produce an account verified by affidavit of the net profit on every hat or helmet made by them up to the present time. He also contended that the plaintiffs were only entitled to an account of profits

(1) Erle, C.J., Byles, J. and Keating, J.

from the 14th of April, when the title was completely registered.

Hindmarch and *Aston*, in support of the rule.—The statement offered by the defendants is not sufficient. The mere profit and loss account of each hat may not nearly represent the injury inflicted on the plaintiffs. The defendants may have sold the hats at a cheap rate, for the express purpose of depreciating the invention. In *Walton v. Lavater* (2), the rule was drawn up on the principle contended for.

[*WILLIAMS, J.*—No such order was made in *Holland v. Fox* (3), or in *Vidi v. Smith* (4).]

The statement put forward is entirely *ex parte*.

ERLE, C.J.—I am of opinion that substantial justice would be done in this case if the rule were discharged. But precisely because it would be adopting the statement of one party without giving the other an opportunity of controverting it, I scruple to take this course. The rule must, therefore, be made absolute to refer the matter to the Master to take an account of the profits actually made by the defendants from the date of complete registration. The plaintiffs are not entitled to any other account than this, and, if they do not surcharge the defendants one-sixth upon the account produced, they must pay the costs of the inquiry and of this rule.

WILLIAMS, J.—I am of the same opinion. I do not apprehend that this Court in any way sanctioned the form of order in *Walton v. Lavater* (2). The motion was not contested.

WILLES, J.—I am of the same opinion. We do not at all decide that, if the plaintiffs had suffered damage by such conduct as has been suggested by the counsel who supported the rule, they could not recover compensation in the shape of damages; but that must be at the hands of a jury, and not by means of an account to be taken by the Master.

Rule accordingly.

(2) 8 Com. B. Rep. N.S. 192; s.c. 29 Law J. Rep. (N.S.) C.P. 275.

(3) 3 E. & B. 986; s.c. 23 Law J. Rep. (N.S.) Q.B. 211.

(4) 3 E. & B. 969; s.c. 23 Law J. Rep. (N.S.) Q.B. 342.

[IN THE EXCHEQUER CHAMBER.]
(Appeal from the Court of Common Pleas.)

1864. }
Nov. 30. } LEE AND ANOTHER v. JONES.*

*Guarantie—Avoidance of Contract—
Fraud—Concealment—Misrepresentation.*

P. was employed by the plaintiffs, who were coal-merchants, to sell their coals on commission, on the terms that he was to be answerable for the price of the coals sent out to customers on his order, and to pay for them monthly. *T.* guaranteed the due performance by *P.* of his engagements to the amount of 300*l.* After some years, *P.*, not paying for the coals supplied according to his agreement, and owing the plaintiffs, on the coal account, above 1,300*l.*, the plaintiffs required further security. *P.* having stated to the plaintiffs that the defendant would become surety for him, the plaintiffs prepared an agreement, which, after reciting the original agreement between *P.* and the plaintiffs, the guarantie by *T.* and that *P.* had for some time been salesman to the plaintiffs on the terms stated, and that in order to induce the plaintiffs to continue the arrangement with *P.* the defendant had agreed to guarantee, went on to provide that the defendant should give a floating and continuing guarantie to the plaintiffs for three years to secure the amount of any balance that might at any time during the three years be due from *P.* to the plaintiffs. This agreement was sent to the defendant by the plaintiffs, and executed by the defendant. It, however, did not recite that any debt was then due from *P.* to the plaintiffs, nor did the plaintiffs inform the defendant of the fact. The defendant made no inquiry of the plaintiffs. In an action against the defendant on his guarantie, he pleaded that the guarantie was obtained from him by the fraud of the plaintiffs, and by the fraudulent concealment by the plaintiffs of material facts:—Held, by the majority of the Court of Exchequer Chamber that there was some evidence, taking the circumstances of the case and the recitals in the agreement together, from which a jury would be jus-

* Decided in the Sittings after Michaelmas T., 1864, coram Pollock, C.B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J. and Shee, J.

tified in saying that the plaintiffs had been guilty of intentional fraudulent misrepresentation to induce the defendant to sign the agreement.

This was an appeal, by the plaintiffs, against the decision of the Court of Common Pleas, discharging a rule to set aside the verdict for the defendant, and to enter a verdict for the plaintiffs for 100*l*.

The action was to recover 100*l*. The declaration was framed upon an agreement between Charles Jones, the defendant, and four other persons of the one part, and the plaintiffs, Lee & Jerdein, coal-merchants, of the other.

The agreement, dated October 1861, commenced in the following terms: "Whereas James Packer has for some time past been a salesman of coals upon commission for the said Lee & Jerdein, he the said James Packer giving bills of exchange to the said Lee & Jerdein for all such coals as may be delivered to his order, such bills being floating bills, to be settled for and paid up at the expiration of the current months during which such bills are respectively running; and whereas the said Lee & Jerdein requiring security from the said James Packer, they stipulated (amongst other things) that the said Charles Jones" [and the four other persons naming them] "should give them a floating and continuing guarantee for the term of three years from the date hereof on behalf of the said James Packer, to secure to them, the said Lee & Jerdein, the amount of any balance which might at any time or times be due to them, the said Lee & Jerdein, from the said James Packer upon any such coal account on bills, to the amount of 300*l*., in the proportions following: the said Charles Jones in the sum of 100*l*." [it then stated the proportions of the other four sureties], "making together the said sum of 300*l*.; and in order to induce the said Lee & Jerdein to continue the said arrangement with the said James Packer, the said Charles Jones" [and the other four sureties] "agreed to enter into this agreement for guarantee in manner hereinafter appearing: Now this agreement witnesses, that in consideration of the said Lee & Jerdein agreeing to allow the said James Packer a certain commission upon coals, under an agreement between

them, and bearing date the 1st of November 1856, they the said Charles Jones" [and the other four sureties] "do hereby severally and respectively guarantee, promise and agree to and with the said Lee & Jerdein, that they the said Charles Jones" [and the other four sureties] "shall and will pay and make good in the respective proportions hereinbefore mentioned, to the said Lee & Jerdein, or their executors, administrators or assigns, all such sum and sums of money as may be due and owing to them at any time or times during the said term of three years from the said James Packer, in relation to the said agreement or bills of exchange, not exceeding in the whole the said sum of 300*l*., such guarantee to be a continuing guarantee, and to be made good at any time by the said Charles Jones" [and the other four sureties] "for any balance or amount due to the said Lee & Jerdein in respect of the said agreement between the said James Packer and the said Lee & Jerdein during the said term of three years."

The agreement then further stated, that giving time to James Packer should not invalidate the agreement, and continued: "That this agreement is to be taken as supplemental and in addition to an agreement bearing date the 1st of November 1856, made between Sarah Tinson of the one part, and the said Lee & Jerdein of the other."

The original agreement between Lee & Jerdein and Packer, made the 1st of November 1856, stated that it was agreed that Packer should continue as agent for the sale of coals on the terms that Packer should obtain customers for Lee & Jerdein, and have coals delivered to his order, for which Packer was to receive a specified commission; and in consideration thereof that Packer should give bills of exchange to Lee & Jerdein, as security for the amount in value of the coals so to be delivered, the intention being that Packer should make himself personally responsible for the payment of such amounts to Lee & Jerdein; that the customers so introduced should be deemed customers of Lee & Jerdein, and all bills and accounts sent in to them as such. And it went on: "that all monies received by the said James Packer from any of such customers shall be so received by him as agent for the said Lee & Jerdein, and paid

over and accounted for by him within six days after the receipt thereof by him; that such amounts so accounted for shall from time to time be taken off or credited upon the said floating bills so to be given from time to time by the said James Packer as aforesaid." The agreement further proceeded to witness that, in consideration of the commission, James Packer promised and agreed to perform and keep all the foregoing agreements and stipulations.

The agreement of the same date, the 1st of November 1856, between Sarah Tinson and Lee & Jerdein, recited that Packer was her son, that he was a salesman on commission for Lee & Jerdein, "he, the said James Packer, giving bills of exchange to the said Lee & Jerdein for all such coals as may be delivered to his order, such bills being floating bills, to be settled for and paid up at the expiration of the current months during which such bills were respectively running." It then provided that Sarah Tinson guaranteed that she would pay and make good to Lee & Jerdein "all such sum and sums as may be due and owing to them at any time or times from the said James Packer in relation to the said agreement or bills of exchange, not exceeding in the whole 300*l.*; such guarantee to be a continuing guarantee," &c.

The defendant pleaded that the supposed agreement and promises were obtained from him by the plaintiffs, by the fraud of the plaintiffs, and by their fraudulent and undue concealment of material facts within their knowledge, material to be made known to the defendant before he entered into the said agreement.

From November 1856 Packer had acted as agent for the plaintiffs, selling coals on the terms of the original agreement of that date; but he did not, for a long time previous to October 1861, pay the plaintiffs for the coals delivered to his order pursuant to the agreement, and in October 1861 was in debt to the plaintiffs, in respect of the coal account, 1,332*l.* The plaintiffs, on this, required from him further security, and he obtained the consent of the defendant and of the other persons mentioned as sureties in the agreement declared on to become sureties. On this, the plaintiffs caused the agreement declared on to be prepared, and

sent it to the defendant by their collector, who had no authority to answer any statements respecting it. The defendant made no inquiry of the plaintiffs respecting the state of Packer's account, nor did the plaintiffs give the defendant any information respecting it. Nothing was stated in the agreement of guarantee executed by the defendant respecting the debt due from Packer to the plaintiffs, or respecting the state of the accounts or the course of business between them, except as is above set out. The case found that there was no evidence to shew that the plaintiffs were aware that Packer had actually received from the customers for the coals the monies making up the 1,332*l.*; and it did not otherwise than inferentially from the above statement aver that Packer himself had received the money. The defendant, when he executed the agreement, was not aware of the debt due from Packer to the plaintiffs.

On the trial a verdict was found for the defendant, Erle, C.J., before whom the case was tried, holding that there was evidence of fraud for the jury. Leave was reserved to the plaintiffs to move to set aside that verdict, and enter a verdict for 100*l.*

The plaintiffs having moved accordingly, the Court of Common Pleas supported the ruling of the Chief Justice.

The case was argued, in the Exchequer Chamber (June 18, 1864), by

Collier (Solicitor General) (Prentice with him), for the plaintiffs, the appellants. —There was no evidence of any fraud on the part of the plaintiffs. There was no moral or legal duty obliging the plaintiffs to tell the defendant that Packer had not paid his bills monthly, and that they had not enforced their strict rights, according to the agreement between them. If the defendant wished for information from the plaintiffs respecting the state of Packer's account with the plaintiffs, he ought to have asked the plaintiffs. If he chose to trust to Packer's statement alone, or to make no inquiry at all, the plaintiffs ought not to suffer from his indiscretion. The plaintiffs ought not to be in a worse position because the defendant acted without due caution. Packer was not a defaulter in the sense of having received money and having not paid it over. He was a *del credere* agent.

The plaintiffs did not think Packer a defaulter. It may be that there was no actual default. It is not found that the parties for whom Packer was responsible had paid him. They may have all been solvent. The very fact of the plaintiffs asking for further security was enough to put the defendant upon making due inquiry. There was no misrepresentation on the plaintiffs' part. Every statement in the document submitted to the defendant is true and fair. The principle which governs in marine and life insurances, that the party insuring is bound to disclose every circumstance material to the subject of the contract, is peculiar to such insurance contracts only, and does not extend to guaranties—*Hamilton v. Watson* (1), *North British Insurance Company v. Lloyd* (2). There must be actual fraud to vitiate any other contract. To avoid this contract there must have been a plain misrepresentation. It cannot reasonably be argued that the omitting to recite in the agreement that Packer was in debt to the plaintiffs amounts to a representation that he had duly paid his bills. *Railton v. Mathews* (3) is very distinguishable. The marginal note there is incorrect. The only decision there was that the ruling of a Scotch Judge was incorrect. It turned on the law of Scotland, which is different, it seems, from the English law; and, further, the principal there was known to be a defaulter.

Honyman, for the defendant, the respondent.—There was evidence of fraud. The defendant had a right to have communicated to him by the plaintiffs the state of the accounts between them and Packer, who was in arrear to a very large amount, 1,332*l.*—*Pidcock v. Bishop* (4). The mode of the recital of the prior agreement in the agreement which the defendant was induced to sign leads naturally to the inference that the plaintiffs mean to represent that that prior agreement had been substantially carried out, and that the further security was required respecting future debts. The recitals in the agreement amount in substance to evidence of actual intentional

misrepresentation, which misled the defendant to his hurt.

Cur. adv. vult.

The learned Judges, differing in opinion, delivered their judgments *seriatim*, on the 30th of November 1864.

SHEE, J.—The question for our decision is, whether on the facts before us as stated in the case, and in the agreements which are to be taken as parts of it, there was any evidence for the jury, in support of the defendant's plea, that the supposed agreement and promises were obtained from him by the fraud of the plaintiffs, and by their fraudulent and undue concealment of material facts within their knowledge respecting the said James Packer, material to be made known to the defendant before he entered into the agreement. The facts were as follows: Under an agreement of the 1st of November 1856 James Packer had been for five years a commission agent of the plaintiffs for the sale of coals, to be delivered by them to his order, on the terms that he should from time to time give to the plaintiffs his bills for the amount of the coals so delivered, and pay to them within six days of its receipt all money received by him from customers for such coals, to be taken off and credited upon the bills so to be given by him. And by an agreement of the same date, between the plaintiffs and Sarah Tinson, the mother of Packer, she had become surety to the plaintiffs to the extent of 300*l.* for the due performance by Packer of his agreement. Packer not having for a very considerable time "carried out his agreement by settling for and paying up his bills at the expiration of the months during which they were current," had become debtor to the plaintiffs in the sum of 1,332*l.*, and Sarah Tinson, on her guarantie for him, had become their debtor to the extent of 300*l.*, when the plaintiffs informed Packer that they wanted further security, and could not without it continue him in their employment, and stipulated with him that the defendant and the other parties, sureties with him in the agreement sued upon, should, by their several and continuing guaranties, give the plaintiffs further security to the extent of 300*l.* against the said James Packer. In pursuance of this stipulation the plaintiffs caused

(1) 12 Cl. & F. 109.

(2) 10 Exch. Rep. 523; s.c. 24 Law J. Rep. (N.S.) Exch. 14.

(3) 10 Cl. & F. 934.

(4) 3 B. & C. 605.

the agreement sued upon to be prepared. Although in legal construction it extends to defaults already made as well as to defaults which might be in the future made, it gives no intimation in any part of it of an intention that it should operate retroactively, or of any ascertained default on which it could so operate. It is silent on the fact of the breach by Packer of his agreement, that he would for the coals delivered to his order give from time to time his acceptances, and take them up at the expiration of the months during which they were current; on the fact that by not having done so he had incurred a debt to the plaintiffs of 1,332*l.*, and involved Sarah Tinson in a liability for 300*l.*; on the fact that the plaintiffs had informed him that he must give them further security or relinquish their employment; on the fact that the defendant, on his signature of the agreement, would, not contingently only on future defaults, but at once, become liable for 100*l.*: and none of these facts, of which the defendant was entirely ignorant, were communicated to him by the plaintiffs, nor was any opportunity for inquiry of them, or of those who represented them, afforded to the defendant. The plaintiffs personally had no communication with him, and never saw him; it was left to Packer, whose employment and livelihood, as well as the liability of Sarah Tinson, were at stake, to obtain the consent of the defendant and of the other sureties in the best way he could, and as he thought proper; and the collector of the plaintiffs, who was sent round with the agreement to procure the signatures of the defendant and of the other sureties, had no authority to answer questions. It is clear from the case of *The North British Insurance Company v. Lloyd* (2), correcting the dictum of Lord Truro in *Owen v. Homan* (5), that the rule which prevails in assurances upon marine and life risks, that all material circumstances known to the assured must be disclosed by him, and that the non-disclosure of them, though innocent and not fraudulent, vitiates the contract, does not apply to contracts of guarantee. But upon a discussion in which the question is, whether there was any evidence to be left to the jury to support a

plea, not of non-disclosure merely, but of fraud and fraudulent concealment of facts material to be made known to the defendant, this singularity of insurance law is surely little better than an intruder. What place can it have in the argument, unless they who put it forward are at liberty to assume the negative of the plea. Whether there was any evidence of fraud and fraudulent concealment is the subject of inquiry, and there is no definition of guilty, as distinguished from innocent silence, or of bad faith and fraud in contracts which the facts in this case do not exactly fit. *Aliud simulatum aliud actum* (6), the making one state of things appear to those with whom you deal to be the true state of things, while you are acting on the knowledge of a different state of things—among the oldest definitions of fraud in contracts—is here exemplified; for the agreement was prepared by the plaintiffs as a security to them against a defaulter, with whom, on account of his default, except on further security, they had declined to continue their arrangement; and the defaulter is held out by them as their commission agent, with a five years' character in their service, who had been guaranteeing by his own bills during that time the customers introduced by him, under the protection of a pre-arranged system of short reckonings, settlements and payments from all temptation to dishonesty, irregularity or rash dealing. Sarah Tinson, whom presumably he would be reluctant to imperil, is held out as a person who was willing after five years' experience of the working of her son's commission agency, to continue liable to the same extent in amount and time with the defendant and the other proposed sureties; whereas her guarantee, to which theirs is described as "supplemental and additional," was exhausted, the first and immediate office of their guarantee being to make hers good should she fail in doing so; they, should she discharge it, continuing liable to the extent of 300*l.* for the balance, and any future addition to it remaining due by Packer to the plaintiffs. The only hint in the agreement sued upon of the real state of things between the plaintiffs and Packer is to be found in the recital that, "in order to induce the said Lee & Jerdein to con-

(5) 8 Mac. & G. 378; s. c. 20 Law J. Rep. (N.S.) Chanc. 314.

(6) Cicero de Officiis, b. 3. c. 14.

tinue the said arrangement with the said James Packer, the said sureties had agreed," &c., the effect of which recital was for the jury, and which, when read with the context was more likely to lead the proposed sureties to the inference that the existing security had, by reason of the increase of Packer's transactions on account of Lee & Jerdein, become inadequate than that it was already forfeited. "The guilt of fraud," says the *Digest*, "is not in him only who, for the purpose of deceiving, uses obscure language, but in him who insidiously and without appearing to do so dissembles what he thinks"—*Digest*, l. 43, s. 2, *de Dolo Malo*. "Dolus malus non tantum in eo est qui fallendi causâ obscure loquitur, sed etiam qui insidiosae vel obscure dissimulat." It is difficult to conceive language more obscure and better calculated to mislead, or dissimulation more insidious than in this agreement. Who would imagine that a recital "that James Packer has for some time past been a salesman of coals on commission for the said Lee & Jerdein, he the said James Packer giving bills of exchange to them for all such coals as may be delivered to his order, such bills being floating bills, to be settled for and paid up at the expiration of the current months during which such bills are respectively running," was, if true in any sense, true only in the loose sense that he had contracted five years before to give bills from time to time for such coals as might be delivered to his order, without any stipulation as to their being settled for and paid up at the expiration of the current months during which they were running, and that the course of dealing thus described, if it ever existed, had not, as the case expressly states, been observed by Packer for a very considerable time? What plain man, bargaining with one whom he thought honest and did not care to insult, could reasonably be expected to inquire whether the words, "should give to Lee & Jerdein a floating and continuing guarantee for the term of three years," might not mean, or be intended to mean, that he was to be liable before his signature to the agreement was dry, absolutely and inevitably to the extent of 100*l.*, or whether the words in the operative part of the agreement, "do hereby guarantee, promise and agree that they shall and will pay and make

good all such sum and sums of money as may be due to Lee & Jerdein at any time during the said term of three years," might not be intended to mean—do hereby guarantee, promise and agree that they shall and will pay and make good to the extent of 300*l.* a debt of four times that amount now due, and all further debts which may become due during the term of three years? "To be silent is one thing, concealment is another. You may be silent respecting facts within your knowledge without being guilty of concealment. You are guilty of it, when the motive of your silence is a wish that others for your advantage should be ignorant of facts which you know, and which it is for their interest that they should know." Such is the description or definition of undue concealment in the *Treatise de Officiis*:—"Aliud est celare, aliud tacere (7). Neque enim id est celare quidquid reticeas; sed cum quod tu scias id ignorare emolumenti tui causâ, velis eos, quorum intersit id scire. Hoc autem celandi genus quale sit et cujus hominis quis non videt? Certe non aperti, non simplicis, non ingenui, non justis, non viri boni; versuti potius, obscuro, astuti, fallacis, malitiosi, callidi veteratoris, vafri, hæc tot et alia plura nonne inutile est subire nomina? (8) These definitions and maxims, though cited in all the books on the contract of insurance, are of much older date than any certain trace of that contract, and not more applicable to it than to the contract of guarantee. Is there not in this agreement a studied effort to conceal the truth from those who were interested in knowing it, and whom the plaintiffs and Packer wanted not to know it? Under this impression I should on the argument of this case, had it not been for the dissent of my Lord Chief Baron and some of my learned Brothers, have arrived at a confident opinion, that there was not only some evidence, but cogent evidence of such a suppression of the truth, by a partial, inaccurate and subdolosus setting forth by the plaintiffs in the agreement of facts within their knowledge material for the proposed sureties to be informed of, as along with the non-communication of other facts material for them to know, amounted to a misrepresentation

(7) Cicero de Officiis, book 3, c. 12.

(8) Ibid. c. 13.

to the proposed sureties, that they were asked to come under none but the more ordinary liabilities of sureties—a contingent liability; and that Packer during his five years' agency had proved himself to be a man worthy of trust and confidence—a satisfactory guarantor of others and himself the safe subject of a guarantie.

But it was urged, on the part of the plaintiffs, and with the apparent assent of some of my Brothers, that we are concluded on this point by authority, and that if the cases which had been cited to us had been more maturely considered in the Court below, its judgment would have been different. I do not think so. The two cases in the House of Lords, and the case in the Court of Exchequer, appear to me to have been rightly understood by the Chief Justice at *Nisi Prius*, and by the Court of Common Pleas, and to be in favour of the defendant. There is not a word in them tending to weaken the principle that an undue and fraudulent concealment of matters material to be known by the guarantor vitiates the contract which is tainted by it. The case of *Railton v. Mathews* (3) decided, that on an issue "whether the pursuer was induced to subscribe the bond by undue concealment or deception on the part of the defenders,"—as explained by the summons of reduction of suretyship, to mean "whether when the defenders accepted and took possession of the said bond they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of the debtor,"—it was a misdirection to tell the jury that "such concealment, to vitiate the bond, must be wilful and intentional on the part of the person obtaining it, and with a view to an advantage to himself." Undue concealment, though not wilful and intentional and with a view to the advantage of the person taking a guarantie, being thus held sufficient to vitiate it, the case is strongly in favour of the defendant, for there was in this case, as it seems to me, evidence that the non-communication to him by the plaintiffs was not merely undue, but wilful and intentional; and it was for their immediate advantage, and, as they knew, and knew that the defendant did not know, for his immediate disadvantage, if an underhand dealing of guarantie by the party taking it can ever be so.

But *Railton v. Mathews* (3) is said to have been qualified by the later case—*Hamilton v. Watson* (1). Quite otherwise, as it appears to me. In *Hamilton v. Watson* (1) (the true grounds of the decision of which are to be found in the judgment of Lord Cottenham, and in what fell from him in the course of the argument rather than in the judgment of Lord Campbell), a cash credit on the guarantie of sureties had been granted to a man already in debt to the bankers who granted it, and the debt which had not been mentioned to the sureties was discharged by a cheque which, but for the new cash credit, the debtor would not have been in a position to draw. There was no allegation, as was observed by Lord Cottenham, of fraud or misrepresentation, or of any secret agreement as to the way in which the cash credit should be applied.

But it was pressed upon the House at the bar, that it was the duty of bankers taking a guarantie for a cash credit to inform the party giving the guarantie of every circumstance in the previous dealings of the party guaranteed, which might influence the consideration whether the guarantie should be given or refused. Lord Cottenham and Lord Campbell combat this contention in their judgment. The latter suggests as a criterion of innocent silence on the part of a creditor taking a suretyship bond, whether the fact not disclosed be one the existence of which might naturally be expected by the surety, as the indebtedness to his bankers of a person asking friends to be sureties for him to those bankers in a new cash credit would be. Their decision is, that where there is no fraudulent concealment it is not necessary to the validity of a cash credit surety bond, that all the circumstances of the dealings between the debtor and the creditor taking it should be voluntarily disclosed by him to the party giving it. There is a wide difference, as respects what might naturally be expected to be the actual state of the account of one man with another, between the case of a suretyship for a man requiring and applying for a cash credit to bankers with whom he had had previous dealings, and whose business it is to lend capital to penniless persons on the security of sureties, and the case of a suretyship for a surety of others—a surety between whom as such and his employers, short

reckonings as the defendant was led to suppose, had for five years been observed as a rule. But it is unnecessary to dwell upon the distinction, for in *Hamilton v. Watson* (1) neither fraud nor fraudulent concealment was charged; whereas here they are charged, and the only question is, whether there was any evidence to be left to the jury of them.

The case of *The North British Insurance Company v. Lloyd* (2) would not probably have been cited had it not been for the distinction re-established in it by my Lord Chief Baron, between the contracts of insurance and of guarantie. The fact not disclosed in that case was considered by the jury not to have been one material for the surety to have been informed of, and the Court concurred in their decision upon that point. It is stated in the case that there was "no evidence to shew that the plaintiffs were aware at the time when the agreement of the 3rd of October 1861 was entered into, that Packer had actually received payment from the customers for the coals delivered to his order." This seems to imply that Packer had received such payment, and though we are not at liberty to infer the plaintiffs' knowledge of it, we are at liberty to infer that, while contemplating the obtaining of the suretyship of the defendant and of the other sureties, the plaintiffs were deliberately and grossly negligent of a duty which, for the sake of the proposed sureties, it was incumbent upon them to discharge—the duty of ascertaining the cause of Packer's default; whether he had received payment for the coals delivered to his order, and if so whether the money which he ought to have paid over to the plaintiffs within six days of its receipt had been applied by him to other uses—*Dissoluta negligentia propè dolum est*; Digest b. 1. 1, a. 29. If Packer, with the plaintiffs' authority, had actually received payment for the coals delivered to his order, the observation of one of my learned Brothers in the course of the argument, that the customers, notwithstanding Packer's intervention, were, as well as he, and they primarily, responsible to the plaintiffs, would have less weight than it might otherwise be entitled to. This double liability of Packer and of the customers to the plaintiffs could in no case, as it appears to me, countervail the in-

herent ugliness of the transaction. Upon the whole, I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

BLACKBURN, J.—I am of opinion that in this case the decision of the Court below should be affirmed. The question is, whether, under the circumstances stated in the case there was evidence to go to the jury in support of the averment of fraud; for I think that the averment of undue concealment carries the case no further, and that unless actual fraud was proved, the substance of the issue was not proved. It was decided in *The North British Insurance Company v. Lloyd* (2) that the rule that all material circumstances known to the assured must be disclosed, is peculiar to contracts of insurance, and that it does not extend to contracts of guarantie. I concur in this, which, I think, is founded upon principle as well as authority. It was pointed out by the Chief Baron, in the argument in the present case, that a surety is, in general, a friend of the principal debtor, acting at his request, and not at that of the creditor; and in ordinary cases it may be assumed that the surety obtains from the principal all the information which he requires; and I think that great practical mischief would ensue, if the creditor were by law required to disclose everything material known to him, as in a case of insurance. If it were so, no creditor could rely upon a contract of guarantie unless he communicated to the proposed sureties everything relating to his dealings with the principal to an extent which would, in the ordinary course of things, be so vexatious and annoying to the principal and his friends, the intended sureties, that such a rule of law would practically prohibit the obtaining of contracts of suretyship in matters of business. This is well pointed out by Lord Campbell, in his judgment in *Hamilton v. Watson* (1). But I think, both on authority and on principle, that when the creditor describes to the proposed sureties the transaction proposed to be guaranteed (as in general a creditor does), that description amounts to a representation, or, at least, is evidence of a representation that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction

such as that described. And if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that if it were known to him he would not enter into the contract of suretyship, I think it is evidence of a fraudulent representation on his part. I think that it appears in *Hamilton v. Watson* (1) that such was the opinion of Lord Campbell, and I think that on this principle are founded the judgments of Lord Eldon in *Smith v. the Bank of Scotland* (9), and of the Court of King's Bench in *Pidcock v. Bishop* (4). In the present case the plaintiffs had no personal communication with the defendant, the surety, and when they sent the agreement to him for execution they sent it by an agent, who had no authority from the plaintiffs to make any statement whatever, or to do anything more than obtain the defendant's signature to the agreement thus sent. The argument for the plaintiffs before us was, in substance, that under such circumstances, though there might be a concealment or non-disclosure of material facts, there was not and could not be any misrepresentation on the plaintiffs' part, and that without it there could be no fraud; and during the argument I was inclined to be of that opinion; but on consideration I have come to the conclusion, that in this case there was evidence of intentional deceit by a false representation, of the kind I have above referred to, amounting to actual fraud. The written agreement, which before it was executed the plaintiffs sent to the defendant, recites, that Packer, the principal, had been for some time salesman to the plaintiffs on terms by which he was, in substance, to be a *del credere* agent, settling and paying for what he had sold monthly, and that they had required from him security to induce them to continue him in the employment, and stipulated that the defendant and others should give them a floating and continuing guarantee for the term of three years from the date thereof, to secure the amount of any balance which might, at any time, be due to them on the coal account. I think

this was evidence of, or rather, if not qualified by other matters, amounted to a representation that there was nothing in the transaction between the plaintiff and Packer which might not, in the ordinary course of affairs, be expected to have taken place between them as parties to such a transaction. It is stated in the case that at the time when this agreement was sent to the defendant, a balance of 1,332*l.* was actually then due from Packer, he not having for a very considerable time settled for and paid up at the expiration of the current month, as stipulated by the agreement. It is, however (in favour of the plaintiffs), further stated, that there was no evidence that the plaintiffs were aware that Packer had actually received the money from the customers. Now, whether the handing the agreement by the plaintiffs to the defendant amounted to an inaccurate representation or not depends, as I think, on the question whether, in such a transaction as that described in the agreement, it might, or might not, naturally be expected that the masters might have allowed a balance of this extent to accumulate, and might have allowed the amount to stand over unsettled for so long a time. In *Hamilton v. Watson* (1) the transaction was a security for a banker's cash account, and the decision of the House of Lords was, that in such a case it might be so naturally expected that the proposed principal had already overdrawn his account, that there was no evidence of a representation that he had not. In *Smith v. the Bank of Scotland* (9), where the security was given for the good behaviour of a bank agent, it was held, that an allegation that the bank knew that the principal had misconducted himself in his office, and that this fact was concealed from the sureties, ought to have been admitted to proof in the Court below. I think the effect of Lord Eldon's judgment in that case is, that it was so little to be expected that a bank would continue in their service an agent who had already, by breach of trust, run into their debt, that the application for security amounted, as he says, to holding him forth to the sureties as a trustworthy person—1 *Dow*, 292. I think that it must in every case depend upon the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist, and that

(9) 1 *Dow*, 272.

must generally be a question of fact proper for a jury. If in this case the amount of the balance already due had been small, or the period during which the accounts were left unsettled short, there would, in my opinion, have been such a mere scintilla of evidence as would not have warranted the jury in finding the verdict of fraud, and the Judge would have been justified in withdrawing the question from their consideration. But as it is, the amount of the balance already due being, relatively to the amount of the security, so large, and the period during which no settlement had taken place being so considerable, I think the Judge could not have withdrawn the case from the consideration of the jury, who might well come to the conclusion that the sending of the agreement in these terms, amounted to an inaccurate representation. This would not be enough to support the verdict on the plea of fraud, unless it was further established, that the plaintiffs made the inaccurate representation, intending to deceive the defendant, and induce him to enter into the contract in the belief that what was represented did exist; whilst the plaintiffs knew it did not exist. But of that also I think there was sufficient evidence. The improbability that any one could suppose that sureties would have entered into such an agreement, if they had known the truth, is so great, that the jury might well think that the plaintiffs knew that the defendant was in ignorance of it; and if the jury so thought, they might from that alone have drawn the inference that the representation was fraudulently intended to deceive. This is strengthened by the facts that the plaintiffs apparently avoided having any personal communication with the proposed sureties, and sent the agreement for execution by an agent, who had no authority from them to make any statements, from which the jury might perhaps draw the further inference, that the plaintiffs took pains to avoid the risk of the sureties asking questions and being undeceived. It is not essential to constitute fraud that there should be any misleading by express words. It is sufficient if it appears that the plaintiffs knowingly assisted in inducing the defendant to enter into the contract by leading him to believe that which the plaintiffs knew to be false, the plaintiffs knowing

that if he had not been thus misled he would not have entered into the contract. For the reasons above given, I think there was, on this case, evidence to support the verdict; and consequently the judgment, in my opinion, should be affirmed.

BRAMWELL, B.—I think this judgment should be reversed. It is clear that nothing turns on the defendant being a surety. The question raised, and properly raised, by the pleadings is, was the defendant's engagement obtained by the plaintiffs' fraud, actual moral fraud? The question argued before us was, was there evidence of such fraud? The Court below says there was; but unfortunately does not point out in what it consisted. With very great respect I see none, and I think it can be shewn there is none. To constitute fraud there must be—first, the assertion of something false, which is not the case here; or, secondly, the suppression of something true, where there is a duty or profession of stating everything material; and here there is no such duty; or, thirdly, what perhaps is included in one of the foregoing, a suggestion of falsity by statement of some facts, and suppression of others which would qualify those stated. As if one should say A. was seised and died, B. was eldest son, entered and enjoyed, and suppressed that A. had made a will and given B. a life estate. To my mind there is nothing of that kind here. Perhaps, but most improbably, the defendant inferred or guessed that no arrears were due to the plaintiffs. I should not have so concluded: on the contrary, I should have concluded that there was some change in the circumstances of the parties which induced the plaintiffs to require further security. But supposing that the defendant's was a right conclusion, and supposing that if he could not inform himself further, he was justified in acting on it, I say that here he was not so justified, because he might, if he cared to know them, have informed himself of the actual facts from the plaintiffs, or if they had refused to tell him he might have refused to be surety. I think a man has great right to complain of another who charges him with fraud, because he, the accuser, had not taken the trouble to make a few inquiries. I really can see no evidence of any fraud, of anything dishonest in this case. There is nothing inconsistent with the plaintiffs' honesty. But when the facts are equally consistent with

a conclusion one way or the other, they are no evidence either way. I think the opinion that there was evidence of fraud is founded on a misapprehension. Packer was not a dishonest defaulter to the knowledge of the plaintiffs. He was liable to them to a large amount, every shilling of which might have been due from solvent debtors. The plaintiffs continued him a long time after in their service. They sent the agreement of suretyship to the defendant, and left it with him several days for him to make such inquiries as he thought fit. He makes none. Suppose he had asked and been told the truth, could anybody say that there had been any fraud or attempt at fraud? Suppose he had employed an attorney, would anyone say that there was any attempt to deceive the attorney? The notion of fraud arises from the defendant being likely to behave foolishly, to make no inquiry, making none and being a surety. I think this very mischievous, that a man should have his carelessness rewarded by liberty to call out Fraud!—very mischievous that people should be charged with fraud by careless persons simply on account of their own carelessness. No one is safe if this is allowed. No one can ever know that he has sufficiently guarded against the rash conclusions and folly of those he deals with, and saved himself from the uncharitable and foolish conclusion to which a jury may be disposed to come in favour of a surety.

CROMPTON, J.—The judgment I am about to deliver is one in which my Brother Channell concurs.

The question in this case is, whether the Court of Common Pleas was wrong in holding that there was some evidence of fraud to go to the jury. It is quite clear that the mere non-disclosure of material facts will not operate so as to avoid a contract of the nature of the one in this case, such defence being, as pointed out in the case of *The North British Insurance Company v. Lloyd* (2), peculiar to the contract of insurance. Such non-communication avoids the contract of insurance without fraud and however innocent the conduct of the party may be, on grounds peculiar to the contract of insurance and not applicable to the case of a guarantie. I cannot say that the Court below was wrong in holding that there was some evidence of fraud to go to the jury in this case, or that the learned Judge who

tried the case could properly have withdrawn it from the jury.

To constitute a fraudulent misrepresentation, it need not be made in terms expressly stating the existence of some untrue fact; but if it be made by one party in such terms as would naturally lead the other party to suppose the existence of such state of facts, and if such statement be so made designedly and fraudulently, it is as much a fraudulent misrepresentation as if the statement of the untrue facts were made in express terms. It seems to me that the defendant in the present case would be naturally led by the guarantie, and the original agreement with Packer annexed thereto, and the reference to the agreement with Mrs. Tinson, referred to in the guarantie which is said to be supplemental to that agreement, to suppose that a different state of things existed from the real state of things known to the plaintiffs. It was known to the plaintiffs that Packer the principal had not carried out his original agreement with them, and that there was a large sum due from him on his floating bills. By his agreement with them, the monies to be received by him from the customers from time to time were to be paid over and accounted for within six days, and were to be applied to the floating bills. Surely on perusing such documents as were sent, the proposed sureties would be led to suppose that the monies to be received from time to time would be applicable, in the first instance, to the bills to be given from time to time, and not to a large deficit on the old bills. In truth, none of the money to be received would be applicable to the new transactions till the large balance was wiped off; and it is very unlikely that the surety would have joined in the new guarantie had he been aware of the existence of the old debt. I think also that the new sureties would naturally be led to suppose from the draft guarantie, and from its being stated that their engagement was to be supplemental, and in addition to Mrs. Tinson's, that her guarantie was practically applicable to the new dealings; whereas, whether the defendant's suretyship was applicable retrospectively or not, hers would really be in effect absorbed by the large balance. I think, therefore, that there was evidence that the defendant was led by the sending of the documents in question to the belief in an untrue state of facts, where the

knowledge of the true state of facts would have prevented his joining in the contract of suretyship.

It was said, indeed, that the plaintiffs sending the documents in this shape may have been without any intentional fraud on their part, and that they may merely have got the documents drawn by their professional advisers in a proper state, and forwarded them without moral fraud. This seems, however, to me to be a question which the jury were to determine; and it is not necessary for me to consider whether in their place I should have found the fraud. We are only to decide whether there was evidence to go to the jury. The sending the documents to the defendant and leaving them with him; the largeness of the sum in arrear; the improbability that the defendant would have become surety if he had known the real facts on the one hand, and on the other hand the circumstances of the plaintiffs not having seen the proposed sureties and merely having sent the papers to them, and the other circumstances referred to in the argument were, as it seems to me, matters entirely for the jury; and I cannot say that the Court of Common Pleas were wrong in holding that there was some evidence for their consideration, and I therefore think that the judgment of the Court below should be affirmed.

POLLOCK, C.B.—The question in this case is simply whether there was any evidence of fraud on the part of the plaintiffs, such as to prevent them from recovering from the surety the amount guaranteed.

The facts are very short and plain. James Packer acted as commission agent for the plaintiffs, selling goods which they supplied and receiving payment for them, charging a commission upon each transaction. He gave bills to the plaintiffs which were to be paid at stipulated times. As this involved considerable responsibility on the part of Packer, he originally gave security to the plaintiffs by his mother, Sarah Tinson, to the amount of 300*l*. The business went on, and his accounts became in arrear to some extent, upon which the plaintiffs told him that they could not allow his employment to go on unless he found further security, whereupon he undertook to do so, and procured the defendant and others to undertake to sign the agreement on which this action is brought. This was a further security for

300*l*. more, expressed to be supplemental and in addition to the former; so that the new sureties were to be liable for whatever Sarah Tinson was to be liable to, and this was distinct notice that the suretyship was to be retrospective. The plaintiffs never had any communication with the defendant, and never interfered in any way beyond sending the agreement to be signed which they had been told by Packer that the defendant had approved of, and which was true. It is said there was in this matter concealment or misrepresentation. In fact, there was no representation at all, and therefore there could not be misrepresentation; and as to concealment, the plaintiffs never undertook to make any disclosure; and in my judgment were not under any legal or moral obligation to make any disclosure under the circumstances.

It must be taken that the occupation of Packer was a profitable one—one in which a prudent man might have recovered himself though he had fallen into some difficulties. The plaintiffs say to him, if you can procure from your relations or friends a further guarantie, we will allow you to continue notwithstanding the present state of your accounts, but if you cannot we will stop now. He undertakes to procure, and does procure a further guarantie; and the business therefore went on. Whether Packer made to his sureties a faithful and true representation of the state of his affairs is entirely a matter of indifference; if he did, then they have no ground of complaint at all; if he did not, it is no fault of the plaintiffs. The defendant has trusted Packer, whom the plaintiffs would trust no longer; and Packer has deceived the defendant, but the plaintiffs never directly or indirectly made any communication to the defendant on the subject of the state of the accounts. It was, however, manifest that the plaintiffs required further security, and retrospective security. It was therefore the duty rather of the sureties to inquire, than of the plaintiffs to inform them, what was the state of the accounts. In my opinion, there is a total absence of any evidence of fraud, and, I should add, no just ground for any suspicion of it. I think the rule ought to be made absolute.

Judgment affirmed.

1865.
Feb. 6. } FIELDING v. LEE AND ANOTHER.

Bankrupt—Order and Disposition—
12 & 13 Vict. c. 106. s. 125.

A Commissioner in Bankruptcy made an order, under the 12 & 13 Vict. c. 106. s. 125, in these terms: "That the household goods, furniture, &c. being in or about the messuage or dwelling-house and premises in the occupation of the said T. Taylor, in Cross Street, Middleton, and known as the Cross Keys, be sold and disposed of by the assignees for the benefit of the creditors of the said T. Taylor":—Held, per Erle, C.J., and semble per Byles, J., that the order was sufficiently specific.

Held, also, per Byles, J., that the order was not bad upon the face of it; and could not be held to be bad, unless it appeared from the evidence that a more specific order might have been made.

This was an action tried, before Mr. Serjeant Atkinson, at the Assizes held at Manchester in August last.

The action was in trover and trespass for taking away certain household goods and furniture. The defendants pleaded not guilty, by statute, referring to the 12 & 13 Vict. c. 106. s. 159; 13 & 14 Vict. c. 61. s. 19; 15 & 16 Vict. c. 54. s. 6. Secondly, a denial that the goods in question were the property of the plaintiff. Thirdly, a plea that after the passing of the Bankruptcy Act, 1861, one Thomas Taylor was duly declared a bankrupt, and that a warrant of seizure was duly issued by the Judge of the Court having jurisdiction in the matter of the said bankruptcy, whereby the bailiffs of the said court and others were required "to enter into and upon the house of the said bankrupt, and then and there to seize the goods of the said bankrupt, and in case of resistance or of not having the key or keys of any door or lock of any premises belonging to the said bankrupt where any goods of his were, or were suspected to be, to break open, or cause the same to be broken open, for the better execution of the said warrant." And the defendants alleged that John Harper, a bailiff of the court, entered into the house of the bankrupt and took peaceable possession of certain goods; that he was

afterwards ejected therefrom, and the defendants thereupon entered the said house for the purpose of enabling the said John Harper to assist in the execution of the said warrant, and seized, took and carried away the goods in the declaration mentioned, which were the grievances complained of. There was also a fourth plea that the plaintiff had given no notice of action.

The plaintiff took issue on the above pleas, and he also new assigned, to which the defendants pleaded not guilty.

It appeared at the trial that a person of the name of Taylor had formerly kept a beer-house called the Cross Keys, at Middleton, near Manchester. On the 15th of January 1863 Taylor left the Cross Keys, and went to live in a neighbouring cottage. He was succeeded in the business at the Cross Keys by his son-in-law, one Ogden, who took from him the furniture and fixtures in the beer-house at a valuation. While Taylor was residing in the cottage, namely, on the 7th of September, his furniture was seized under a writ of *fi. fa.* at the suit of Lee, one of the defendants in this action, and was sold by Aspinall, another defendant. The plaintiff bought the furniture at the sale, and replaced it in Taylor's cottage. In the following October, one Kenyon, Taylor's brother-in-law, bought the goodwill and furniture of the Cross Keys of Ogden, and subsequently took out a licence in his own name, and put his name over the door; but put Taylor into the house to manage the business for him. When Taylor returned to the Cross Keys he took with him from the cottage the furniture which the plaintiff had bought at the sale and replaced in the cottage. In February 1864 Taylor was committed to prison on a judgment-debtor summons by the Judge of a county court, and on the 1st of April he was declared bankrupt, the proceedings being carried on in the same county court. The defendant Lee was appointed creditors' assignee, and on the 16th of June, upon the application of Lee, the Judge of the county court, sitting as a Commissioner in Bankruptcy, made the following order: "That the household goods, furniture, &c. being in or about the messuage or dwelling-house and premises in the occupation of

the said T. Taylor, in Cross Street, Middleton, and known as the Cross Keys, be sold and disposed of by the assignees for the benefit of the creditors of the said T. Taylor." He also issued a warrant of seizure in the terms stated in the third plea. In accordance with this warrant the high bailiff of the county court took possession of all the furniture in the Cross Keys, which was subsequently sold by auction by the defendant Aspinall.

The present action was brought by the plaintiff to recover that part of the goods seized, which consisted of the furniture brought from Taylor's cottage, and which he had bought at the sale on the 9th of September.

The learned Serjeant was of opinion that, under the circumstances, the defendants could not set up as a defence under the 12 & 13 Vict. c. 106. s. 125, that the goods were in the order and disposition of the bankrupt, and the only question he asked the jury was whether the goods claimed by the plaintiff were *bonâ fide* his property at the time of seizure. The jury found that they were, and the verdict was entered for the plaintiff accordingly.

Temple, in Michaelmas Term, obtained a rule for a new trial, upon the ground of misdirection by the learned Serjeant, in telling the jury that the defendants could not set up, as an answer to the action, that the goods were in the order and disposition of the bankrupt as reputed owner.

E. James, Baylis and *Pope* shewed cause. — They contended that the order of the Commissioner under which the assignee claimed was not sufficiently specific (1); and they referred to *Heslop v. Baker* (2) and *Quartermaine v. Bittlestone* (3).

Temple, Wood and *Torr*, in support of the rule, referred to *Freshney v. Carrick* (4) and *Graham v. Furber* (5).

(1) This point was apparently not taken at the trial.

(2) 8 Exch. Rep. 411; s. c. 22 Law J. Rep. (N. S.) Exch. 333.

(3) 13 Com. B. Rep. 133; s. c. 22 Law J. Rep. (N. S.) C. P. 105.

(4) 1 Hurl. & N. 653; s. c. nom. *Freehney v. Wells*, 26 Law J. Rep. (N. S.) Exch. 129.

(5) 14 Com. B. Rep. 134; s. c. 23 Law J. Rep. (N. S.) C. P. 10.

ERLE, C.J.—I am of opinion that this rule ought to be made absolute for a new trial. The action is brought by the alleged owner of goods in trover and trespass. The defendants, of whom Lee is the assignee in bankruptcy and the other is Lee's agent, plead not guilty by statute. The evidence shewed that Lee caused the goods to be seized under his assumed rights as assignee of one Taylor; and I take it that the plaintiff was the true owner of the goods, and that the goods were at the time of the seizure in the order and disposition of Taylor, the bankrupt, and Lee had a right, under section 125. of the 12 & 13 Vict. c. 106, to take these goods for the benefit of Taylor's creditors, if he has provided himself with the proper order. By section 159. of the 12 & 13 Vict. c. 106, in every action brought against any person for anything done in pursuance of that act, the defendant may plead the general issue. Now the defence is, that the alleged wrongful act is one which the act of parliament really authorizes. The evidence shews, that the goods in question were in the order and disposition of the bankrupt with the consent of the true owner. But the great argument has been, that there has not been the order of the Commissioner as required by section 125, in order to give the assignee a right to take these goods. That order is before me, and it is as follows: "That the household goods, furniture, &c. being in or about the messuage or dwelling-house and premises in the occupation of the said T. Taylor, in Cross Street, Middleton, and known as the Cross Keys, be sold and disposed of by the assignees for the benefit of the creditors of the said T. Taylor." The question is, whether that is a sufficient order under section 125. In *Heslop v. Baker* (2) it was held that goods of which the bankrupt was reputed owner did not vest in his assignees without an order having been first made. In *Quartermaine v. Bittlestone* (3) it was held that a general order to sell all goods which were in the possession, order or disposition of the bankrupt was insufficient. That was an order in the most general terms. But this order is much more specific. To some extent at least it makes it clear what goods are to be sold, inasmuch as it specifies them as household goods and furniture, and as

being in a certain public-house. There is much force in the observation, that the object of this section is to give to the creditors protection against claims which are only put forward by friends of the bankrupt to protect him in his distress, and if it was necessary in every case that the true owner should be found, and that he and the goods to be seized should be minutely described and specified in the order, these provisions of the statute would be completely paralyzed. In this case *de corpore constat* to a sufficient extent.

I should have come into this line of reasoning without any authority, but I am much fortified in it by the case of *Freshney v. Carrick* (4), which has been referred to, and by the remarks of Baron Martin in giving judgment in that case.

BYLES, J.—I am of the same opinion. These were goods in the possession of the bankrupt, and it is plain that there was a true owner apart from the apparent owner, and that the goods were in the possession of the bankrupt with the consent of the true owner. Then the Commissioner makes an order that the household goods and furniture in a certain house should be sold by the assignees for the benefit of the creditors. That order is objected to as being too general, on the authority of *Quartermaine v. Bittlestone* (3). There the order contained no description at all, and was clearly bad; here the goods are described to some extent, because they are described as being on certain premises. It is said that the order is bad because the name of the true owner is not mentioned, and because the particular goods are not specified. As to the first objection, the case of *Freshney v. Carrick* (4) to which Mr. Wood has referred is precisely in point. My Brother Martin says, "it is necessary that the attention of the Commissioner should be directed to particular goods, but it is unnecessary that it should be mentioned in the order who was the party claiming as the owner." That is precisely in point as to the first objection. As to the second objection, I think it is sufficient to describe them as they are described in this order, namely, as goods of a certain kind in a certain house. At any rate, it cannot be said that this is an order bad upon the face of it, and if the objection had been

taken at the trial, it might have been shewn by the evidence to have been under the circumstances as good an order as could have been made.

Rule absolute.

1865. }
Jan. 11. } *In re COOPER.*

Feme Covert—Acknowledgment—3 & 4 Will. 4. c. 74. s. 85.

The affidavit accompanying the acknowledgment by a married woman of a deed executed by her, made abroad may be sworn before a notary public, having authority by the laws of his country to administer an oath.

M'Leod applied that the proper officer of the Court might be directed to receive and enrol the certificate of acknowledgment of Frances Cooper, a married woman, of a deed executed by her, together with the affidavit verifying the same, under the 3 & 4 Vict. c. 74. s. 85.

It appeared that Mrs. Cooper was resident in Wisconsin, one of the United States of America, and that a commission was sent out for the purpose of taking her acknowledgment. The affidavit stated that she had duly acknowledged the deed, and was sworn before a notary public. It was accompanied by a certificate, by the Secretary of State for Wisconsin, that a notary was a person authorized to administer oaths in that State.

The difficulty suggested was, that the affidavit was not sworn before a magistrate, in accordance with a rule of Hilary Term, 14 Geo. 3, relating to common recoveries, by which it is required that the affidavit shall be sworn "either before some person duly authorized to take affidavits in this Court, or before some *magistrate* of the place where such acknowledgment shall be taken, having authority to administer an oath, and in the presence of a public notary."

ERLE, C.J.—I think you are entitled to have this acknowledgment enrolled. The essence of the rule is, that the affidavit should be sworn before a person having authority to administer an oath. The very question arose in the case of *In re Way* (1), and the affidavit was held to be sufficient.

(1) 6 Man. & G. 1046.

So in *Ex parte Hutchinson* (2), an affidavit sworn before the British Consul at Madeira, who was certified to have power, by the laws of that island, to administer an oath, was held sufficient. There is, therefore, ample precedent for granting this application.

WILLIAMS, J., WILLES, J. and KEATING, J. concurred.

Application granted.

1865. }
Jan. 16. } FALKE v. FLETCHER.

Principal and Agent—Unpaid Vendee.

D, a merchant in London, was in the habit of shipping salt for exportation at the port of Liverpool. He usually employed the plaintiff to purchase the salt, and the plaintiff shipped it, taking receipts in his own name from the mate for each delivery, and when the cargo was complete, taking bills of lading in his own name, which he remitted to D, in exchange for D's acceptances for the price of the salt. The plaintiff was paid no commission, but he charged D. an advance on the price of the salt. On the present occasion D. had chartered a ship to load a full cargo of salt for Calcutta, and the plaintiff had placed on board her, in accordance with instructions from D, 1,000 tons of salt which he had purchased for that purpose, and for which he had taken the mate's receipts in the usual course. When this quantity had been placed on board D. stopped payment, and the plaintiff then ceased loading, and demanded bills of lading for the salt already on board in his own name. The defendant, the shipowner, refused to allow them to be given and filled up the ship, and sent her with the salt to Calcutta. The jury found that when the plaintiff put the salt on board he did not intend to pass the property therein to D, but to retain it in himself:—Held, that this was the proper question for the jury, and that on this finding and these facts there was a conversion of the salt by the defendant at Liverpool.

This was an action tried, before Blackburn, J., at the Summer Assizes at Liverpool, 1864.

(2) 5 Com. B. Rep. 499; s. c. 17 Law J. Rep. (N. S.) C.P. 111.

The action was brought for the conversion of 1,000 tons of salt. The defendant pleaded not guilty, and that the salt was not the property of the plaintiff.

It appeared at the trial that the plaintiff was a salt-merchant, carrying on business at Liverpool, and that the defendant was the owner of a vessel called the *Savoir Faire*. In the month of November 1863 one De Mattos, a merchant in London, through the plaintiff, chartered the *Savoir Faire* to load a complete cargo of salt and proceed therewith to Calcutta; the captain to apply to the plaintiff for cargo and custom-house business.

It was proved that De Mattos was frequently in the habit of employing the plaintiff to charter vessels for the conveyance of salt, and that the course of business was for the plaintiff to purchase the cargo, and to load it in his own lighters and at his own expense. That in the course of doing so he took the mate's receipts, which were made out in his own name, and, when the whole cargo was loaded, he took bills of lading in his own name. These he sent to De Mattos, with invoices of the price of the salt, and received in exchange De Mattos's acceptances for the amount. The plaintiff charged no commission to De Mattos, but charged such a price for the salt as would remunerate him for his trouble.

This course was followed in the present instance, until about 1,000 tons of salt were loaded, when the plaintiff having heard that De Mattos had stopped payment, declined to load any more. The defendant thereupon filled up the ship on his own account. The plaintiff demanded of the captain bills of lading in his own name for the salt on board in exchange for the mate's receipts. These the defendant refused to permit him to give, and the plaintiff thereupon sent the mate's receipts to his agents at Calcutta with directions to them to claim the salt on its arrival. This was done, but the captain refused to deliver up the salt.

The learned Judge directed the jury that, if the property in the salt remained in the plaintiff, the sailing away from Liverpool after the demand and refusal of the bills of lading was a conversion by the defendant; and that, if the plaintiff did not

intend to part with the property in the salt when he placed it on board, it remained in him as against De Mattos and also as against the defendant.

The jury found a verdict for the plaintiff, with damages, 582*l*. 19*s*. 6*d*., the damages being estimated on the assumption that there had been, in accordance with the direction of the learned Judge, a conversion at Liverpool.

Edward James now moved for a new trial, on the ground of misdirection, and that the damages were wrongly estimated, there having been no conversion until the vessel reached Calcutta. He contended that the salt having been purchased by the plaintiff, as agent for De Mattos, and delivered on board a ship chartered by De Mattos, the property in it had passed to De Mattos, and that the defendant had a right to refuse to give bills of lading made out in the name of any other person than De Mattos.

ERLE, C.J.—I am of opinion that there ought to be no rule in this case. The plaintiff was in reality in the situation of an unpaid vendor. Having undertaken to procure salt as agent for De Mattos he puts it on board a ship chartered by him for De Mattos, and takes the mate's receipts in his own name. Upon this the proper question was submitted to the jury, namely, whether the plaintiff intended thereby to vest the property in the salt in De Mattos, or whether he intended to retain the control over it which he would have, if such was not his intention; and the jury have found that question in favour of the plaintiff. Then the question is, whether there was a conversion by the captain's sailing away from Liverpool and refusing to give the plaintiff bills of lading in his own name. By reason of his doing so, goods to which the plaintiff was entitled have been absolutely lost to him; and I think the learned Judge was right in saying that, under the circumstances, there was a conversion when the defendant caused the goods wrongfully to be taken out of the control of the plaintiff.

WILLIAMS, J.—I am of the same opinion. It is a pure matter of fact: what was the intention of the plaintiff in putting the goods on board? There was evidence upon this point which might have justified the

jury in finding either way. One of the circumstances to be taken into consideration was, that the plaintiff was also the agent for the vendee, and no doubt that was pressed, on the part of the defendants, upon the jury. As to the damages, it is clear that as soon as the plaintiff was deprived of the power to exercise his right to resume possession of the goods there was a conversion.

WILLES, J.—I am also of opinion that the learned Judge left the proper question to the jury, namely, whether, looking at all the circumstances, there was an intention by the plaintiff to appropriate the salt to De Mattos and to pass the property to him, when he put it on board the vessel. Looking to the course of dealing between the parties, I think it is clear that the jury were right. The practice of sending the bill of lading together with the invoice direct to the principal, produced great hardships in *Key v. Cotesworth* (1), the goods having got into the hands of a bankrupt consignee. That eventually led to the practice being adopted similar to that in *Turner v. the Trustees of the Liverpool Docks* (2), namely, for the merchant to ship the goods on board on his own account. That was the course of business adopted in previous transactions between the plaintiff and De Mattos, and there is every reason to suppose that in this case also he meant to retain that security. With respect to the argument that has been used that the plaintiff put the goods on board as agent for De Mattos, that appears to me to be only one circumstance in the case, and not a conclusive one. In one sense, no doubt, he was the agent of De Mattos, but for the purpose of considering this question he must be treated as a vendor, as was done in *Feise v. Wray* (3). With respect to the conversion, I am satisfied that the learned Judge was right in his direction to the jury.

KEATING, J. concurred.

Rule refused.

(1) 7 Exch. Rep. 595; s.c. 22 Law J. Rep. (N.S.) Exch. 4.

(2) 6 Exch. Rep. 543; s.c. 20 Law J. Rep. (N.S.) Exch. 393.

(3) 3 East, 93.

1865. } CLARKE AND OTHERS v. WAT-
Jan. 25. } SON AND ANOTHER.

*Contract — Surveyor's Certificate —
Wrongful Refusal to give Certificate.*

A declaration, after setting out an agreement by which the plaintiffs contracted with the defendants to do certain works for a certain sum to be paid them by the defendants on production by the plaintiffs of the certificate of the surveyor of the defendants that the works had been efficiently performed to his satisfaction, averred that, although all things had been done by the plaintiffs to entitle them to such certificate, yet the said surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do, and the defendants had not paid the money payable on such certificate:—Held, on demurrer, bad as not disclosing any cause of action against the defendants.

This was an action, by the assignee of Francis Ayers, a bankrupt, and one William Mallows, and one William Johnson, and the first count of the declaration stated that, before F. Ayers became bankrupt, by an agreement in writing made between the said F. Ayers, W. Mallows and W. Johnson, therein called the contractors of the one part, and the defendants of the other part, the said contractors agreed with the defendants to do certain works in conformity with certain plans, drawings and sections therein mentioned, and also in conformity with certain specifications, as well as to the satisfaction and approval of the engineer to a certain local board of health for the time being, should such be found necessary, for 312*l.* 15*s.* to be paid as follows: 156*l.* 7*s.* 6*d.* on production by the contractors to the defendants, or one of them, of the certificate of William Lambert, or other the surveyor for the time of the defendants, that the contractors had duly and efficiently performed and completed such portion of the work as, according to the judgment of the said surveyor, should be not less than three-fourths thereof in extent and value; 78*l.* 3*s.* 9*d.* on the production by the said contractors to the defendants, or to one of them, of the certificate of the said surveyor as aforesaid, that the whole of the works mentioned and referred to in the said plans, drawings and specifications had been duly and efficiently performed and completely

finished to his satisfaction, and also to the satisfaction of the engineer for the time being of the local board of health, if necessary; and the balance of 78*l.* 3*s.* 9*d.* at the expiration of four months from the date of the said surveyor's certificate of completion, provided the therein mentioned roads, pathways, drains and culverts, and every part thereof, should then be certified by the said surveyor to be in good repair and in perfect and sound condition in all respects, and the defendants thereby agreed with the said F. Ayers, W. Mallows and W. Johnson, in consideration of the due performance of the said agreement therein contained on their part, to pay to them the said sum of 312*l.* 15*s.* at the times and in the manner therein-before mentioned.

Averment, that, although 156*l.* 15*s.*, part of the said sum of 312*l.* 15*s.*, has been paid, and all things necessary on the part of the said contractors to entitle them to have the certificate of the surveyor of the defendants that the whole of the work in the said plans, drawings and specifications had been duly and efficiently performed and completed to his satisfaction and also to the satisfaction of the engineer of the said local board of health, have been done and performed by them, yet the surveyor has not given such certificate, but has wrongfully and improperly neglected and refused so to do, nor have the defendants paid the said sum of 78*l.* 3*s.* 9*d.* payable on such certificate; and further, that although more than four months since the surveyor ought to have given such certificate have elapsed, and although all things have been done by the said contractors on their part to entitle them to a certificate by the said surveyor that the said roads, pathways, drains, culverts and every part thereof were at the expiration of the said four months in good repair and in perfect and sound condition in all respects, yet the said surveyor has not granted such certificate, but has wrongfully and improperly neglected and refused so to do, and the defendants have not yet paid the said balance of 78*l.* 3*s.* 9*d.*

Demurrer thereto and joinder in demurrer.

Henry James, in support of demurrer.—The defendants, by the contract set out in the declaration, were only to pay the contract price on the production of the certificate of their surveyor, and the defendants

are sued in this court for the wrongful refusal by such surveyor to give his certificate. This is a novel action and without precedent. The allegation is, that the surveyor "wrongfully and improperly" refused to give the certificate. Work might be done to the value of 150*l*. and the surveyor might perhaps *bona fide* suppose the value of the work done was only to the extent of 100*l*., and therefore refuse to give a certificate for 150*l*. This would be a wrongful refusal by him, but could it be said that the defendants would be liable? The Court stopped him, and called on—

Parry, Serj. (*Joyce* with him) to support the declaration.—The surveyor is the agent of the defendants. They employ him to certify, according to the contract, and the fair meaning of both parties to such contract was that the defendants should employ a surveyor who would rightfully and honestly perform the duty of surveyor, and if under such circumstances the surveyor they appointed improperly refused to certify, that would be (it is submitted) a wrong done to the plaintiffs by the agent of the defendants, for which of course the defendants would be responsible. In *Macintosh v. the Great Western Railway Company* (1), a railway company had contracted to pay on the completion of certain works, with a proviso that unless the engineer of the company should give his certificate, the works should not be considered as completed, and the Court of Chancery overruled a demurrer to a bill filed by the contractor, alleging that the engineer in collusion with the company refused his certificate, and praying for an account and payment of the sums due to such contractor. In *Scott v. the Corporation of Liverpool* (2), the engineer appeared to have acted properly, and therefore the bill in Chancery was dismissed; but Vice Chancellor Stuart was of opinion that the result would have been otherwise "if the evidence had established a case of gross misconduct in the engineer, or of wilful neglect, refusal or absolute incapacity in him to perform his duties." The same Vice Chancellor, in a case where the architect had acted unfairly, relieved the contractor, and decreed payment of the balance due to him—*Pauley v. Turn-*

bull (3). It is submitted that the defendants by appointing a surveyor who will not certify when he ought to do so, dispensed with the condition in the contract requiring such certificate as precedent to any payment.

[*WILLES, J.*—If the surveyor appointed by the defendants will not act, he ceases to be their surveyor, and therefore the proper course in that case would be for them to appoint some other surveyor. *WILLIAMS, J.*—If the defendants in such a case were to refuse to appoint another surveyor, would not an action lie against them at the suit of the plaintiffs, for so refusing?]

In *Batterbury v. Vyse* (4) works were contracted to be done by the plaintiff to the satisfaction of the defendant and his architect, and no payment was to be considered due unless upon production of the architect's certificate. In an action for withholding the certificate, the declaration alleged that the architect unfairly and improperly neglected to certify, and so neglected in collusion with the defendant and by his procurement; and the declaration was held, on demurrer, to disclose a good cause of action. The cases of *Milner v. Field* (5) and *Grafton v. the Eastern Counties Railway Company* (6) do not militate against the plaintiff's right of action, where the certificate has been improperly withheld.

ERLE, C.J.—I think that judgment should be for the defendants. This is a contract by the defendants to pay, on the production of the certificate of the surveyor of the defendants that the contractors had efficiently performed a certain portion of the work. Many contracts are so made, and every one is master of the contract which he chooses to make; and it is of the last importance that contracts should be construed according to the meaning of the words in which they are made. Now, here the contract by the defendants to pay, is on the production of such certificate of the defendants' surveyor, and in the present case no such certificate was produced; but the plaintiffs allege that the surveyor wrongfully and improperly neglected and refused to give his certificate. That is not sufficient.

(3) 3 Giff. 70.

(4) 2 Hurl. & C. 432; s.c. 32 Law J. Rep. (N.S.) Exch. 177.

(5) 5 Exch. Rep. 829; s.c. 20 Law J. Rep. (N.S.) Exch. 68.

(6) 8 Ibid. 699.

(1) 2 Mac. & G. 74; s.c. 19 Law J. Rep. (N.S.) Chanc. 374.

(2) 1 Giff. 216; s.c. 27 Law J. Rep. (N.S.) Chanc. 641.

If it had been alleged that the defendants and their surveyor colluded to withhold the giving of the certificate in order to prevent the plaintiffs from being paid for their work, there is abundant authority, both at law and in equity, to shew that the defendants could not shelter themselves by means of any such misconduct. This is an attempt to take away from the defendants the protection afforded by the opinion of their surveyor, and to substitute a jury in his place. I think, however, that the allegations in this declaration are not such as to entitle the plaintiffs to maintain this action.

WILLIAMS, J.—I am of the same opinion.

WILLES, J.—The only wrong imputed here is an error of judgment on the part of the surveyor.

KRATING, J. concurred.

Judgment for the defendants.

1865. }
Jan. 27. } SWIRE v. LEACH.

Landlord and Tenant—Distress—Damages—Pawnbroker.

Goods in the possession of a pawnbroker as security for money advanced cannot be distrained for rent.

In an action by the pawnbroker to recover goods distrained under such circumstances, the pawnbroker is entitled to recover the full value of the goods.

This was an action tried, at the Liverpool Summer Assizes, 1864, before Pigott, B.

The declaration was for the conversion by the defendant of goods pledged with the plaintiff as a pawnbroker, to which the defendant pleaded not guilty.

It appeared that the plaintiff occupied a house and shop and two cottages, as tenant to one Gray. One of the cottages was used by him as a pawnbroker's shop, and the rent being in arrear, Gray directed the defendant to distrain generally on the premises. The defendant accordingly did so, and proceeded to sell the articles distrained, but whilst the sale was going on the plaintiff's attorneys gave notice to the defendant that the articles in one of the cottages were pledged goods, and that he was not to sell them; the defendant, however, removed the goods, and from time to time restored some of them as the owners applied to redeem them. Subsequently the plaintiff demanded that the pledged goods

which remained in the defendant's possession should be delivered up to him, and as the defendant refused to comply with this demand, the present action was brought.

The learned Judge told the jury that the unforfeited pledges were exempt from distress for rent, and they found for the plaintiff, giving as damages the full value of the goods in the defendant's possession at the time of the demand. Leave was reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that the above direction was wrong in point of law.

Monk, in Michaelmas Term last, obtained a rule accordingly, and also to reduce the damages.

W. Saunders and Holkar shewed cause.—The direction was right. A landlord cannot distrain unforfeited pledges. The ground of the exemption is given, by Bayley, B., in *Adams v. Grane* (1), namely, the interest of the public, in enabling persons to carry on their trade. In that case goods sent to an auctioneer to be sold by him were held to be privileged. So of materials delivered to a manufacturer to be worked up—*Gibson v. Ireson* (2); and of an animal sent to a butcher to be slaughtered—*Brown v. Shevill* (3). The other side may rely on *Muspratt v. Gregory* (4), but that case was decided expressly on the ground that the goods were left on the premises for the convenience of the owner of the goods, and not deposited with the owner of the premises in the way of his trade. *Joule v. Jackson* (5), where it was held that a brewer's casks in a public house might be seized, is also distinguishable. There the casks were sent by the brewer for his own convenience. In *Findon v. M'Laren* (6) it was held, that goods in the hands of a commission agent for sale were exempt from distress. The same was held in *Brown v. Arundel* (7), in *Williams*

(1) 1 Cr. & M. 380; s. c. 2 Law J. Rep. (N.S.) Exch. 105.

(2) 3 Q.B. Rep. 39.

(3) 2 Ad. & E. 138; s. c. 4 Law J. Rep. (N.S.) K.B. 50.

(4) 1 Mee. & W. 633; s. c. 6 Law J. Rep. (N.S.) Exch. 34; in error, 3 Id. 677; s. c. 7 Law J. Rep. (N.S.) Exch. 385.

(5) 7 Mee. & W. 450; s. c. 10 Law J. Rep. (N.S.) Exch. 142.

(6) 6 Q.B. Rep. 891; s. c. 14 Law J. Rep. (N.S.) Q.B. 183.

(7) 10 Com. B. Rep. 55; s. c. 20 Law J. Rep. (N.S.) C.P. 30.

v. Holmes (8) and in *Adams v. Grane* (1) of goods deposited with an auctioneer. The case of *Fonkes v. Joyce* (9), where it was held, that cattle on their way to market, and put into a close to graze for the night, might be distrained for rent, is commented on in 2 *Wms. Saund.* 290, a. In *Thompson v. Mashiter* (10) it was held, that goods deposited with a wharfinger were privileged. In *Brown v. Shevill* (3) it was held, that the carcass of a beast sent to a butcher to be slaughtered was privileged; and that case is recognized in *Gibson v. Ireson* (2). The plaintiff is entitled to full damages, he having a right as against the defendant to the absolute possession of the property.

Monk, in support of the rule.—These are not goods delivered to a man in the way of his trade. Strictly speaking, a pawnbroker is not a trader; he is merely a bailee for reward. It was repeatedly said in *Muspratt v. Gregory* (4) that these exemptions ought not to be extended. In *Parsons v. Gingell* (11), it was held that horses and carriages standing at livery are not privileged. Moreover, the damages ought to be confined to the actual interest of the plaintiff in the goods; that is, the amount due to him for the advance on the goods with the arrears of interest—*Johnson v. Stear* (12).

ERLE, C.J.—I am of opinion that this rule ought to be discharged. The action is brought by a pawnbroker against his landlord, to recover articles which were taken as a distress for rent in arrear, and which articles were at the time in the plaintiff's possession upon the premises in respect of which rent was due, having been deposited with him as securities for advances made in the way of his business as a pawnbroker. The governing point is, whether goods pledged with a pawnbroker can be taken as a distress for rent. Certain classes of goods are exempt from distress, and many Judges have endeavoured to lay down a rule which should embrace all exemptions; but in the application of the rule we are obliged to be guided by the specific instances which

have occurred. I think that these goods fall within the description of "things delivered to a person exercising a public trade to be managed in the way of his trade," (13), which is one of the classes of goods which are said to be privileged. I see no distinction for this purpose between an auctioneer, or wharfinger, and a pawnbroker. His business is to keep the goods and make a profit by doing so; and he is bound to keep the goods carefully. It is clear to my mind that pledged goods in the possession of a pawnbroker are within the principle of the exemption to which I have referred. As to the damages, I am of opinion that the plaintiff is entitled to the full value of the goods. The case of *Johnson v. Stear* (12) has no application to the present, because, as against the plaintiff in this case, the defendant has no right whatever. The bailee in an ordinary action of trover recovers the full value of the goods. The plaintiff holds the goods for the pawnor.

WILLIAMS, J.—I am of the same opinion. I think the goods were privileged upon the general ground that they were in the hands of a pawnbroker to be held by him as security in the way of his trade. The case is very similar to that of a wharfinger which has been referred to. As to the damages, it is clear that the plaintiff may recover the full value of the goods.

KEATING, J. concurred.

Rule discharged.

1865. }
Jan. 27. } *SKELTON v. SYMONDS.*

Debtor and Creditor—Bankruptcy Act, 24 & 25 Vict. c. 134. s. 198.—Process—Protection.

Section 198. of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), provides that, after notice of the filing and registration of a deed of composition, process shall not issue against the person or property of the bankrupt "without leave of the Court":—Held, that the Court of Bankruptcy is the Court here referred to.

Griffiths, in this term, obtained a rule calling upon the defendant to shew cause why the plaintiff should not have the leave of this Court, under section 198. of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), to

(13) See per *Willes, C.J.*, in *Simpson v. Harbott, Willes, 512.*

(8) 8 *Exch. Rep.* 861; s.c. 22 *Law J. Rep.* (N.S.) *Exch.* 283.

(9) 3 *Lev.* 260; s.c. 2 *Vent.* 50; 2 *Lutw.* 1161.

(10) 1 *Bing.* 283.

(11) 4 *Com. B. Rep.* 545; s.c. 16 *Law J. Rep.* (N.S.) *C.P.* 227.

(12) 33 *Law J. Rep.* (N.S.) *C.P.* 130.

make the judgment obtained by him in this action available by issuing a writ of *fiat facias* or *capias ad satisfaciendum*, notwithstanding the registration of the deed of composition by the said defendant, he, the said defendant, not having paid or tendered to the said plaintiff and others the first instalment payable under the said deed.

It appeared from the affidavits in support of the motion, that in the month of July 1864 the defendant executed a deed of composition for the benefit of his creditors by which he covenanted to pay to his creditors 1s. 6d. in the pound within three months, and 1s. in the pound within twelve months after the execution of the deed. The plaintiff asserted that these covenants had not been performed, but the defendant asserted that the sums covenanted to be paid had either been paid or tendered. The defendant accordingly brought this action and recovered judgment; and it was upon this judgment that the defendant sought to issue execution.

Kenealey shewed cause against the rule. —The question depends on section 198. of the Bankruptcy Act, 1861. Section 197. provides, that after the registration of a composition-deed in conformity with the act, the debtor and creditors, and trustees, parties to such deed, or who have assented thereto, or who are bound thereby, shall, in all matters relating to the estate and effects of such debtor, be subject to the jurisdiction of the Court of Bankruptcy. And the section then goes on to put the compounding creditor under the control of the Court of Bankruptcy, in exactly the same way as if he had been made a bankrupt. By section 198, "after notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant *without leave of the Court*; and a certificate of the filing and registration of such deed, under the hand of the chief registrar and the seal of the Court, shall be available to the debtor for all purposes as a protection in bankruptcy." The Court to which the plaintiff ought to apply for leave to issue execution is the

Court of Bankruptcy — *Walter v. Adcock* (1) and *Ex parte Morrison* (2). This is clearly shewn by the meaning put on the word "Court" in the interpretation clause.

Griffiths, in support of the rule, referred to *Baerselman v. Langlands* (3), and said the question was entirely as to the jurisdiction of this Court.

ERLE, C.J.—I am of opinion that this rule ought to be discharged. A deed of composition with his creditors had been registered by the defendant in this case, and all the requisitions of the statute had been complied with, so as to entitle the defendant to the protection conferred on compounding debtors by the Bankruptcy Act of 1861. The question is, what is the meaning of the section, which says, that no process shall be available against the person or property of such a debtor *without leave of the Court*? I think that may well refer to the Court of Bankruptcy, and that the interpretation clause shews that it does so. That Court has power to suspend the protection of the bankrupt, if it should see fit, and the Court of Bankruptcy in entertaining such an application as this does not in the least interfere with the process of this Court; it only removes an impediment which otherwise exists.

WILLIAMS, J. concurred.

WILLES, J.—If the party were wrongfully arrested we should be bound to discharge him. The cases are collected in *Chit. Arch.* 11th edit. pp. 770, 771, and there are several instances of privileged persons arrested under the process of one Court, and discharged by another. This protection of the creditor is in the nature of a privilege, and looking to the very general terms in which the powers and authorities of superior Courts of law and equity are given to the Court of Bankruptcy by section 1. of the act of 1861, I am not sure that if process were to issue in this Court against the defendant, the Court of Bankruptcy would not have power to release him. It is clear to me that the Court of Bankruptcy is the only Court which can grant the permission required by section 198.

KEATING, J. concurred.

Rule discharged.

(1) 31 Law J. Rep. (N.S.) Exch. 380.

(2) 33 Law J. Rep. (N.S.) Bankr. 47.

(3) *Ante*, Exch. 3.

1865. }
JAN. 19. } HOGG v. SKEEN AND ANOTHER.

Bill of Exchange—Acceptance by one Partner in Fraud of the other—Title of Indorsee—Onus of Proof—Evidence.

In an action by an indorsee against the members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership and contrary to the partnership articles, the onus is cast on the plaintiff of shewing that he gave value.

The case of Musgrave v. Drake (1) commented upon.

Action by indorsee against the acceptors of a bill of exchange for 38*l.* 17*s.* 6*d.* The defendant Skeen pleaded that he did not accept. Issue thereon.

Judgment for want of appearance was signed against the other defendant Pizey Vincent.

The cause was tried, before Willes, J., at the London Sittings after Trinity Term, 1864. It was proved that the acceptance, which purported to be that of "Vincent and Skeen," (the bill being drawn on that firm) was in the handwriting of the defendant Vincent, who was then in partnership with the defendant Skeen, and so accepted the bill in the name of the partnership firm, but for his, Vincent's, own private use. The defendant Skeen produced the deed of partnership, by which it appeared that Vincent was expressly prohibited from drawing or accepting bills in the partnership name; and the defendant Skeen also gave evidence that he had never authorized Vincent to accept the bill in question, and that Hodgkinson, who was the drawer of the bill, knew that Vincent had no authority to accept.

The plaintiff attempted to prove that he had given value for the bill; but the jury found a verdict for the defendant Skeen, leave being reserved to the plaintiff to move to enter a verdict for the amount claimed, if the Court should be of opinion that it was not incumbent on the plaintiff to prove that he had given value.

A rule nisi was afterwards obtained to

(1) 5 Q.B. Rep. 185; s. c. 13 Law J. Rep. (N.S.) Q.B. 16.

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enter the verdict for the plaintiff pursuant to the leave reserved, or for a new trial on the ground of the verdict being against the evidence. Against this rule—

Griffiths shewed cause.—With respect to that part of the rule which seeks to enter a verdict for the plaintiff, it must be assumed that the plaintiff did not prove to the satisfaction of the jury that he had given value for the bill; and the only question therefore is, whether, after evidence had been given by the defendant Skeen that the bill had been accepted by one partner in fraud of the other, it was not then incumbent on the plaintiff to prove that he had given value for the bill.

[*C. Pollock* stated that he should contend in support of the rule that the defendant ought to have shewn that the plaintiff had notice that the bill was tainted with illegality or fraud, and that here there was no evidence of such general notice of fraud as is explained in *Byles on Bills*, p. 113, 8th ed. to be necessary to destroy a holder's title.]

[*ERLE, C.J.*—It must be taken for the purpose of the present question that no value was given for this bill by the plaintiff; then, the bill being tainted with fraud, that would seem to amount to a verdict for the defendant.

The Court then called on—

C. Pollock to support the rule.—It is submitted that evidence that the bill was accepted by one of the partners in fraud of the partnership articles, is not alone an answer to this action, without further circumstances shewing that the plaintiff had notice of the fraud—*Musgrave v. Drake* (1). That was an action by an indorsee against the acceptors of a bill of exchange. Some of the defendants pleaded that they did not accept, and it was proved that all the defendants were partners, and that one of them, who had suffered judgment by default, had accepted the bill in the name of the firm in fraud of the partnership, and not for partnership purposes. The Court of Queen's Bench held that such proof without evidence of knowledge on the part of the plaintiff, did not under this issue oblige the plaintiff to shew that he gave consideration for the bill.

[*WILLES, J.*—That case turned on the form of pleading.]

The decision, it is submitted, goes further than that. Lord Denman, C.J. in delivering judgment, which he stated was after consulting the Judges of the other Courts, said, "Though the defendant shews that this signature was a fraudulent act on the part of such partner, yet, if the proof does not affect the plaintiff with knowledge of the fraud, that does not put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction."

[KEATING, J.—I see my Brother Byles, in his work on *Bills*, page 44, adds, by way of note to the case of *Musgrave v. Drake* (1), that the case of *Grant v. Hawkes* (*Chitty on Bills*, p. 32, 10th edit.) does not appear to have been brought to the notice of the Court, though perhaps distinguishable.]

No doubt *Grant v. Hawkes* is an authority that Lord Ellenborough ruled that the indorsee must shew that he gave value where the bill has been accepted by one partner in fraud of the other partners; and in a more recent case of *Smith v. Braine* (2), the Court considered the amount of evidence which would be sufficient to raise the presumption that the holder received the bill without consideration, so as to put the plaintiff to prove that he had given value. Here, as in *Musgrave v. Drake* (1), the acceptance was in the ordinary name of the firm, and there was nothing likely to raise a suspicion of any fraud in the mind of the plaintiff when the bill was indorsed to him. Therefore, it is submitted that the plaintiff under these circumstances was not called on to prove that he had given value. With respect to the verdict being against the evidence, that of course must depend on whether the learned Judge who tried the cause is dissatisfied or not with it.

ERLE, C.J.—I am of opinion that this rule should be discharged. The action is by the holder and indorsee of a bill of exchange against the acceptor, and the plea is *non acceptit*. The evidence is, that one partner accepted the bill in fraud of the other partner, and that he applied the proceeds therefrom for his own benefit; and the question is,

whether that cast the onus on the plaintiff of shewing that he gave value for the bill. I consider it to have been now long established, that proof of a bill being tainted with fraud in its inception throws the burden on the holder of shewing that he gave value for such bill. Mr. Pollock has, however, relied on the case of *Musgrave v. Drake* (1), where there was this species of fraud committed by one partner accepting the bill in the name of the firm in fraud of the partnership; and in an action on the bill by the holder, on an issue joined on the plea of *non acceptit*, the Court of Queen's Bench held, that on these pleadings and proof that the acceptance was the signature of one partner competent to bind the firm, the plaintiff was entitled to recover without proving the circumstances under which the bill was indorsed to him. But I think that the judgment in that case was entirely on the effect of that plea, and was not a judgment upon the law. At that time there was a variation of opinion amongst the Courts as to what was put in evidence by that form of plea. It was, moreover, not the judgment of the Court of Queen's Bench alone, but it was delivered after the Judges had spoken to the Judges of the other courts, and often when other Judges have been consulted the real point is lost sight of. I should have considered it of more value as an authority if it had been only a judgment of the Court of Queen's Bench, instead of being founded on what had been learnt from the other Courts. It is to be observed, that Lord Denman there says, "Where issue is joined on a plea of *non acceptit*, and the proof offered of the acceptance is the signature of one partner competent to bind the firm," which is not the present case, "then, though the defendants shew that this signature was a fraudulent act of such partner, yet, if the proof does not affect the plaintiff with the knowledge of the fraud, that does not put the plaintiff to answer, nor make it necessary for him to give any explanation or account of the transaction." The Court in that case thought that the defendant should have pleaded specially, and did not mean to alter the rule of law that where it is shewn the bill is tainted with fraud in its inception, the onus is on the holder to prove that he gave value for it. My Brother

(2) 16 Q. B. Rep. 244; s. c. 20 Law J. Rep. (N. S.) Q. B. 201.

Willes is satisfied with the verdict, therefore the verdict must stand.

WILLIAMS, J.—As to the necessity of the plaintiff's shewing that he had given value, as soon as there was evidence that the bill was tainted with fraud in its inception, it would have been impossible for Mr. Pollock to have contended as he did, but for the case of *Musgrave v. Drake* (1). I agree with what has fallen from the Chief Justice as to that case. It was a decision on the form of the pleading. The Court there considered that the signature of the firm, in fraud of the other partner, was not involved, in that case, in the issue on the plea of *non accepit*, though they considered it would have been so involved if the plaintiff had been affected with knowledge of the fraud, because one partner has no power to bind his co-partner in fraud of the partnership, as against a person who has notice of the fraud. Here, however, no question is raised about the form of the pleading.

WILLES, J.—I also am of opinion that this rule should be discharged. As to the case of *Musgrave v. Drake* (1), that is distinguishable from the present. That was simply the case of a partner accepting a bill for his private purposes, in fraud of the partnership, he having, however, authority to accept bills in the course of the partnership business; and I think that the Court of Queen's Bench, in their desire to narrow the issue for convenience, omitted to consider the effect their decision might have on the general law. I am satisfied that that Court would not have come to the conclusion they did in a case like this, in which the partner who accepted never could have had authority to accept the bill in question. But treating that case of *Musgrave v. Drake* (1) as a decision on the pleading, I do not assent to it. The reason why, in the case of partnership, a person is bound by an acceptance which is not his own, but is the acceptance of his partner, is founded on the law of estoppel *in pais*; it is because he has consented to his partner having authority to accept bills in the name of the firm that he is, therefore, bound by the exercise of such authority (even though fraudulently exercised), as against all persons who have taken the bill for value, and without notice of the fraud.

In such a case he is estopped, from what I why from denying his acceptance. The question, therefore, arises on the plea of *non accepit*. It seems to me to be a contradiction to say that he can go into the question of whether it is his acceptance by reason of the holder of the bill being holder with notice, but that he cannot go into that question by reason of the holder being holder without value. He must, I think, be as much estopped from doing so in the former case as in the latter. If, then, he may go into the question, it resolves itself simply into one of evidence. I will only add, that my Brother Byles, in his work on *Bills*, at p. 111 (8th edit.), lays it down that where the bill is infected with fraud or illegality in its inception, the holder must shew that he gave value, stating that "it is not for the defendant to prove the absence of value, but the plaintiff, the transferee, to prove value given either by himself or by some one under whom he claims." I also refer to my Brother Byles's notice of *Musgrave v. Drake* (1), at p. 44 of his book on *Bills*, where he treats that case as depending on the form of the pleading, for he puts in *italics* the words "where issue is taken on the acceptance"; so that it is clear that he considers it as an exception to the general rule by reason of the narrow issue which was there set up. I may add, also, that I am not dissatisfied with the verdict of the jury.

KEATING, J. concurred.

Rule discharged.

1865. } NEILL AND ANOTHER v. WHIT-
Jan. 24, 26. } WORTH AND OTHERS.

Sale—Terms of Contract—Goods to be taken from Quay—Condition Precedent.

In a contract to sell "500 bales of cotton to arrive in Liverpool per ship or ships from Calcutta," there was the following stipulation: "the cotton to be taken from the quay; customary allowances of tare and draft, and the invoice to be dated from date of delivery of last bale":—Held, that the stipulation, "the cotton to be taken from the quay," was an independent stipulation for the seller's benefit, and not a condition precedent, which

the purchaser had a right to insist on being performed.

Action for not delivering 500 bales of cotton according to the terms alleged to have been agreed on.

The declaration stated that the defendants bargained and sold to the plaintiffs, and the plaintiffs bought of the defendants certain cotton at 15½d. per lb., that is to say, 500 bales of cotton, guaranteed to be October shipment, to arrive from Calcutta in Liverpool per ship or ships, and to be fair Bengal cotton. *The said cotton to be taken from the quay*; customary allowances of tare and draft, and the invoice to be dated from the date of the delivery of the last bale. The said cotton to be in merchantable condition; the damaged, if any, to be rejected, provided it could not be made merchantable. Should the said cotton be transhipped into other vessels arriving, the contract to hold good; but if any of the vessels, should be lost the contract to be void so far as regarded such ships only. Payment for the said cotton to be made in cash within ten days, made equal to ten days and three months, and cash on account to be paid before delivery if required. Averment, that all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to the delivery of the said cotton as agreed; yet the defendants made default in delivering the said cotton as agreed, whereby the plaintiffs have lost and been deprived of the profits which would have accrued to them from the delivery of the said cotton, and were prevented from fulfilling a contract entered into by them for the re-sale of the said cotton, and thereby lost great gains, and by reason of the premises the plaintiffs incurred expenses in and about endeavouring to procure the delivery of the said cotton by the defendants as agreed.

Pleas: first, that the defendants did not bargain and sell to the plaintiffs, and the plaintiffs did not buy from the defendants the cotton in the declaration mentioned upon the terms therein alleged; secondly, that the defendants did not make default in delivering the cotton in the declaration mentioned as therein alleged.

Issues thereon.

At the trial, before Pigott, B., at the last Liverpool Summer Assizes, the following facts were admitted by both parties. On the 2nd of October 1863 the defendants, through their brokers Messrs. Trueman & Rouse, made the contract with the plaintiffs which was the subject of this action. The contract was made by bought and sold notes, and the following is a copy of the bought-note:

"Bought for account of Messrs. Neill Brothers, of B. Whitworth & Brothers, Manchester, 500 bales of cotton, at 15½d. per lb., guaranteed October shipment, to arrive in Liverpool, per ship or ships from Calcutta.

"The cotton guaranteed fair Bengal. Any slight variation in mark not to vitiate this contract. In case of dispute arising out of this contract, the matter to be referred to two respectable brokers, who shall decide as to quality and the allowance, if any, to be made.

"*The cotton to be taken from the quay*; customary allowances of tare and draft, and the invoice to be dated from date of delivery of last bale.

"To be in merchantable condition, the damaged, if any, to be rejected, provided it cannot be made merchantable. Should the cotton be transhipped into other vessels arriving, the contract to hold good; but if any of the vessels be lost, the contract to be void so far as regards such ships only.

"Payment cash within ten days, made equal to ten days and three months. Cash on account before delivery if required."

(Signed) "Trueman & Rouse."

On the 8th of January 1864 the defendants declared the 500 bales of cotton to arrive as follows: 250 bales per *Talavera* and 250 bales per *Fort George*. The *Talavera* arrived on the 3rd of February 1864 at the port of Liverpool, with a cargo of cotton, which was landed at the quay there. By the dock regulations goods landed on the quay must be removed within twenty-four hours, and in pursuance of such regulations the 250 bales which had been brought by the *Talavera* were removed and warehoused by the dock authorities.

The *Fort George* was wrecked in Car-

narvon Bay. The cotton in question, which formed her cargo, was sent by rail from Carnarvon, and was, on the 24th of February 1864, placed in the wreck transit shed of Prince's Dock, Liverpool, and which it was agreed was to be looked upon as part of the quay. This cotton was afterwards removed from the wreck transit shed and warehoused in like manner as the cotton per the *Talavera*. Applications were made from time to time to the defendants for delivery-orders of the cotton under both shipments, but none could be obtained until all the cotton had been warehoused.

The defendants afterwards offered to deliver both cargoes from the warehouses at quay weights, and without charging warehouse-rent, or to cart them back to the quay and there deliver them to the plaintiffs; but the plaintiffs refused this, and insisted that the defendants had failed to deliver the cotton according to the contract, as they had not delivered it *ex quay*.

A verdict was entered for the plaintiffs for 2,109*l.* 7*s.* 6*d.*, with leave to the defendants to move to enter a verdict for them or to reduce the damages, and the Court were to be at liberty to draw inferences of fact and to make all such necessary amendments as a Judge at Nisi Prius might have done.

A rule nisi to that effect was afterwards obtained on the ground as to the point on which it was sought to enter a verdict for the defendants, that the stipulation "the cotton to be taken from the quay" was in favour of the vendors, or if not that it was a stipulation only, and not a condition in the contract.

E. James, Mellish and Baylis shewed cause.—The construction of the contract is, that the plaintiffs may if they choose receive from the quay. It is an essential part of the contract that the defendants should deliver the cotton to the plaintiffs during the time the cotton is allowed by the dock authorities to remain on the quay. It is not a mere stipulation in favour of the defendants, but one which the plaintiffs had a right to insist on being performed.—[They then argued at considerable length as to the right of the plaintiffs to recover the damages for which the verdict had

been entered; but this is omitted, as the decision made it unnecessary.]

Brett and Holker, in support of the rule.—The delivery of the cotton *ex quay* was not a condition precedent which the plaintiffs have a right to insist on; and yet to maintain this action they must shew that it is such a condition precedent, and that a delivery anywhere else than on the quay will not fulfil the contract. It is submitted that the sellers are not bound to deliver the cotton in a merchantable condition as soon as the cotton is landed on the quay, or within twenty-four hours afterwards; but the sellers have a reasonable time during which they may make it merchantable, for the sale is not a sale of any specified cotton; indeed, at the time of the contract, the sellers have the power of performing it by delivering cotton brought in any ship, and even after the name of the ship has been declared it was still unspecified cotton, and a delivery of any 250 bales out of the ship would suffice. The defendants therefore had a right to apply any of the cotton brought by these vessels to satisfy their contract, and might have delivered the cotton at any time whilst there were 250 bales on board. Therefore, the stipulation, "the cotton to be taken from the quay," was not a condition precedent to a delivery or acceptance under the contract. The question as to what is a condition precedent, and what only a representation a breach of which will not justify a repudiation of the contract, but can only be compensated by damages, was very fully considered, and the authorities thereon referred to, by Williams, J. in delivering the judgment of the Court of Exchequer Chamber in *Behn v. Burness* (1). In *Abbott on Shipping*, part 4, c. 1, s. 5, it is said: "Whether or not a particular covenant by one party is a condition precedent, the breach of which will dispense with the performance of the contract by the other, or an independent covenant, is a question to be determined according to the fair intention of the parties to be collected from the language employed by them. An intention to make any particular stipulation a condition precedent should be clearly and unambiguously ex-

(1) 32 Law J. Rep. (N.S.) Q.B. 204; s.c. 3 B. & S. 751.

pressed." This passage is cited by Pollock, C.B., in giving his judgment in *Tarrabochia v. Hickie* (2). — [They also cited *Ritchie v. Anderson* (3) and *Jonasohn v. Young* (4).]

ERLE, C.J.—I am of opinion that this rule should be made absolute to enter a verdict for the defendants. This is an action for not delivering certain cotton. The defendants say that they did not make default, and that they were willing to deliver the cotton. The plaintiffs allege that there was a condition precedent, which the defendants did not perform, and that, therefore, this action lay; and the question is, whether these terms in the contract, "the cotton to be taken from the quay," form a condition precedent. The law on this subject has been made clearer than it was by the judgment delivered by my Brother Williams in *Behn v. Burness* (1), and the principles as to what would be a condition precedent, and what an independent stipulation or representation, are there pointed out; and I am of opinion that the clause now in question is an independent stipulation for the benefit of the vendors, and that the vendees cannot insist on its being performed for their sake. Looking at the bought note, it appears that the stipulation, "cotton to be taken from the quay," comes in that part where there are provisions in favour of the vendors, namely, "customary allowance of tare and draft." I, moreover, do not see how it can possibly affect the vendees where they get their cotton, provided they are not put to any additional expense, and sustain no damage from delay. I do not think that this stipulation is a stipulation as to place, namely, that the cotton is to be delivered from the quay, nor is it a stipulation as to time; that is to say, that the vendees are to have the cotton the moment the ship arrives. There is nothing to shew which 500 bales out of the cargo are to be delivered to the vendees; and the defendants were at liberty to have delivered under this contract either the first or the last 500 bales which were landed. I see

nothing, therefore, in this stipulation as to any particular time or place; and I am of opinion that it is not a condition precedent, and there has been no breach of the contract by the defendants, and that, therefore, this action does not lie.

WILLIAMS, J. concurred.

WILLES, J.—I also am of the same opinion. It struck me at first that the expression "to be taken from the quay," must be construed literally as a stipulation by the vendors that the delivery should be at the quay, and that unless the vendors were ready to deliver at that place to the buyers, the vendors must be taken to have broken their contract; but I am now satisfied that such literal construction of the contract is not correct. Then, in order to determine whether there be any stipulation as to time for the delivery of the cotton in these words, "to be taken from the quay," let us see how it would be if these words were left out. It would be a contract for a delivery within a reasonable time. I think, then, that the stipulation is to be construed in favour of the vendors, and that it means to fix the time after which the cotton is to be at the expense of the buyers. The cotton is to be delivered within a reasonable time, and if not delivered or taken on the quay the expenses of the warehousing are to be paid by the party who was not ready to deliver or take the cotton at the quay. The defendants, in fact, offered to take the goods back to the quay, so that to support the plaintiffs' contention and to enable them to maintain this action, the contract would have to be read as stipulating that the goods were to be taken as soon as the vessel arrived.

KEATING, J.—I am of the same opinion. I think that the stipulation in question was introduced solely for the benefit of the vendors. It means this, that the vendees are to take delivery from the quay if the vendors are there, and have given notice that they are ready to deliver there. The stipulation was probably introduced to get rid of the warehouse charges.

Rule absolute to enter a verdict for the defendants.

(2) 1 Hurl. & N. 188; s.c. 26 Law J. Rep. (N.S.) Exch. 26.

(3) 10 East, 295.

(4) 32 Law J. Rep. (N.S.) Q.B. 385; s.c. 4 B. & S. 296.

[IN THE EXCHEQUER CHAMBER.]
(Appeal from the Court of Common Pleas.)

1865.

Feb. 6.

} DOGGETT v. CATTERMS.*

Gaming—Betting Houses Act, 16 & 17
Vict. c. 119.—Place—Recovering Deposit.

The defendant was in the habit of resorting to a certain tree in Hyde Park for the purpose of making bets on horse races. He there received deposits on such bets from many persons, and from the plaintiff among others. It was held by the Court of Exchequer Chamber, reversing the judgment of the Court of Common Pleas, that the defendant was not a person from whom the plaintiff could recover his deposit under section 5. of the statute 16 & 17 Vict. c. 119, since the spot in Hyde Park which the defendant frequented was not a "place" within the meaning of the act.

This was an appeal from the judgment of the Court of Common Pleas (1) making absolute a rule to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendant in an action brought by the plaintiff to recover a sum of money deposited with the defendant by the plaintiff as his stake for a bet made by him with the defendant.

The defendant, it appeared on the evidence, was in the habit of resorting daily to a certain tree in Hyde Park, and there making bets on horse races. From 150 to 200 persons frequently collected round him. It was usual for those who betted with the defendant to deposit their stakes with him. The plaintiff having betted with the defendant and deposited his stake with the defendant, now sought to recover it back under section 5. of the statute 16 & 17 Vict. c. 119. The Judge of the Sheriffs' Court, before whom the case was tried, decided in favour of the defendant; but the Court of Common Pleas overruled his decision, and held that the statute entitled the plaintiff to recover.

Hayes, Serj., for the appellant, the defendant, contended that the statute did not apply; that the defendant was not the

owner or occupier, or a person acting on behalf of any owner or occupier, or a person having the care of any place used for betting purposes, on whom alone a penalty is imposed by section 4. of the statute 16 & 17 Vict. c. 119; that section 5, giving the right of action to recover back the amount deposited by a person *in pari delicto*, was confined in its application to the persons mentioned in section 4; and that the statute did not mean to include the shadow of a tree in a public park under the term "place," since there could be no occupier of such a spot, and certainly the defendant was not the occupier, or acting on behalf of any occupier.

Yeatman, for the respondent, the plaintiff, urged that section 5. was not limited in its application to the persons mentioned in section 4, but extended to all persons mentioned in sections 1, 2, 3, and that it applied in plain language to persons *using*, as well as occupying, any place for the purposes of betting, whether public or private, and that betting in Hyde Park was as mischievous as betting in a house.

POLLOCK, C.B.—We are of opinion that the judgment of the Court below must be reversed. I observe that nothing is stated in the judgment below, except a decision that the *locus in quo* was a "place" within the meaning of the act. I quite agree with the Court of Common Pleas that the circumstance of the spot where the defendant was being open land, without any house or room on it, would not prevent its being a place within the meaning of the act, if in any other respects it came within the provisions of the statute. But it is necessary, in my view of the act, that the place should be one which has an owner or occupier, or the possibility of an owner or occupier, which this spot had not.

CROMPTON, J.—I am of the same opinion. The judgment below turns almost entirely on the meaning of the word "place" in the statute referred to. I think that the judgment of the under-sheriff, who tried the cause, was the correct one. The spot where the defendant transacted the business does not, in my opinion, come within the meaning of the expression "place" in the statute. Section 5. enacts that "any money received by any such

* Coram Pollock, C.B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., Mellor, J. and Pigott, B.

(1) Reported, ante, p. 46.

person aforesaid" as a deposit on a bet may be recovered back. This refers us to section 4. for a definition of "any such person," and section 4. provides that "any person, being the owner or occupier of any house, office, room, or place, opened, kept, or used for the purposes aforesaid, or either of them, or any person acting for or on behalf of any such owner or occupier, or any person having the care or management or in any manner assisting in conducting the business thereof," whosoever shall receive a deposit on a bet, shall be liable to a penalty. It cannot, in my opinion, fairly be said that the defendant was the owner or occupier of the spot where he met his associates, or that he was acting on behalf of the owner or occupier, or had the care or management thereof. Any one else might go to that part of the park at his pleasure.

BRAMWELL, B.—I agree that the judgment ought to be reversed; but I should be very unwilling to reverse it on the ground that section 5. applies to section 4. only. The first three sections of the act speak of houses and places kept or used for the purposes of betting. A person might be the owner or occupier of a house which was used for the purposes of betting by some other person. The owner or occupier not so using it could not be liable under the act. But the person using the house for betting purposes, though not the owner or occupier, would, in my opinion, be liable under the act to repay a deposit received by him on a bet. However, in this case I do not think that the defendant can be said in any sense to have owned, occupied, or used a place within the meaning of the act. What place can he be said to have used? Was it the whole park or the very spot on which he stood, or the plot of ground taken up by those who stood round him? In my view, there was no place here capable of being used within the meaning of the act. A man standing under a tree in the park, and shifting his standing ground, sometimes a yard on one side and sometimes a yard on the other, does not occupy or use a place. If another man had been sitting on the other side of the tree betting in the same way, it would be difficult to say that these were two places being used within the act. The preamble of the act shews that it was intended for the purpose of putting down

the use of certain fixed, ascertained betting houses or offices. Here the mischief could be obviated by the police making the men move on. Again, by section 1, any place used for betting is a common nuisance, and an indictment will lie against persons liable in respect of such a nuisance. The defendant could hardly be indicted for keeping Hyde Park as a common nuisance, or for keeping Westminster Hall as such if he had made his bets there. These observations would not apply to the case of a man whom the owner or occupier of a house allowed to use it for the purposes forbidden by the act. The man so using a house by the permission of the occupier would be within the act, and would be indictable for keeping the house which he would be using for the purpose of a common gaming house. I therefore rest my decision in favour of the defendant on the general ground, that there is not in this case any place, capable of being occupied or used within the meaning of the act, used or occupied by the defendant, rather than on the ground that to be within the statute the defendant, if he be liable, must be the owner and occupier of the place, or acting on behalf of the owner or occupier, or engaged in the care or management of the place.

CHANNELL, B.—I am of opinion that the judgment must be reversed, on the ground stated by the Chief Baron and by my Brother Crompton. I do not think that the liability to a penalty, or the remedy for recovering the money paid as a deposit on a bet, is limited to the case of the person who is the owner or occupier of the house or place, but it extends to every person who acts for the owner or occupier to receive the money. But, in my opinion, the place must be a place to which there can be an owner or occupier.

BLACKBURN, J.—I think that the judgment ought to be reversed and given for the plaintiff below. The 5th section, on which the case arises, refers us back to section 4, in which we find that the penalty for receiving a deposit on a bet is imposed upon any person who is owner or occupier, and on any person acting on behalf of such owner or occupier, or having the care or management of the house, office, room or place, and is confined to persons who come

within that description. I do not say that an open field is not a place which may come within the description of the term "place" in the statute; but it is necessary to shew that the person against whom the action is brought is either owner or occupier of the place, or acting on behalf of the owner or occupier, or having the care or management thereof. The evidence here shews that the defendant and several other persons were in the habit of meeting under a tree in the park. The defendant was, in my opinion, not more owner or occupier of the place in question than the plaintiff himself.

MELLOR, J.—I am rather inclined to adopt the view taken by my Brother Bramwell; but I think it is impossible for us to say that this was a place within the act under the circumstances of the case. I think, therefore, that the judgment should be reversed.

PICOTT, B.—I also think that the judgment ought to be reversed. I prefer to base my judgment upon the grounds put forward by my Brother Bramwell.

Judgment reversed.

1865.

Jan. 23;

Feb. 27.

SEMENZA AND OTHERS v.
BRINSLEY AND ANOTHER.

Principal and Agent—Set-off—Pleading.

If a person buys goods of another whom he knows to be acting as agent, though he does not know who the principal is, he cannot set off a debt due to him from such agent in an action by the principal for the price of the goods.

To a count for goods sold and delivered, the defendants pleaded that the goods were sold and delivered by M, then being the agent of the plaintiffs in that behalf, and intrusted by the plaintiffs with the possession of the said goods as apparent owner thereof, and that M, having possession of the said goods, sold and delivered the same to the defendants in his own name, and as his own goods, with the consent of the plaintiffs; and that at the time of the said sale the defendants did not know, and had not the means of knowing, that the plaintiffs were the owners of the said goods, or were interested

therein, or that M. was the agent of the plaintiffs in that behalf; and that at the time of the said sale, and before the defendants knew that the plaintiffs were the owners of the said goods or interested therein, or that M. was the agent of the plaintiffs in the sale thereof, the said M. became and was indebted to the defendants in an amount equal to the plaintiffs' claim, which amount the defendants were willing to set off against the plaintiffs' claim:—Held, on demurrer, a bad plea, as it was consistent with what was therein averred that the defendants bought the goods knowing that M. was a mere agent, though not knowing who was his principal.

The third count of the declaration was for goods sold and delivered.

Plea thereto—That the goods were sold and delivered to the defendants by one John Peter Moll, then being the agent of the plaintiffs in that behalf, and intrusted by the plaintiffs with the possession of the said goods as apparent owner thereof; and the said J. P. Moll, having possession of the said goods as aforesaid, sold and delivered the same to the defendants, in his own name and as his own goods, with the consent of the plaintiffs; and at the time of the said sale and delivery of the said goods, the defendants did not know, and had not the means of knowing, that the plaintiffs were the owners of the said goods, or were interested therein, or in the said sale thereof, or that the said J. P. Moll was the agent of the plaintiffs in that behalf; and at the time of the said sale and delivery of the said goods, and before the defendants knew that the plaintiffs were the owners of the said goods, or any of them, or interested therein, or that the said J. P. Moll was the agent of the plaintiffs in the sale thereof, the said J. P. Moll became and was at the commencement of this suit, and still is, indebted to the defendants in an amount equal to the plaintiffs' claim for money payable by the said J. P. Moll to the defendants for goods sold and delivered by the defendants to the said J. P. Moll, and for money found to be due from the said J. P. Moll to the defendants, on accounts stated between them, which amount the defendants are willing to set off against the plaintiffs' claim.

Demurrer and joinder in demurrer.

Sir G. Honyman, in support of the demurrer.—The plea is bad; it does not allege that the defendants did not know that Moll was only an agent, but only alleges that the defendants did not know that the plaintiffs were owners of the goods, and that Moll was the agent of the plaintiffs. No doubt, the plea follows the form given in *Bullen's Precedents of Pleading*, 2nd edit. p. 580; but in this respect it departs from the forms in *Chitty on Pleading*, 7th edit. pp. 122, 123, and the other authorities. In *Purchell v. Salter* (1) it was averred in the plea that the defendant bought the goods of Mason as his, and did not know that Mason was only an agent in that behalf; and in *Carr v. Hinchliff* (2) the plea denied that the defendant knew that the plaintiff was interested in the goods, and alleged that the defendant bought them as the goods of the agent. In fact, in all the precedents of such a plea of set-off, there is an averment either that the defendant bought the goods as the goods of the agent, or else in ignorance that the agent was an agent in the matter. The case of *Maans v. Henderson* (3) shews that telling a broker, with whom a party effected an insurance on a vessel in time of war with this country, that the vessel was neutral, was sufficient indication to the broker that such party was not a principal, but agent only, and therefore that the broker had no right of set-off as between him and the principal. The case of *Dresser v. Norwood* (4) turned on how far the knowledge of the agent of the purchaser is the knowledge of his principal. There the purchaser, who bought through his agent goods of a factor, did not know that they were not the factor's own goods, but his agent did; and in this Court it was held, that he was not affected with such knowledge, and might set off, therefore, a debt due to him from the factor against a claim by the owner of the goods. This decision

was, however, reversed by the Court of Exchequer Chamber, which held that the purchaser was affected by such knowledge of his agent. It is admitted, that knowing a man is a factor is not sufficient to deprive one who buys of such factor of his right of set-off; for, as said by Lord Ellenborough in *Moore v. Clementson* (5), "A man who is in the habit of selling the goods of others may likewise sell goods of his own, and where he sells goods as a principal, with the sanction of the real owner, the purchaser who is thus led to give him credit shall on no account afterwards be deprived of his set-off by the intervention of any third person." Here it is consistent with this plea that at the time the debt sought to be set off was incurred, the defendants knew that the goods were not Moll's; and in that case the authorities shew the defendants would not be allowed their set-off.

Watkin Williams, contra.—The plea avers, that at the time of the said sale Moll was indebted to the defendants; what is afterwards averred about Moll being indebted to the defendants before the defendants knew the plaintiffs were owners, or that Moll was the agent of the plaintiffs, is superfluous; for the plea could not be proved without shewing that Moll's debt was incurred either before or at the time of the sale.

[WILLES, J.—The plea would be better if it were much shorter. ERLE, C.J.—You had better amend and strike out the averment of want of knowledge by the defendants that Moll was the agent of the plaintiffs. WILLES, J.—It would be better to aver that Moll sold the goods as principal. What is averred about having possession of the goods he sold as his own, is only evidence that he sold them as principal.]

It is submitted that the plea is good in its present form and without amendment. The rule is laid down broadly in *George v. Clagett* (6), that if the owner of goods empowers an agent to sell the goods as the goods of the agent, and the purchaser so purchased them, he has a right to set off against the claim by the principal a debt due to him from

(1) 1 Q.B. Rep. 197; s.c. 10 Law J. Rep. (N.S.) Q.B. 81.

(2) 4 B. & C. 547; s.c. 4 Law J. Rep. K.B. 5.

(3) 1 East, 335.

(4) 32 Law J. Rep. (N.S.) C.P. 201; s.c. 14 Com. B. Rep. N.S. 574: in error, 34 Law J. Rep. (N.S.) C.P. 48; s.c. 17 Com. B. Rep. N.S. 466.

(5) 2 Campb. 24.

(6) 7 Term Rep. 359; s.c. 2 Smith's Lead. Cas. 106, 5th ed.

the agent. In *Fish v. Kempton* (7), Wilde, C.J. says, "Where goods are placed in the hands of a factor for sale, and are sold by him under circumstances that are calculated to induce and do induce a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him." The present case is within the principle of that case, and also of *Moore v. Clementson* (5), but distinguishable from the facts in both of those cases, as the purchaser in each of them had notice at the time of his purchase that the seller was acting as agent for another. The objection taken to this plea is really only matter of special demurrer, and the plea is substantially the same as in *Carr v. Hinchliff* (2). The plaintiffs ought to have raised the point they are now making, not by way of objection to the plea, but by replying that the defendants knew that Moll was a mere agent when he sold the goods.

Sir G. Honyman replied.

Cur. adv. vult.

WILLES, J. (Feb. 27) delivered the judgment of the Court (8).—This was an action for goods sold and delivered. The sixth plea, the validity of which is in question, alleged a set-off against a person named Moll, who is stated to have been the factor of the plaintiffs. To that plea the plaintiffs have demurred and the defendants joined in demurrer. The case was argued before the Lord Chief Justice, my Brother Keating and myself, and we took time to consider. The question is, whether the plea sufficiently identifies Moll with the plaintiffs so as to shew that a set-off against him is available in an action by them; and there was an attempt to sustain that by reference to a series of authorities beginning with that of *George v. Clagett* (6). The plea alleges that Moll was intrusted by the plaintiffs with the possession of the goods, and that he sold them as his own goods with the consent of the plaintiffs; and then it goes on to state that at the time of the sale and delivery the defendants knew not and had no

means of knowing that the plaintiffs were the owners of the goods or were interested therein, or in the sale, or that Moll was the plaintiffs' agent, and that at the time of the sale and delivery of the goods, and before the defendants knew that the plaintiffs were the owners of the goods or in any manner interested therein, or that Moll was the agent of the plaintiffs in the sale thereof, Moll became indebted to them (the defendants) in the amount which they seek to set-off. It is necessary to consider whether the averments in the plea satisfy the conditions under which a debt due by a factor can be set off against the principal. The rule of law is well and clearly stated in the marginal note to *George v. Clagett* (6), that "if a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor, against the demand for the goods made by the principal." We may observe, as has often been pointed out, and clearly so by Holroyd, J. in the case of *Carr v. Hinchliff* (2), that the setting up as a defence against the principal that which would be a defence against the factor, with the view of extinguishing the debt by payment in that way, was a right which the defendant had; but that the difficulty was in applying the Statute of Set-off, and in saying that the terms of the statute were satisfied, so that the debt of the factor should, for the purpose of the action, be considered as the debt of the principal, who was the plaintiff. That difficulty, however, was got over, and the factor and the principal were identified by that decision for the purpose of the statute; and it was held, that the existence of a set-off, without the knowledge of the agency, enabled the debtor to set up against the principal the defence of set-off as a *quasi* extinguishment, notwithstanding the literal words of the Statute of Set-off. In order to make the defence a valid defence within the rule stated, it seems obvious that the plea must shew that the contract was made by a person whom the plaintiff intrusted with the possession and ownership of the goods; that he sold them as his own, in his own name as principal, with the authority of the plaintiff; and that the defendant then believed him to be the principal in the transaction. Upon the true construction of this plea, however, taking

(7) 7 Com. B. Rep. 687; s.c. 18 Law J. Rep. (N.S.) C.P. 206.

(8) *Erie, C.J., Willes, J. and Keating, J.*

all the averments together, it is, we think, consistent with the statements in it that the seller Moll was a factor, and so sold the goods, as it is usual for a factor to do, as his own, and yet, that the defendants may have bought the goods knowing that the seller was not the true owner, and that he had a principal, but not knowing who that principal was; and so the averments in the plea would be proved. Indeed, the plea studiously avoids stating that which is the gist of such a defence, namely, that the defendant knew nothing of any principal. We think the principle that is laid down in *George v. Clagett* (6) should not be extended to a case in which a buyer dealing with an agent knew that he was an agent, though he did not know what principal he represented. We regret that we are obliged to decide this case on the construction of the plea, but Mr. Watkin Williams refused to assent to the suggestion which was thrown out by the Court, that he should amend the plea. We are obliged, therefore, to put a construction upon the plea, and having done so, it is what we have stated, that it does not amount in point of law to a defence. The plaintiffs at the trial will do well to have the facts specially found. Upon the construction of the plea the plaintiffs, if they are entitled to succeed upon the facts, will be in a condition to obtain the judgment of the Court, at least upon demurrer.

Judgment for the plaintiffs.

1865. }
Feb. 11. } BOURNE v. FOSBROOKE.

Trover—Possession against a Wrong-doer—Jus Tertii—Married Woman—Husband's Right to Property.

Plaintiff when a young child resided with her aunt in the house of the defendant's testator, where the aunt lived as house-keeper, and the plaintiff was almost adopted into the testator's family. The aunt was a married woman living apart from her husband who had deserted her, and previously to her death she gave the plaintiff some articles of jewelry and apparel; part of these the plaintiff gave the testator to keep for her, and the rest she placed in her own boxes in the testator's house. Upon the aunt's death

her husband once called and claimed her effects, but the testator repudiated the husband's right, and the husband never afterwards claimed them or interfered further in the matter. When the testator died, which happened whilst the plaintiff was away at school, the defendant as executor took possession of the articles which had been so given to the plaintiff, and refused to restore them to her:—Held, that the plaintiff was in possession so as to be entitled to maintain an action against the defendant for these articles; and that it was not competent to the defendant to set up the right of the aunt's husband as an answer to the action.

Detinue and trover, for jewelry and wearing apparel.

Pleas to the count in detinue, *non detinet*, and to the other count not guilty, and to the whole declaration not possessed.

The cause was tried, at the last Summer Assizes, at Leicester, before Channell, B.

The plaintiff was an infant of seventeen years of age and sued by her father as her next friend.

The defendant was the executor of the Rev. Philip Fosbrooke, the vicar of Lockington, near Derby. For a long time previous to 1853 one Susan Philips had been in the service of the testator as house-keeper; and in 1853 the plaintiff, who was the niece of Susan Philips and then a child of five or six years old, went to visit her aunt at the house of the testator, who became much attached to the plaintiff, and ultimately had her to reside permanently with her aunt at his house. She was placed at school by the testator at his expense, and she spent her holidays at the testator's house, which, in fact, became her home.

The aunt, Susan Philips, died at the testator's house in February 1853, but the plaintiff continued in the same position there as before the aunt's death.

It appeared that the aunt had in her lifetime given her watch and various other articles, consisting of jewelry and wearing apparel, to the plaintiff, and that some of these the plaintiff had asked the testator to take care of for her, and that others she had put in her boxes in his house.

Susan Philips had married in 1851, but her husband deserted her shortly after her marriage, and they never afterwards lived

together; but upon her death he came once to the testator's residence, at Lockington, and claimed the effects left by his wife, when the testator refused to give them up to him, saying that there were expenses, which must be paid before he could have them, and that he had no claim upon them because he was living in adultery. The husband never made any further claim in respect of these articles.

The plaintiff having spent her holidays as usual at the testator's residence returned to school on the 9th of January 1864, and the testator died on the 13th of that month, having before his death labelled some of the plaintiff's things with her name.

The defendant took possession, as executor, of the house and effects, giving up to the plaintiff the things labelled with her name, but refusing to give her some of the articles alleged to have been given to her by her aunt, and also some others which she said had been given her by the testator in his lifetime.

The jury found, that as to the articles given to the plaintiff by her aunt there had been a transfer of possession of them to the plaintiff; and that they were of the value of 25*l*. As to the other goods claimed by gift from the testator the jury found that there had been no transfer of possession of them to the plaintiff, though there was a verbal gift; consequently no further question arose as to those goods. Under the direction of the learned Judge, a verdict was entered generally for the defendant, leave being reserved to move to set it aside and enter a verdict for the plaintiff for 25*l*., on the ground that the plaintiff was entitled to maintain this action, notwithstanding that Susan Philips was a married woman.

O'Malley having accordingly obtained a rule—

Keane and *Merewether* shewed cause.—Susan Philips, the plaintiff's aunt, being a married woman, the articles in question belonged to her husband and she had no power of disposing of them. It is true, that where a married woman takes personal property to her separate use she has in equity a right to dispose of it—*Fettiplace v. Gorges* (1); but even in equity, unless property has been settled to the separate

use of the wife, not only such property but the produce of it belongs to the husband—*Lamphir v. Creed* (2). The case of *Carne v. Brice* (3) is a strong authority to shew that what is claimed here by the plaintiff belonged to the husband of her aunt. In that case the property in wearing apparel bought for herself by a wife living with her husband, out of money settled to her separate use before marriage, was held to vest in the husband, and to be liable to be taken in execution for his debts. To the same effect is *Messenger v. Clarke* (4). That, too, meets the argument which may be made on the other side, that the husband and wife in the present case were not living together; for in *Messenger v. Clarke* (4) the wife was living separately from her husband, and yet where she had invested some savings out of the allowance she received from her husband in the funds, and had afterwards shortly before her death sold it out and given it to the defendant, it was held that the husband was entitled to recover it back. In *Bird v. Pegrum* (5) Williams, J., in the course of the argument, says, "Can it be contended that a Court of law recognizes a married woman's right to have money of her own in her possession? Where goods and chattels, furniture for instance, are settled on a married woman, without the intervention of a trustee, it cannot be doubted that, in the eye of the law, they belong to the husband; although in a Court of equity he would be considered as a trustee for his wife." *Tugman v. Hopkins* (6) also supports the husband's right, and shews that the wife had here no *jus disponendi*. If a married woman die when living apart from her husband, and a stranger in the absence of her husband pay no more than is suitable to her rank for her funeral, the husband is liable to repay the funeral expenses, although he has never been asked to bury his wife, if he has not been prevented from discharging that duty by any fraud or misconduct of the person who is at the expense

(2) 8 Ves. jun. 599.

(3) 7 Mee. & W. 183; s. c. 10 Law J. Rep. (N.S.) Exch. 28.

(4) 5 Exch. Rep. 388; s. c. 19 Law J. Rep. (N.S.) Exch. 306.

(5) 22 Law J. Rep. (N.S.) C.P. 166; see p. 169.

(6) 4 Man. & G. 389; s. c. 11 Law J. Rep. (N.S.) C.P. 309.

(1) 1 Ves. jun. 46.

of such funeral—*Bradshaw v. Beard* (7). The doctrine of paraphernalia does not apply here. Jewelry is not suitable to the station in life of a housekeeper, and even if these articles were paraphernalia she had no right to part with them as against the husband or his creditors—*Graham v. Londonderry* (8). Strong evidence is required to shew that a husband divested himself of his property and engaged to hold it as trustee for the separate use of his wife—*Waller v. Hodge* (9). Here, however, the husband interfered and claimed the property, and the defendant has a right therefore to set up the husband's title.

O'Malley and Markby, in support of the rule.—All the cases cited in favour of the defendant are cases in which there were either claims of the execution creditor, executor or the husband himself. These goods were taken out of the plaintiff's possession by a wrong-doer, and she has a right to say, "You do not claim under the husband of the deceased woman," for the defendant's testator had repudiated the husband's right. The husband had no right to claim the goods from the donee of the wife, because under the present circumstances his consent to the gift will be presumed—*Ringham v. Clements* (10).

[SMITH, J.—There she was handing them over for his benefit.]

The evidence in the present case was sufficient to have justified the jury in finding that the wife had been authorized by her husband to make these dispositions. Moreover, there are cases where a person with no legal title, but in possession, may maintain trover against a wrong-doer—*Sutton v. Buck* (11), *Wilbraham v. Snow* (12). Here, at all events, the plaintiff had a good right to these goods as against all but her aunt's husband. The defendant is a mere wrong-doer, and cannot set up the husband's title. The case of *Fyson v. Chambers* (13) shews that a mere

wrong-doer cannot in trover, by the administrator of a deceased bankrupt, set up the title of the assignees, unless they have interfered; and this is approved of by *Herbert v. Sayer* (14). The difference between the present case and that of *Buckley v. Gross* (15) is, that there it was obvious that the possession was against the consent of the true owner.

ERLE, C.J.—I am of opinion that this rule should be made absolute. The plaintiff claims to have a right to recover from the defendant the value of certain articles of which the defendant had taken possession. The defendant was the executor of Philip Fosbrooke, and disposed of the things in the house, as he thought, in the performance of his duty as executor. The plaintiff's aunt had lived with the testator as housekeeper, and the present plaintiff was invited to stay in the house and was almost adopted into the family. The claim made by the plaintiff was of a great many articles appertaining to women's dress and ornaments, which she alleged had become hers in the testator's lifetime, and a great contest was made at the trial whether the property in them passed to the plaintiff; and the jury, as to many of them said that it did not, and therefore the executor had a right as to them; but as to a class of articles, of the value of 25*l.*, the jury found that they had been given to the plaintiff by the aunt, and that the aunt had transferred the possession of them to her. It is a rule of law that personal property cannot pass by parol gift without a transfer of possession, and hence arose the contest at the trial, whether these things were given and so transferred; and the jury found that they were. Then an objection was taken, for the defendant, that the housekeeper was at the time a married woman, and that, therefore, the articles were the property of the husband, and the gift operated naught. Now, in point of law, the learned Judge was right in holding that such was the law of England; and I do not contravene it, nor do I decide the point as to an authority being presumed in the wife to give away these things, by reason of her

(7) 31 Law J. Rep. (N.S.) C.P. 273; s.c. 12 Com. B. Rep. N.S. 344.

(8) 3 Atk. 393.

(9) 2 Swanst. 92.

(10) 12 Q.B. Rep. 260; s.c. 17 Law J. Rep. (N.S.) Q.B. 289.

(11) 2 Taunt. 302.

(12) 2 Wms. Saund. 47 f.

(13) 9 Mee. & W. 460; s.c. 11 Law J. Rep. (N.S.) Exch. 190.

(14) 5 Q.B. Rep. 965; s.c. 12 Law J. Rep. (N.S.) Q.B. 286.

(15) 32 Law J. Rep. (N.S.) Q.B. 129; s.c. 3 B. & S. 566.

having been deserted by her husband for nearly twelve years, and allowed to receive them as gifts. When that point is before the Court, it will be disposed of. But I am of opinion that, here, the plaintiff did not derive any property as against the husband of her aunt, and it is very material to understand who the party was against whom the plaintiff was claiming the articles. If the husband had taken them from the plaintiff, she would have acquired nothing as against the husband; but I think she can maintain this action against the defendant, because the rule of law is, that a person in lawful possession of an article has a right to recover, if a wrongdoer takes it away. A person taking an article with the authority of the owner is not a wrong-doer, but a person taking it without colour of title is a wrong-doer, and as against him a person who has had lawful possession of it may maintain an action for it. That is the result of the well-known case of the chimney-sweeper—*Armory v. Delamirie* (16), where a chimney-sweeper's boy found a jewel, and took it to a goldsmith's shop, and the goldsmith kept the stones; and it was held that the boy had a right to recover the value in an action of trover. Now it seems to me, that although the plaintiff was a school-girl going backwards and forwards, visiting the testator from time to time and receiving these presents, and leaving them at his house, she was in law in possession of these articles. Possession is a very ambiguous term. A person has possession of an article although he has not the article about him. Now these presents were placed, some in boxes in the testator's house, and others of them she handed over to the testator to keep for her, and they were in her possession. Handing them to him to keep for her, and he agreeing to keep them for her, they remained in her possession in the drawer in which he placed them. Therefore they were lawfully in her possession as much as the property, in the case of *Fyson v. Chambers* (13), was in the possession of Mr. Fyson. Now, we should have had great difficulty in this case if the husband had come forward and demanded the goods, and the defendant had agreed to hold them on the husband's account, so as to have enabled the defendant to have come in under the

husband. But considering what the testator said when the husband came and claimed the articles, which though the testator was wrong in his law is important as shewing the terms on which he held such articles, I see nothing to authorize the defendant in refusing to give them up to the plaintiff. He is not justified in setting up the right of the husband.

KEATING, J.—I am of the same opinion. If the defendant had been in a position to avail himself of the title of the husband, he would have had a good answer to this action; and that in truth was the only question on which the learned Judge gave his opinion. But here the defendant cannot avail himself of the title of the husband, because his testator repudiated the title of the husband. The jury have found, that in point of fact possession was transferred by the wife to the niece. Therefore, the possession was in the plaintiff, and there is nothing to shew that the defendant obtained a position which can prevail against that possession which the jury have so found in the plaintiff.

SMITH, J.—I am of the same opinion. It is clear that the defendant had no right to these goods. Neither he nor the testator had any title to them, and on the only occasion when the husband claimed them the testator elected to keep them. The only question is, had the plaintiff a sufficient possession of the articles? It is impossible to say that she had not, except as against the husband. They were in the possession of her aunt, and the husband never interfered with them. She handed them to her niece, and the husband might perhaps have confirmed the gift. Then it was not shewn that that possession once vested in her was ever divested. The goods remained in the house of the testator by his permission, and she had a right to them against all the world but the real owner, and he has not come in to claim them. The case of *Buckley v. Gross* (15) does not interfere with our judgment; Crompton, J. says, in that case, "No doubt, bare possession is sufficient to maintain trover or trespass as against a wrongdoer, who takes the article from the person having possession. It does not, however, appear to me that the plaintiff was 'the finder,' within the case of *Armory v. Delamirie* (16); he rather became possessed of the

tallowfeloniously or fraudulently (whichever his dealing with it may be called), and he was not a mere innocent finder." Here it seems to me that the plaintiff was a perfectly innocent holder. I think that she is entitled to maintain the action for these articles, notwithstanding that her aunt was a married woman, and that therefore the rule should be made absolute.

Rule absolute.

1864. } CAPEL v. POWELL AND
Nov. 26.* } ANOTHER.

Husband and Wife—Divorce à vinculo—Liability of Husband.

After a divorce à vinculo matrimonii, a man is not liable to be sued, jointly with his former wife, for a tort committed by her during the coverture.

This was an action, tried before Martin, B., at the last Surrey Assizes.

The action was brought against one Powell and a person named Caroline Nickel, and the declaration alleged that the defendant Caroline Nickel at and during the time she was the wife of the defendant Powell unlawfully imprisoned the plaintiff.

The defendant Caroline Nickel pleaded not guilty, and a justification. The defendant Powell denied the coverture at the time the trespass was committed.

It appeared at the trial that at the time of the alleged false imprisonment the two defendants were married, but were living apart by mutual consent. Subsequently the husband obtained a divorce *à vinculo matrimonii*, and after the divorce the plaintiff brought this action.

The jury found a verdict for the plaintiff, whereupon the learned Judge ordered the verdict to be entered against the defendant Caroline Nickel only, reserving leave to the plaintiff to move to enter the verdict against Powell, if the Court should think that he was also liable.

Daly having obtained a rule accordingly, *Hawkins* and *Sir G. Honyman* shewed cause.—They contended that all liability of the husband for the tort of the wife ceased

with the termination of the coverture, in exactly the same way as if the husband had died. They referred to 1 *Chit. Pl.* 104; *Head v. Briscoe* (1).

Daly and *Houston*, contra, referred to *Marshall v. Rutton* (2), and 20 & 21 *Vict. c. 85. ss. 25, 26.*

ERLE, C.J.—I am of opinion that this rule should be discharged. I think a husband after he has been divorced from his wife is not liable for a tort committed by her during the coverture. The whole question turns upon the point whether he is so liable, and I think it is apparent that he is not. During the coverture the wife has, in law, no separate existence, and she can neither sue nor be sued in any court. For any wrong committed by her she is liable; but, because she has no separate existence, she cannot be sued alone, and her husband must be joined with her. If the wife dies after an action has been commenced against her and her husband, the action abates, but if the husband dies, then the action goes on against her. It is clear, therefore, to my mind that the only reason why the husband is joined at all in such an action is from the disability of the wife to sue or be sued alone. But as soon as there has been a divorce *à vinculo matrimonii* that disability ceases; she is in the same position as if she had never been married, and the husband ought no longer to be joined. Where the marriage is not dissolved, but the parties are judicially separated, then it is necessary to make some provision for a state of things not recognized by the common law; for *Head v. Briscoe* (1) is an authority that for wrongs committed by the wife during the coverture the husband is jointly liable, even though they might be living entirely separate. This was done by the provisions of the 20 & 21 *Vict. c. 85*, which have been referred to. But there was no necessity to make any analogous provision for a dissolution of marriage, for which the common law is sufficient. I, therefore, think that this rule ought to be discharged.

KEATING, J. concurred.

Rule discharged.

(1) 5 C. & P. 484; s. c. 2 Law J. Rep. (N.S.) C.P. 101.

(2) 8 Term Rep. 545.

* Decided in the Sittings after Michaelmas Term, 1864.

1865. }
 Jan. 19. } **BORRIES AND OTHERS**
 v. HUTCHINSON.

*Damages, Measure of—Sale of Goods—
 Damages for Delay where no Market—
 Sub-Sales.*

Plaintiffs bought caustic soda of the defendant, part to be shipped in June, part in July, and the rest in August. The defendant knew at the time of the sale that the plaintiffs bought to sell again on the Continent, and that it was to be shipped from Hull, but not that it was for Russia, although he learned this also before the end of August. The defendant neglected to deliver any such soda during the time contracted for, but he delivered a portion in September and October. There was no market for caustic soda, and the plaintiffs, who had contracted for the re-sale of the soda to H, a merchant in Russia, lost the profit on such re-sale in respect of the soda which was not delivered at all, and, by reason of the approach of winter in the Baltic, were obliged to pay an increased rate of freight and insurance on the shipment of the soda which was delivered in September and October:—Held, that the damages which the plaintiffs were entitled to recover for the defendant's breach of contract were the loss of profit on the sale to H, and also the cost of such increased rate of freight and insurance, but not the damages the plaintiffs paid H. in respect of a sub-sale made by him to a consumer of the article.

Declaration, that the plaintiffs bargained and agreed with the defendant to buy of him 75 tons of his best caustic soda, strength guaranteed not to be less than 70 per cent., in 5 cwt. iron casks or 3 cwt. wooden casks, at the plaintiffs' option, at the price of 16l. 5s. per ton, free, on rails, at Widness dock, less 2½ per cent. discount and 1 per cent. commission; payment, cash fourteen days after delivery; shipment to be 25 tons in June, 25 tons in July, and 25 tons in August; and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to the delivery of the said caustic soda, yet the defendant did not deliver the same to the plaintiffs, and the plaintiffs, by reason of the premises, have been hindered and prevented from performing a certain other contract made by them with one Heitmann,

of St. Petersburg, for the sale to him of the said caustic soda at greatly increased prices, which last-mentioned contract was made on the faith of the agreement by the defendant, and by reason of the premises the plaintiffs have been obliged to pay a much larger sum for freight and insurance than they otherwise would have done if the defendant had performed his said contract, and have incurred other losses, and are liable for other damages.

Plea, payment into court of 52l. 5s. 4d., and averment that the same was sufficient to satisfy the plaintiffs' claim.

Replication, that the said sum so brought into court was not enough to satisfy the claim of the plaintiffs. Issue thereon.

The cause was tried, before Willes, J., at the London Sittings, in Michaelmas Term last, when the following facts were given in evidence. The defendant was a soda-manufacturer, at Liverpool, and in May 1863 he contracted with the plaintiffs, who were merchants, at Newcastle-on-Tyne, to sell to them 75 tons of caustic soda, to be shipped 25 tons in June, 25 tons in July, and 25 tons in August, as stated in the declaration. The correspondence between the parties shewed that, at the time of entering into the contract, the defendant knew that the soda was bought for sale to connexions of the plaintiffs on the Continent, and that it was to be shipped from Hull; and before the end of August the defendant also knew that the soda was to be sent to Russia, but there was no evidence that the defendant knew this at the time of making the contract. Contemporaneous with making this contract with the defendant, the plaintiffs contracted with a Mr. Heitmann, a merchant at St. Petersburg, for the sale of the soda to him at the price of 17l. 10s. per ton, free on board at Hull, and shipment in June, July and August. Heitmann then contracted with a Mr. Heinburger (a soap and candle manufacturer in Russia) for the re-sale of the soda to him, at a profit. None of the soda was delivered in June, July, or August; but on the 16th of September, and on other days between then and the 26th of October, various portions of the soda, amounting altogether to about 26 tons, were delivered by the defendant at Hull, and afterwards shipped by the plaintiffs for St. Petersburg. The season

for shipment at St. Petersburg is closed at the end of October; and after August, as the season draws nearer to its close, the rates of freight and insurance on shipments for the Baltic increase. The difference between the rate of freight which the plaintiffs were obliged to pay on the shipment of the soda delivered in September and October, and what it would have been had the soda been delivered at the times contracted for, amounted altogether to 35*l.* 15*s.*, and the difference in the insurance which the plaintiffs paid came to 5*l.* 2*s.*, the whole together being 40*l.* 17*s.* At the time the soda was to have been delivered, the demand for caustic soda exceeded the supply (its makers being very limited), and there was no market where the plaintiffs could have purchased the article necessary for performing their contract with Heitmann. The plaintiffs claimed, therefore, the loss of the profit they would have made on the remaining 49 tons, had they been delivered, and which profit amounted to 52*l.* 5*s.* 4*d.* This sum the defendant paid into court. In addition to this sum, the plaintiffs also claimed the said sum of 40*l.* 17*s.* for the difference in freight and insurance, and a further sum of 159*l.*, which the plaintiffs had paid in respect of the loss of Heitmann's profit on his sub-sale to Heinburger, and for compensation to the latter on the non-delivery of the soda. A verdict having been entered for the plaintiffs for 199*l.* 17*s.* beyond the sum paid into court, with leave to the defendant to move to enter a verdict for him or to reduce the damages, a rule nisi to that effect was afterwards obtained, pursuant to such leave, on the ground that the damages claimed beyond the amount paid into court were too remote.

Temple and Udall now shewed cause.—The plaintiffs are entitled to keep their verdict for the full amount. It is manifest that the defendant was sufficiently aware at the time of making the contract of the object for which the caustic soda was bought by the plaintiffs, to make him know that if he failed to carry out the contract the damages now claimed would be the natural result of such breach. The defendant knew that the soda was for sale on the Continent, and he also knew that it was to be shipped from Hull. He must have known, therefore, that it was most probably going to a northern

port, and, consequently, that the rates of freightage and insurance would be affected by the approach of the winter months. Then, before the end of the time within which the defendant was bound to complete his contract, he distinctly knew the soda was sold by the plaintiffs to Heitmann, in Russia; the claim therefore to these damages, especially with respect to the loss of profit on the sale to Heitmann, and the increased cost of freight and insurance, is within the principle laid down in *Hodley v. Baxendale* (1) for ascertaining the measure of damages. The plaintiffs, as the defendant knew, were only merchants, and until the article had got to its natural termination, that is, into the hands of a manufacturer, as Heinburger was, the defendant, it is submitted, must be liable for the damages—*Randall v. Roper* (2). There the plaintiffs, who were corn-factors, bought of the defendant barley warranted to be seed barley of a particular quality, and re-sold it with a like warranty to persons who sowed it, and the crop being of an inferior kind of barley, and claims having been made on the plaintiffs by such sub-purchasers for compensation, it was held that the plaintiffs might recover of the defendant the amount of damage these sub-purchasers had sustained. The rule in that case was adopted by Martin, B., in *Josling v. Irvine* (3). They also referred to *Smead v. Foord* (4), *Barrow v. Arnaud* (5), *Dunlop v. Higgins* (6) and *Mayne on Damages*, 16.

Brett and Littler, in support of the rule.—There being no market for the soda, it is admitted the doctrine respecting the purchaser going into the market and purchasing the article does not apply; and as it is not reasonable to suppose that the plaintiffs would give an order to another manufacturer to supply him with the soda he required, it is admitted that they are entitled to recover the amount of their loss of profit on the sale to Heitmann, and that amount has been paid into court. What the defendant disputes is his liability for the differ-

(1) 4 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179.

(2) E. B. & E. 84; s. c. 27 Law J. Rep. (N.S.) Q.B. 266.

(3) 30 Law J. Rep. (N.S.) Exch. 78.

(4) 1 El. & B. 602; s. c. 28 Law J. Rep. (N.S.) Q.B. 178.

(5) 8 Q.B. Rep. 595.

(6) 1 H.L. Cas. 381.

ence of freight and insurance, and the loss on the sale from Heitmann to Heinburger. Both these are too remote; and it is on that ground the defendant is not liable. What the plaintiffs are entitled to recover is not all the damage they may have suffered, but only such damage as the defendant may be said to have contracted to make good in the event of his not performing his contract to deliver the soda. That is the principle of *Hadley v. Baxendale* (1). The rule is thus stated in *Mayne on Damages*, 15: "The first and in fact the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act; it will assume this character if it can be shewn to be such a consequence as in the ordinary course of things would flow from the act, or in cases of contract, if it appears to have been contemplated by both parties." That obviously means contemplated at the time of making the contract. Now, neither of the claims of the plaintiffs, which the defendant now disputes, comes within that rule. All that the defendant knew at the time of this contract was, that the soda was wanted to supply a customer of the plaintiffs on the Continent. The natural consequence of the breach of contract in such case cannot be the loss on any other contract the purchaser may have made. The increased cost of freight and insurance cannot be the result of a breach of contract to deliver goods at Hull. It must only be with reference to some other contract, and the defendant clearly had no knowledge of such other contract as would make him know that the breach of his contract to deliver at Hull would probably occasion this damage. If this be so as to the plaintiff's claim for extra freight and insurance, still more so must it be as to the claim of loss on the sub-contract made by Heitmann—*Portman v. Middleton* (7).

ERLE, C.J.—This was an action for breach of a contract to deliver certain soda. The general rule is, that a vendor failing to deliver according to his contract pays the damages the purchaser has sustained thereby as compared with the market price of the article at the time it ought to have been delivered; that is to say, where the purchaser has been obliged to go into the market to

get the article, the vendor must reimburse him the difference between what he has so paid for the article and the contract price. But if, however, the article is one for which there is no market, another principle for estimating the damages must be resorted to; and according to the rule laid down in *Hadley v. Baxendale* (1), the vendor is to pay such damages as at the time of the contract he may fairly and reasonably be considered to have had notice that he would be liable for in case of breach of such contract. In the present case the defendant had notice that the soda was bought for the purpose of being sent on the Continent, and I think the defendant had knowledge also that the plaintiffs bought to sell again. Heitmann was the person to whom the plaintiffs had agreed to sell the soda, and if they had been able to have sold and delivered it to him, there would have been a profit to the plaintiffs of 52*l.* 5*s.* 4*d.* That sum the defendant has paid into court, and it is agreed on all sides that the plaintiffs are entitled to as much as that sum. Then the contract was for delivery of twenty-five tons in June, July and August, and a portion of the goods was not delivered at all, and as to the rest the defendant broke his contract in not delivering it until after August. The question is, whether he is liable for damages in respect of such late delivery. The plaintiffs' purchaser was in Russia, and if the plaintiffs had had the soda at Hull in July or August, they could then have delivered it to their purchaser in Russia at a less cost of freight and insurance, and they in fact lost 40*l.* 17*s.* in consequence; that being the difference in freight and insurance between what they were at that time and during the months of July and August, when the defendant ought to have delivered pursuant to the contract, and that sum is what the plaintiffs had to pay. Mr. Brett contended, that notice to the defendant being that the goods were for a purchaser on the Continent, and that they were to be shipped from Hull, was not a notice from which the defendant had any reason to infer that the goods were for a port in the Baltic, and I think Mr. Brett made good that ground. But then the contract has been broken by the defendant not delivering the goods in time, and the plaintiffs have a right to damages for such breach, and the question is, what are the damages

(7) 4 Com. B. Rep. N.S. 322; s. c. 27 Law J. Rep. (N.S.) C.P. 231.

they are so entitled to? I think they are such as might in one sense be reasonably expected to arise from such breach. At the time the goods were sent by the defendant to Hull, they were not so available for the Baltic market as they would have been if sent earlier, and I think the plaintiffs receiving the goods as they did in September turned them to the best account they could, and I do not see how they could have diminished the loss by sending them elsewhere. Then 40*l.* 17*s.* (the extra cost of freight and insurance) was the amount of deterioration of the article by reason of the defendant's breach of contract in delivering it in September instead of July and August, and this amount I think therefore the plaintiffs are entitled to recover. The plaintiffs have also claimed damages by reason of the sub-sale from Heitmann to Heinburger. If the goods had been delivered to Heitmann, and he had delivered them to Heinburger, there would have been a profit to Heitmann of 159*l.*, which he has claimed from the plaintiffs, and this the plaintiffs now claim from the defendant. I think this is too remote. The defendant had no notice of this at the time of his contract, and without such notice his liability is not to go on for any number of sub-sales. The defendant is therefore not answerable for this loss, as it is not the direct consequence of his breach of contract.

WILLES, J.—I am of the same opinion. As to the sub-contract between Heitmann and Heinburger, it is quite consistent with the state of things at the time of making the defendant's contract that such a contract might not have been entered into, therefore if the defendant knew of an intent to sell, he would not be liable for such remote consequences. This case is different from that of *Randall v. Roper* (2), where the defendant sold barley as seed barley of a particular quality, and it was sold again by the purchaser with the same description, and on being sown an insufficient and inferior crop came up. It was therefore a matter of indifference there whether the damages which so resulted were incurred by the first or the sub-purchasers; they were the natural consequences of the breach of contract. In the present case, I think the damages arising from the second sale might be too remote, even if notice of such sale had been given the defendant; but, at

all events, he entered into no bargain to be answerable for such consequences. With respect to the damages arising from the delivery at a later period than was contracted for, it appears to me that such can be recovered on the ground stated by my Lord. It is not suggested that the plaintiffs could have done anything more than they did, by which they could have made the soda more valuable to them. Indeed, what they did then appears to me to have been not only the most reasonable thing, but the only reasonable thing which they could have done. In ordinary cases, the measure of damages is the difference between the contract price and the market price; and I can quite understand a case in which, where notice is given to deliver goods in respect of a particular contract, when the price under the same would be different from the market price, the amount of damages would be influenced thereby. This was not the case, however, of such notice; and there was here no market for this soda. What, then, must we do? We must see what was the difference between the value of the soda when it was to have been delivered, and when it was, in fact, delivered. Now, if the soda had been delivered at the time contracted for, it might have been easily transferred to Russia; when it was delivered it was also capable of being transferred to Russia, but at a greater cost for freight and insurance; therefore, as a mere question of what was the difference in value of the soda when delivered and when contracted to be delivered, the difference between what would have to be paid for freight and insurance at these periods constitutes the measure of damages; that difference amounts to the sum of 40*l.* 17*s.*, and that sum the plaintiffs are entitled to recover.

KEATING, J.—I also am of opinion that the plaintiffs are entitled to recover for the increased freight and insurance, on the ground that the same was occasioned by not delivering the soda at the time contracted for. The same principle was acted on by this Court in the case of *Wilson v. the Lancashire and Yorkshire Railway Company* (8). That was an action against a carrier for loss, which the plaintiff, a cap-manufacturer, had sustained by the delay in the delivery of cloth which had been

(8) 9 Com. B. Rep. N.S. 632; s. c. 30 Law J. Rep. (N.S.) C.P. 232.

given to the carrier to carry. The plaintiff wanted the cloth to make into caps, and it was necessary for the sale of the caps to the best advantage that they should be made up at a certain season, and the delay in the delivery of the cloth caused the plaintiff to lose the season; and this Court was of opinion that the loss of the season might, for the purpose of estimating the damages, be considered as a deterioration in the market value of the cloth when delivered. As to the further damages which have been claimed, I agree with the rest of the Court that they are too remote.

*Rule absolute to reduce the damages to 40*l.* 17*s.**

1865. }
Jan. 17. } *In re DORNING.*

Baron and Feme—Acknowledgment—3 & 4 Will. 4. c. 74. s. 85.—Affidavit.

Where the consideration-money for a married woman giving up her interest in the estate in respect of which the acknowledgment is taken, under 3 & 4 Will. 4. c. 74, is to be paid into her own hands, the Commissioners should distinctly ascertain from her that she wishes to pass her property without any provision being made for her.

Quain moved that the proper officer of the Court might be directed to receive and file the certificate of acknowledgment of the execution of a deed by Harriet Dorning, a married woman, pursuant to 3 & 4 Will. 4. c. 74. s. 85. The affidavit by the Commissioners verifying the certificate of acknowledgment contained the following statements: "That previous to the said Harriet making the said acknowledgment, I inquired of the said Harriet whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken without having any provision made for her in lieu of, or in return for, or in consequence of, her so giving up her interest in such estates; and that in answer to such inquiry the said Harriet declared that the sum of 1,503*l.* 15*s.* was to be paid to her in lieu of her interest in the said estates." "That before the said acknowledgment was so taken the said sum of 1,503*l.* 15*s.* was paid to her in the presence of me and the said James Street." The officer objected to

register this acknowledgment without the direction of the Court, on the ground that the sum which Mrs. Dorning received in respect of her interest in the estate ought to have been properly settled upon her. It is submitted that the affidavit is sufficient. It appears from the recitals in the deed of conveyance that her interest, which was a moiety in the land thereby conveyed, had been held for her sole and separate use. She joins with the owner of the other moiety in the conveyance to a purchaser, and the deed recites a payment to her of the moiety of the purchase-money. Then the affidavit states this sum was paid to her in the presence of the Commissioners.

[WILLES, J.—That is no security to her, because her husband can take it out of her hands directly afterwards.]

Rule 3. of Hilary Term 1834 states the inquiry to be made by the Commissioners making the affidavit, and then says, "and where any such married woman in answer to such inquiry shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration." Here the married woman does not claim any provision; she may therefore give up the property without any provision being made for her benefit. All that is required by the rule and statute is, that the Commissioners shall first ascertain by inquiry that she intends to do so.

ERLE, C.J.—We think the officer may receive the acknowledgment on an affidavit by the Commissioner that he is satisfied it was the intention of Mrs. Dorning to convey the estate without any provision being made for her out of the proceeds. On the examination of a married woman by the Commissioners, before they receive the acknowledgment in a case where a sum of money is to be paid to her for her interest in the property, they should always explain to her that payment to her is a payment to her husband, and then they should ascertain from her whether that is what she desires or not.

The rest of the COURT concurred.

Rule refused (1).

(1) Eventually a fresh certificate and affidavit were made in the usual form, which rendered any fresh application to the Court unnecessary.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF COMMON PLEAS.

EASTER TERM, 28 VICTORIÆ.

1865. } BULLEN AND ANOTHER v.
April 26. } SHARP THE ELDER.

*Partners—Marine Insurance—Policy—
Underwriters.*

S. entered into an arrangement with F., whereby F. was to manage an underwriting business in the name of S., S. finding the funds. The defendant guaranteed S. to a certain amount; and in consideration thereof S. agreed to pay him an annuity, which, on a given state of the profits, was to be increased to a yearly sum equal to one-fourth of the profits; the defendant, however, not to be considered as a partner. S. afterwards married, and by the marriage settlement all the profits were assigned to the defendant and D. on certain trusts, the first trust being to pay out of the profits the said annuity:—Held, that the defendant was liable as partner on a policy underwritten in the name of S.

This was an action to recover 100*l.* for a loss on a marine policy of assurance effected by the plaintiffs and underwritten in the name of Sharp the younger, a son of the defendant, with whom the defendant was contended to have been partner.

At the trial, a verdict was taken for the plaintiffs by consent, subject to the following

CASE.

In the beginning of 1857 the defendant applied to a Mr. Fenn, an underwriter at Lloyd's, to introduce his son to Lloyd's, with a view to his becoming a member of that body. Fenn shortly afterwards told the defendant that he had been before the committee at Lloyd's, and they had suggested that the defendant should give a guarantee for the liabilities to be incurred by his son. This the defendant objected to do, but stated that he might not be unwilling to give his guarantee for a limited amount. Fenn thereupon sent the committee a letter of the 17th of March (set out in the case), informing them of the defendant's objection to guarantees, but that he was willing to put 5,000*l.* at his (Fenn's) disposal, and that he had assured him (Fenn) that he would never let his son stand in want of further aid. The committee, on receipt of this letter, elected Sharp the younger; and at the same time, viz. the 17th of March 1857, Sharp the younger and Fenn entered into an agreement (set out in the case) that an underwriting account should be opened at Lloyd's, and carried on in the name of Sharp the

younger, under the management of Fenn, upon the following terms. That as far as practicable all risks taken on account of Sharp the younger, should be identical with those taken by Fenn on his own account, and that exceptions and single lines should be taken as far as practicable alternately, if Sharp the younger required it; that the underwriting business should commence on the 10th of March 1857, and be carried on and the subscription made in the name of Sharp the younger, but the policies, losses and averages be adjusted by Fenn on his account; that Sharp the younger should apply so much of his time to the business as might be essential to him, and Fenn so much as might be required for conducting it, but that Fenn was not to be precluded from carrying on business on his own account; that the business should be carried on for three years, from the 1st of March 1857, after which it might be determined by a three months' notice; that Fenn should keep proper books, &c.; that all premiums and other monies arising or payable in respect of the business should be received by Fenn and paid to the account of Sharp the younger, at his bankers, and all payments and advances in respect thereof be made by Fenn exclusively, Sharp the younger finding the money; that Fenn should be allowed a salary of 300*l.* per annum; that Fenn was to give his best attention to the business; that on the expiration of the agreement Fenn should attend the winding up, but his salary cease at the end of the term; and that no risk should be taken by Sharp the younger personally without the consent of Fenn. Under this agreement the business was carried on by Fenn until the agreement was altered in November 1858, and Fenn subscribed all policies in the name of Sharp the younger. On the 20th of May 1857, Fenn received a letter (set out in the case) from the committee, asking him whether the 5,000*l.* would be placed at his disposal by the defendant on his son's account, and on communicating this to the defendant, Fenn received from him next day a letter (set out in the case) informing him (Fenn) that he the defendant held the sum for his son, and engaged it should be available; whereupon Fenn, without the defendant's knowledge, next day wrote a letter (set out in the case) to the committee, to say he had the 5,000*l.*

for the son's use, and which for his own interest he would take care to secure. The business having proved profitable, by an agreement of November 1858 (set out in the case), Fenn and Sharp the younger, with the defendant's assent, agreed that Fenn should write double or increase the lines on account of Sharp the younger in all practicable cases, and should receive an additional 50*l.* per quarter, as long as Sharp the younger required him to write double or increased lines, and that the agreement should be extended to the 31st of December 1864. Shortly afterwards, and in consequence of this arrangement, Sharp the younger wrote to the defendant the following letter—

“London, 1st Jan. 1859.

“To William Sharp, Esq.,

“In consideration of your guaranteeing me to the extent of 5,000*l.* in my business of an underwriter, until by such business I shall make or acquire from the profits thereof the full and clear sum of 5,000*l.*, after providing for all known losses, I hereby promise and agree to pay to you during your life, in case I shall so long live, but not otherwise, an annuity of 500*l.*, being equal to 10*l.* per cent. per annum, on the sum of 5,000*l.*, this annuity to be paid without any deduction, except on account of the income-tax, by equal half-yearly payments on the 1st of July and the 1st of January in each year, and the first half-yearly payment thereof to be made on the 1st of July next ensuing the date hereof, together with a proportionate part of the said annuity in respect of the time which may elapse between the last pending half-yearly payment of the said annuity and the determination of the same; and, further, that if at the end of three years from the date hereof it shall appear that one-fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500*l.*, then and in that case the said annuity shall thenceforth be increased to a yearly sum equal to one-fourth of such net average annual profits made by me in the said business during the said three years, the said increased annuity to be paid without deduction, except as aforesaid, by equal half-yearly payments on the days above named, and the first half-yearly payment

to be made on the 1st of July 1862, together with a proportionate part of the said increased annuity, in respect of the time which may elapse between the last pending half-yearly payment of the said annuity and the determination thereof; and, moreover, in no case are you to be considered as a partner with me in the said business of an underwriter.

“W. Sharp, jun.

“Witness, T. Donnison, 71, Cornhill,
London.”

On the 2nd of July 1859, by a further agreement (set out in the case), Sharp the younger and Fenn extended the time to the 31st of December 1870, subject to six months' notice by Sharp the younger after the 31st of December 1864. Under these agreements Fenn carried on the business for Sharp the younger, until and at the time of the making of the policy on which the action was brought. In August 1859 Sharp the younger married, and a marriage settlement was made by and executed between him, his intended wife, the defendant, and one Donnison. This settlement recited the several agreements between Fenn and Sharp the younger, the letters of the defendant to Fenn of the 21st of May 1857, and of Sharp the younger to the defendant of the 1st of January 1859, and the intended marriage, and that in contemplation thereof it had been agreed that Sharp the younger should assign to the defendant and Donnison all monies then in the hands and thereafter to come into the hands of Fenn, in respect of the business on behalf and for the benefit of Sharp the younger, and should also transfer to them certain railway stock, being of the nominal value of 1,500*l.*, and assign to them a policy of assurance on his life for 3,000*l.*, to be held by them upon the trusts and for the purposes and intents thereafter expressed; and that in pursuance of the said agreement Sharp the younger did previously to the execution of the deed transfer all the said railway stock into the names of the defendant and Donnison, to be held in trust for him till the marriage and afterwards on the said trusts. The settlement then witnessed that for the considerations therein mentioned Sharp the younger assigned to the defendant and Donnison all and singular the sums of money, earnings,

profits and emoluments which were then in the hands of Fenn, and all such as should come into Fenn's hands on account or in respect of the business, and which, according to the agreements of the 17th of March 1857, 1st of November 1858 and 2nd of July 1859 or otherwise, were, would or might become payable to Sharp the younger, together with full power and authority to and for the defendant and Donnison, and the survivor of them, and the executors and administrators of such survivor, in the name and as attorneys of Sharp the younger, to ask, demand, sue for, recover and receive and give effectual receipts and discharges for the monies, proceeds and premises expressed and intended to be assigned. And Sharp the younger thereby ordered and directed Fenn and other the agent, deputy or attorney for the time being of him in the business, to pay the said monies, profits and premises to the defendant and Donnison, their executors, administrators and assigns, to have and to hold the said monies, profits and other the premises thereinbefore mentioned, and thereby granted and assigned unto the said defendant and Donnison, their executors, administrators and assigns, in trust nevertheless for Sharp the younger till the marriage, and afterwards upon the following trusts: upon trust with and out of the monies and profits arising from the said business, in the first place to pay to the defendant by half-yearly payments, on the 1st of January and the 1st of July in every year (the first payment to be made on the 1st of January after the marriage), the annuity or yearly sum agreed to be paid by Sharp the younger to the defendant by the thereinbefore recited memorandum of the 1st of January 1859; and subject and without prejudice to the payment of the said annuity or yearly sum to the defendant, upon trust in the next place, out of the said monies, profits and premises, to pay to Sharp the younger by equal half-yearly payments, on the said days (the first payment to be on the 1st of January after the marriage) an annuity or yearly sum of 500*l.*, free from all deductions; and also upon trust to pay him when due the dividends of the railway shares, and also the resulting income of the surplus monies, profits and premises to be accumulated and invested as thereafter directed; and upon further

trust to accumulate and invest in manner thereafter expressed the residue or surplus after the payments aforesaid of the said monies, profits and premises thereinbefore assigned, until the same should amount to 3,500*l.* and should remain of that amount or value, without reduction on account of losses in the business, and for the term of two years, and from and after the time when the said accumulations amounted to and remained for two years of the amount or value of 3,500*l.* without such reduction, then upon trust with and out of the proceeds of the business to pay to Sharp the younger, by similar half-yearly payments, an annuity or yearly sum of 750*l.*, free from all deductions, in addition to the income of the said accumulations and of the dividends and annual proceeds of the railway shares, and to accumulate and invest in manner thereafter expressed the residue or surplus of the payments thereinbefore mentioned of the profits of the business until the same should amount to 8,500*l.*, and should remain of that amount or value without reduction on account of losses for two years, and from and after the time when the said accumulations should amount to and remain for two years of the amount of 8,500*l.* without such reduction, then upon trust to re-assign the said monies and profits arising from the business to Sharp the younger, his executors, administrators and assigns.

The deed, which was not further recited, but was appended to the case, also contained other provisions, to which it is not necessary to allude.

After the marriage, the said deed of settlement was acted on by the defendant and Donnison; considerable losses were made in the business, and the defendant being called on by Fenn, under the letter of the 21st of May 1857, made advances to a considerable amount to meet the losses sustained. Fenn carried on the business in the name of Sharp the younger till the 19th of February 1860; on that day Sharp the younger stopped payment, and on the 29th of March 1860 he was made bankrupt. Sharp the younger did not keep any banking account. Fenn received and paid all monies for him in respect of the business, and gave him cheques from time to time for such sums as he drew out of the busi-

ness. These cheques Sharp the younger paid into the defendant's banking account with Hankey & Co., on whom the defendant allowed him to draw cheques till November 1859, when the defendant put a stop to it. Fenn drew his salary out of the funds of the business. The first payment secured to the defendant became due on the 1st of January 1860, and was paid to him by Sharp the younger on the 7th of March 1860, but was afterwards claimed by the assignees under Sharp the younger's bankruptcy as an undue preference, and was repaid. Sharp the younger, between the dates of the settlement and the bankruptcy, drew out of the business various sums on account of the annuity of 500*l.* secured to him.

On the 22nd of December 1859 the plaintiffs effected a marine policy of insurance at Lloyd's in the usual way, which was subscribed by several underwriters, and, amongst others, by a clerk for Sharp the younger for 100*l.* before he stopped payment. A loss afterwards accrued, which rendered the underwriters liable to the full amount subscribed. The plaintiffs were wholly ignorant of the aforesaid arrangements between the defendant, his son, Fenn and the committee of Lloyd's, and also of the settlement, and in such ignorance proved under the bankruptcy of Sharp the younger.

The plaintiffs contended that the defendant, by the effect of the instruments and facts above-mentioned, became a partner or principal in the underwriting business carried on in his son's name, and as such a party to the said policy and liable to pay them the sum of 100*l.* underwritten in the son's name. The defendant contended the contrary. It was agreed that the Court might draw any reasonable inferences of fact.

The question for the opinion of the Court was, whether the defendant was or was not liable on the said policy as a partner with his son.

J. Brown (*Bovill* with him), for the plaintiffs. — The defendant was a secret partner. Under the agreement of January 1859 he was to have an annuity out of the business, and under certain circumstances this was to be increased by a sum equal to one-fourth of the profits. No doubt, a distinction has been taken between a payment in proportion to profits, and one of part of the profits, but we need not trouble ourselves

with this as the matter is carried much further by the settlement, which assigns all the "money earnings and profit," of the business to the trustees; so that, in fact, every sum paid for premiums went immediately to them. And, therefore, first, even if all the trusts were for the son, the defendant, as a bare trustee, would be liable—*Whiteman v. Watson* (1) and *Ex parte Garland* (2), and, secondly, he is clearly so, as there is a trust for his benefit payable by the settlement out of "profits"; and, indeed, a trust which, from being the first, may swallow up all the profits. An annuity payable out of business in this way makes the annuitant a partner—*Re Colbeck* (3) and *Ex parte Hamper* (4).

(He was then stopped.)

Lush (Mellish and Sir G. Honyman with him), for the defendant. — As to the agreement, the debt accrued before the end of three years, and, consequently, before there was any calculation on the profits; this is enough to dispose of the agreement, for it is admitted that the provision respecting the first three years does not constitute a partnership. But, further, even as to the increase in the annuity after three years, this is no part of the profits but merely a sum measured by those made in previous years. As to the settlement, the father is already a creditor for an annuity; the deed transfers, not the business, but such "money," &c. as may be in Fenn's hands; it becomes then necessary to provide for the annuity debt, and therefore the first trust is to pay the annuity.

[ERLE, C.J.—Suppose a grocer wants to marry, and assigns by his settlement his business and stock.]

That would be different, because the business would be assigned. Here this is not so, for Fenn's position under the agreement is not altered by the settlement, and the father has no control over him. The settlement still preserves the business as the son's. An assignment of profits to a person to pay himself his debt does not constitute a partnership—*Cox v. Hickman* (5), in which

Lord Cranworth points out that the test is not who is interested in the profits, but who carries on the business.

[BYLES, J.—The question is not merely whether in terms this is a mortgage of profits; but, further, even if so, can the Court see on the facts that, in truth, it is a scheme by which the father really carries on the business?]

There is no fraud in this case; the business begins in 1857, and is so profitable that in 1859 there is an extension of it and the guarantie given, and then afterwards the settlement secures the debt. If this be a partnership, a mortgage of a railway contract to a banker would constitute one. As to *Whiteman v. Watson* (1), that case is explained in *Labouchere v. Tupper* (6); the executors took the business, but we do not. And as to the annuity cases, the facts are not clear. The late case of *Kelshaw v. Jukes* (7) is also in our favour.

ERLE, C.J.—I am of opinion that our judgment should be for the plaintiffs. The question turns on the operation of the marriage settlement, and I think that it made the defendant a partner by giving him an interest in the business; indeed, if a losing business, the principal interest. The nature of the business must be considered; there was no place of business, no stock, nothing but a contract with Fenn as to underwriting, and a guarantie by the defendant for 5,000*l.* The defendant was also to have an annuity of 500*l.* for the guarantie. By the marriage settlement Sharp the younger assigns "all and singular the sums of money, earnings, profits and emoluments which were then in the hands of Fenn, and all such as should come into the hands of Fenn, on account of the underwriting business," to the defendant and Donnison. The result of this, together with the power of attorney, was to hand over the entirety of the business to them. With the first 500*l.* they were to pay the annuity, and if only 500*l.* accrued from the business, every halfpenny would have been paid to the father, and there would have been nothing to pay a creditor if a loss happened. The matter may have been

(1) 1 M. & S. 412.

(2) 10 Ves. 110.

(3) Buck's Bankr. Cas. 48.

(4) 17 Ves. 403.

(5) 8 H.L. Cas. 268; a.c. 9 Com. B. Rep. N.S. 847; 30 Law J. Rep. (N.S.) C.P. 125.

(6) 11 Moo. P.C.C. 198.

(7) 32 Law J. Rep. (N.S.) Q.B. 217; a.c. 3 B. & S. 847.

without fraud, and all may have originated in a mistaken notion of the defendant that the business would be profitable, and there would be plenty of residue (though if Sharp the younger were to employ Fenn to conduct the business, and were to hand over to me all the profits to pay myself an annuity of 500*l.*, I should think it would look very suspicious), still the entire proceeds went to the defendant till he was paid. He was a principal man. And it may also be observed that the payments were made into his banking account. I, however, rely on the nature of the deed. If this were the case of a manufacturing business, and the whole stock were handed over, it would be beyond argument. The defendant here takes the profits *eo nomine*, and before any one takes anything. This distinguishes the case from the annuity cases. *Cox v. Hickman* (5) is a rational decision, and, no doubt, sound. The present case is one against one of the trustees; and in *Cox v. Hickman* (5) it was admitted that the trustees would have been liable. The business here is also peculiar, and all the proceeds go to the trustees to pay the defendant first. There may have been no notion of overreaching, and the defendant may have thought that the business would be profitable; but the question is, whether the creditors may come on the defendant in respect of the profits, and I think they may.

BYLES, J.—I am of the same opinion. We need not decide the question whether a mortgagee of profits is necessarily a partner: we are to draw inferences of fact; and the question is, whether we see an intention to evade the laws of partnership, which a man has a right to do if he can. That this was present to the defendant's mind is clear. The clause in the agreement as to the fourth share of the profits is cautiously worded: "If at the end of three years from the date hereof it shall appear that one-fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500*l.*, then and in that case the said annuity shall thenceforth be increased to a yearly sum, equal to one-fourth of such net average profits." The person who drew this agreement was evidently desirous not to make a partnership, and this is clear from the concluding words: "in no case are you to be considered as a partner with me." Then, by the set-

tlement there is an express assignment of all "money earnings, profits and emoluments," and a provision for the re-assignment of "the said monies and profits." It seems to me that it was intended that the defendant indirectly should have the profits, and these profits were to go into his pocket, not for money advanced, but because of a guarantee. I, as a jury, should be disposed to say that, although in form it may not be so, yet, in substance, the father was to have the profits.

SMITH, J.—I am of the same opinion. The marriage settlement gives power to take the whole of the profits. It is not a mere mortgage; and I think it gave the defendant the rights of a partner; for instance, the right to have an account. I think if it had been provided that he should have half the profits, he would have been a partner; and he is not the less a partner because he is to have the whole. I think it was an arrangement, by which he was to have the profits, as profits *eo nomine*, and that he is liable as a partner.

Judgment for the plaintiffs.

1865. }
April 26. }

LYNE v. WYATT.

Debtor and Creditor—Composition Deed—Bankruptcy Act, 1861, s. 192.

A composition-deed, made between the defendant, a debtor, of the first part, certain trustees of the second part, and the creditors whose names were thereunto subscribed in the schedule of the third part, contained a clause, whereby the parties of the third part covenanted with the defendant that they would not sue, &c. him, and that if they did, the defendant should be discharged from all actions, suits, debts and demands of those by whom he was so sued, &c., and the deed be pleaded in bar:—Held, that if, on the true construction of the deed, this clause applied to non-assenting creditors, it was unreasonable, and that if it did not, there was no release by non-assenting creditors; and that in either view it was not pleadable in bar of an action by a non-assenting creditor.

In this case there were cross-demurrers to a plea and replication.

The declaration was on three bills of exchange and on accounts stated.

The third plea averred that after the accruing of the cause of action, and after the 11th of October 1861 and the commencement of the suit, and before the plaintiff declared, the defendant, being a debtor unable to meet his engagements, within the meaning of the Bankruptcy Act, 1861, a certain deed (set out in the plea) was, on the 29th of February 1864, made and entered into between the defendant of the first part, certain trustees of the second part, and certain persons whose names and seals were thereunto subscribed in the schedule thereunder written, being creditors of the defendant, of the third part. The deed recited that the defendant was indebted to his creditors in divers sums of money, and particularly to the said several parties thereto of the third part, in the several sums of money set opposite their names, and conveyed all the defendant's property to the trustees, upon trust to realize the same, and, after payment of expenses, to divide the residue among all the creditors in a rateable proportion, without any preference; and it provided that the trustees might require any person claiming to be a creditor to prove his debt, by statutory declaration or otherwise, in such manner as is required by the law of bankruptcy; and that any creditor having, at the time of executing or assenting, for his demand, or any part thereof, any specific lien, security or suretyship, might assent and execute without prejudice thereto. The several parties thereto of the third part then covenanted with the defendant that they, the parties thereto of the third part, would not sue, arrest, attach, take in execution, or otherwise impede or incumber the defendant in any manner on account of their debts; and if they should do so, the defendant should be clearly acquitted, exonerated and for ever discharged from all actions, suits, debts and demands of the creditors by whom he should be so sued, arrested, attached, taken in execution, or otherwise impeded or incumbered, and the deed might be pleaded in bar, as effectually as a release under the hands and seals of such creditors might. It further provided that if the defendant concealed his property, or neglected to deliver a declaration or statement thereof, the said covenant not to sue should cease, and the creditors might sue for the full amount of their

debts, or such part as they had not received. The other provisions of the deed were immaterial for the present case. The plea then averred that everything had been done to make the deed as effectual on the plaintiff as if he had executed it; that it was duly registered, notice duly given, and a certificate duly obtained; and that the plaintiff was a creditor for his claim, within the meaning of the Bankruptcy Act.

The plaintiff demurred to this plea, and also replied that the amounts of the debts due to the creditors, parties of the third part, were by the deed admitted by being in the deed set opposite their names, without being proved by statutory declaration or otherwise, as required by the Bankruptcy Law, while the amount of the plaintiff's debt was not so admitted, and he therefore was not on an equal footing with the other creditors.

To this replication there was a demurrer.

J. Brown, for the plaintiff.—The covenant not to sue is limited to those executing the deed, the parties of the third part. *Legg v. Cheesebrough* (1) is in point; in that case *Macnaught v. Russell* (2) is explained in the judgment. The point has been decided on this very deed in the Bankruptcy Courts—*Ex parte Smith, re Wyatt* (3). If the covenant extended to dissenting creditors, it would be unreasonable; for a debtor has no right to subject his creditor to the loss of his debt on his suing—*Dell v. King* (4).

[*ERLE, C.J.*—Suppose the clause struck out, and an action by an assenting creditor, would the deed be pleadable?]

No—*Eyre v. Archer* (5) and *The Ipswich Park Iron Ore Company* (6). Either the covenant applies only to signing creditors, or it is unreasonable. In *Hidson v. Barclay* (7), in the Exchequer Chamber, it is said in the judgment, "We are not to be understood as in any way overruling the decision in *Dell v. King* (4). . . . We decide

(1) 5 Com. B. Rep. N.S. 741; a.c. 28 Law J. Rep. (N.S.) C.P. 209.

(2) 1 Hurl. & N. 611; a.c. 26 Law J. Rep. (N.S.) Exch. 192.

(3) 2 W. Rep. 692.

(4) 2 H. & C. 84; a.c. 35 Law J. Rep. (N.S.) Exch. 47.

(5) 16 Com. B. Rep. N.S. 638; a.c. 33 Law J. Rep. (N.S.) C.P. 296.

(6) 2 H. & C. 829; a.c. 33 Law J. Rep. (N.S.) Exch. 193.

(7) 3 H. & C. 361.

the present point in favour of the defendant, because we construe the eighth covenant in this deed as amounting to a simple covenant not to sue, except so far as is necessary to prevent the discharge of third parties, and no more." Secondly, there is an inequality, for whilst the debts of the scheduled creditors are admitted, the other creditors are called on to prove theirs by statutory declaration.

[The COURT, however, intimating that they did not think that the schedule created an estoppel, this point was dropped.]

Sykes, for the defendant.—*Clapham v. Atkinson* (8) and many other cases shew that such a deed is a defence against non-executing creditors, if it is not unreasonable. The case of *Legg v. Cheesebrough* (1) has been remarked on in *Wells v. Hacon* (9), where it was pointed out that the word "actually" was there used. The question is, what is the intention of the deed? and the intention is to prevent actions, not to forfeit debts. In *Macnought v. Russell* (2) the covenant was more extensive than it is here; all benefit was to be lost under the deed. So also in *Gardner v. Chapman* (10). In *Dell v. King* (4) the debt was to be lost; here it may go to the trustees.

[ERLE, C.J.—If the creditors sue, the defendant is to be exonerated from all "debts and demands."]

But the clause as to the covenant being no longer binding if the debtor conceals his property, shews the debt is not gone, and so does the keeping up the remedies against sureties. *Com. Dig.*, tit. 'Release' (E.), the cases collected in 2 *Smith's Lead. Cas.* (5th edit.), 451, and the recent case of *Lyall v. Edwards* (11), shew the release is restrained by the intention. The clause is, in fact, a covenant not to sue. He also referred to *Dingwell v. Edwards* (12), *Garrod v. Simpson* (13), *Walker v. Nevill* (14) and *Spitzer v. Chaffers* (15).

J. Brown replied.

(8) 4 B. & S. 730; s. c. *ante*, Q.B. 49.

(9) 33 Law J. Rep. (N.S.) Q.B. 304.

(10) 7 Com. B. Rep. N.S. 317; s. c. 29 Law J. Rep. (N.S.) C.P. 281.

(11) 6 Hurl. & N. 337; s. c. 30 Law J. Rep. (N.S.) Exch. 198.

(12) 4 B. & S. 738; s. c. 33 Law J. Rep. (N.S.) Q.B. 161.

(13) 3 H. & C. 395; s. c. *ante*, Exch. 70.

(14) *Ibid.* 403; s. c. *ante*, Exch. 73.

(15) 14 Com. B. Rep. N.S. 686; s. c. 33 Law J. Rep. (N.S.) C.P. 7.

ERLE, C.J.—I am of opinion that our judgment must be for the plaintiff. The question is, whether this is a valid plea, under the 192nd section of the Bankruptcy Act, 1861. It is clear that a deed may be valid under the act without a release, and give protection; but it cannot be pleaded in bar as a release—*Eyre v. Archer* (5). There is a clause of release in this case; and if it had been only a covenant not to sue, the deed would have been a valid bar, as appears from the judgments of Blackburn, J. in *Hideon v. Barclay* (7), and of this Court in *Spitzer v. Chaffers* (15). If, however, the clause of release goes further, and entails a forfeiture of debts if actions be brought, that clause is void against non-executing creditors. And I am of opinion that this deed is open to this objection. The words are, "if they should sue, &c. the defendant on account of their debts, the defendant should be clearly acquitted, exonerated and for ever discharged from all actions, suits, debts and demands"; so that if a creditor bound by the deed sued, he would forfeit his debt. I am desirous of construing the deed so as not to make it void. The case of *Legg v. Cheesebrough* (1) shews that a deed may be valid under section 192. and give protection, and contain a clause of release and forfeiture, provided the forfeiture be limited to the signing creditors; and in that case the Court held that the clause of forfeiture was so limited. The present deed is drawn with a marked distinction between executing and non-executing creditors; the parties are "the persons whose names and seals are hereunto subscribed in the schedule hereunder written," and the release is, that "they the said parties thereto of the third part would not sue," &c.; and if they should do so, the defendant should be acquitted from the actions of "all creditors by whom he should be so sued." The clause is not so clear as in *Legg v. Cheesebrough* (1). But, at all events, the defendant is in this dilemma: if the clause applies to non-executing creditors, it is unreasonable; if it does not, the present defendant has not executed any release, and therefore there is no defence to plead.

BYLES, J.—I am of the same opinion. The plea sets out a deed, containing the following clause of release—[His Lordship read it].—Such a clause is unreasonable as

to a non-executing creditor; for directly his writ issued his debt would be gone, even without notice of the deed. *Dell v. King* (4) shews such a clause is unreasonable; the only difference between that case and the present is, that in *Dell v. King* (4) the clause in terms applied to all creditors, here only to the parties to the deed, and without the act would be no bar. But then the act says, "the deed shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties thereto"; and the case of *Dell v. King* (4) was distinctly upheld in the Exchequer Chamber as to the present point.

SMITH, J.—I am of the same opinion. If the clause be confined to those executing the deed, then, according to the case of *Legg v. Cheesebrough* (1), it has no operation on the non-assenting creditors. I wish to give no opinion on the construction of the deed. It is not necessary; for the defendant must contend that it binds non-executing creditors; and, if that be so, I think that the clause is unreasonable, and cannot operate on non-executing creditors.

Judgment for the plaintiff.

1865. { *BILBEE v. THE LONDON, BRIGHTON*
May 9. { *AND SOUTH-COAST RAILWAY*
 { *COMPANY.*

Railway—Negligence—Level Crossing.

The defendants' railway crossed a carriage road on a level; there were locked carriage gates and swing gates for foot passengers; the trains were frequent, the crossing was on a curve, and a bridge near to it over the line obstructed the view in that direction. Two trains passed about the same time, and whilst the plaintiff's attention was directed to one the other knocked him down:—Held, that, although there might be no statutory provisions for the safety of such a foot passenger, yet under the circumstances there was evidence of negligence to go to the jury, and the Judge was not bound to nonsuit.

The declaration in this action contained two counts, the first alleging that the defendants' railroad crossed a highway for carts and carriages, yet they did not employ a guard to open and shut the gates next the highway, so that persons passing on the highway should not be exposed to

danger, and did not take proper care of the crossing for protecting persons using it, whereby the plaintiff whilst lawfully using the crossing was knocked down by an engine and hurt; the second alleged that the defendants negligently drove an engine so as to knock him down.

There was a plea of not guilty.

It appeared at the trial that the number of trains which passed the crossing was very considerable; that the crossing was on a curve, and that about 150 yards from it there was a bridge over the line which obstructed the view of trains from that direction till they were partly under it. The gates at the crossing consisted of carriage gates, which were locked, and swing gates for foot passengers. The plaintiff, who was deaf of one ear, had partly got on the line, when his attention was attracted by an engine which ran by on the up-line, and whilst his attention was thus diverted, a down train, which passed about the same time, knocked him down.

At the trial, before Erle, C.J., the jury found a verdict for the plaintiff, and the learned Judge (who thought there was no liability on the defendants), giving leave to the defendants to move to set aside such verdict and enter the verdict for themselves, if the Court should be of opinion that there was no evidence of negligence.

A rule nisi having been granted pursuant to such leave,

Parry, Serj. and Joyce now shewed cause.—Independently of any obligation by statute, there is a common law liability, and there should be proper care taken and proper notice of the danger given. And according to *Scott v. the London Dock Company* (1), it lies on the other side to shew that there has been no negligence. As to the statutory obligation, it is true that there is no provision as to footpaths in the 8 & 9 Vict. c. 20, and that section 47. only refers to carriage roads, but section 46. shews that the road generally must be over or under the railway, and 2 & 3 Vict. c. 45. s. 1. and 5 & 6 Vict. c. 55. s. 9. are still in force, and though they also relate to carriage roads, yet the one provides that steps shall be taken that the "*persons, carts or carriages*" shall not be exposed to danger, and the other provides for interference of the Board

(1) *Ante*, Exch. 17.

of Trade "for the public safety." It must further be borne in mind that a carriage road includes a footway. This was a peculiarly dangerous place; trains were perpetually passing, there was a curve, and there was a bridge obstructing the view. Some notice, or some man, should have been placed there, and a swing gate was improper.

Bovill and *Hannem*, in support of the rule.—There is no power in or duty on the railway company to obstruct a footpath. The 8 & 9 Vict. c. 20. now regulates level crossings, and that only refers to the safety of carriages and cattle, and even if the other statutes are in force, the word "person" in 2 & 3 Vict. c. 45. means those attending to the carriages or cattle, and the "public safety" in 5 & 6 Vict. c. 55. refers to the same object. Again, the distinct provision in 8 & 9 Vict. c. 20. s. 48. as to level crossings near stations is in favour of the defendants. What negligence there has been it is difficult to see. The only things suggested that we should have done are that we should have had a notice or a man there, or a different gate. As to a notice, there could be none except that trains were perpetually passing, and that it was dangerous to cross, which was no more than would strike any one, and certainly a person living near the spot; as to putting a man there, the consequence of a decision that we should have done so would be that we must put one wherever a footpath crosses the line; and as to the gate, it is difficult to see how a swing gate is improper.

ERLE, C.J.—I am of opinion that the rule should be discharged. I am fully impressed with the necessity of not imposing duties on railway companies beyond what the statutes intended. I do not intend to lay down a rule as to footpaths elsewhere, or to interfere with the statute law. The ground of my decision is the great degree of risk in this place; there were many trains, it was on a curve, and near a bridge. The noises of the different trains would interfere with each other, and the bridge would obstruct the sight, and I am therefore unable to say that the Judge was bound to nonsuit.

BYLES, J., KEATING, J. and SMITH, J. concurred.

1865.

May 6.

} LANGLEY v. HEADLAND.

Attorney—Compromise of Action.

The plaintiff recovered judgment and took the defendant on a ca. sa.; W, attorney of the plaintiff's father, agreed with the defendant, that on delivery of certain documents he would discharge the defendant; the documents were delivered, and W. gave defendant an order of discharge, directed by the plaintiff to his attorney; the sheriff refused to discharge, as the order was not directed to him:—Held, that the defendant was entitled to his discharge on condition that no actions were brought against the sheriff or any one else, and that the plaintiff's attorney's remedies on the judgment should not be prejudiced.

This was a rule calling on the plaintiff (upon notice of the rule being given to him and his attorney) to shew cause why the defendant should not be discharged out of custody.

The plaintiff, a minor, having obtained judgment, the defendant was taken in execution at his suit. The affairs of the plaintiff requiring arrangement, his father interfered through a Mr. Wren, his own solicitor, and negotiations took place between Wren and the defendant and his attorney, which ended in an agreement that if the defendant would hand to Wren a certain duplicate and a certain bill of exchange, Wren would discharge the defendant out of custody. The duplicate and bill of exchange were handed to Wren, and Wren gave to the defendant's attorney the following document signed by the plaintiff:

"In the Common Pleas.

H. W. Langley, plaintiff.

H. Headland, defendant.

I hereby consent that the above defendant be discharged from the custody of the sheriffs of London, and request you to take the necessary steps to effect his discharge.

Yours, &c. H. W. Langley,
Witness The above-named plaintiff.
W. W. Wren, attorney, &c.
To Mr. Wallinger,
Plaintiff's attorney."

The defendant's attorney took this document to the plaintiff's attorney, but he refused to act on it as he should lose his costs, and detained the document. An application was then made to Keating, J. for an order to discharge the defendant, who referred the matter to the Court, which made no order on condition that the document was delivered up to the defendant. This was done, and the document was then tendered to the sheriff, but he refused to discharge the defendant, as the document was not directed to the sheriff but to the plaintiff's attorney. Application was then made to Wren to give an order of discharge directed to the sheriff, but he refused to interfere further in the matter, being evidently unwilling to interfere in this question of costs, which had not occurred to him. Application was then made to the Court to grant the present rule, which they did, on condition that notice should be given to the plaintiff's attorney as well as the plaintiff.

No one appeared on behalf of the plaintiff.

Bridge appeared to shew cause on behalf of the plaintiff's attorney, and was decided to have a *locus standi*.—The same attorney is still attorney on the record, and has a lien on the judgment, and the Court will do nothing to deprive him of his rights. The case of *Barker v. St. Quintin* (1) was the case of an action against the sheriff and not of the interference of the Court. Here the Court is asked to interfere in exercise of its equitable jurisdiction to enforce an agreement which will damnify the attorney, and they will not do that in face of the doctrine that the Court will do all it equitably can to get the attorney his costs—*Ex parte Games* (2). The only case in which the Court has so interfered was when there was a new attorney and satisfaction entered up on the record—*Marr v. Smith* (3). He also cited 1 *Chitty's Practice*, 11th edit., 137.

Mellor, in support of the rule, cited 1 *Chitty's Practice*, 11th edit., 137, the judgment of Bayley, J., in *Marr v. Smith* (3) and *Jordan v. Hunt* (4).

BYLES, J.—This is a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of custody, and the plaintiff does not appear, but the Court ordered that his attorney should have notice lest injustice should be done, and he has appeared. On this rule we must assume that the plaintiff consents, and indeed I cannot see how he can do otherwise. He signed a discharge directed to his own attorney, and the full consideration has been paid by the defendant. The sheriff sees that the authority is not directed to him, and refuses to release the defendant without the authority of the plaintiff's attorney. This the attorney refuses to give, and the Court on a previous occasion said that they would not call upon him to do so, but ordered that the document should be given to the defendant to be shewn to the sheriff, who says that he will act if he has the authority of the Court. It is true that the lien of the plaintiff's attorney did not occur to Wren, but this ought not to prejudice the defendant, and he is entitled to be discharged. The simple question is, whether it is an answer to this application that the attorney's lien remains, and the cases shew that this is no answer. The rule will be made absolute on the terms that no action be brought against the sheriff or any one else, and further that it shall be without prejudice to the attorney's remedy on the judgment.

KEATING, J.—I am of the same opinion. For some time I doubted how far the equitable jurisdiction of the Court could be invoked on these facts. But the Court on a previous occasion ordered that the plaintiff's attorney should restore the document to the defendant, and thereby the Court at least sanctioned his having possession of the document, which he used with the object of getting out of custody. Therefore, as the plaintiff consented to the discharge, and has not appeared to-day, we must conclude that this agreement, though originally obtained by Wren, has been ratified by him, and we must give effect to it; but on the conditions mentioned by my Brother Byles.

Rule absolute, on above conditions.

(1) 12 Mea. & W. 441; s. c. 13 Law J. Rep. (N. S.) Exch. 144.

(2) 33 Law J. Rep. (N. S.) Exch. 317.

(3) 4 B. & Ald. 466.

(4) 3 Dowl. P. C. 666.

1865. }
May 2. } RAWLINGS v. MORGAN.

Landlord and Tenant—Covenant to Repair—Damages.

The defendant was lessee of a house, and the plaintiff one of the reversioners and lessors. Before the end of the lease the lessors agreed verbally with M. that he should have a lease, to commence at the end of that of the defendant, the house to be pulled down by M. and new premises built by him. The defendant left the house out of repair at the end of the lease. M. afterwards entered, and some time after that the verbal agreement was put into writing, and the house pulled down. The plaintiff brought an action against the defendant on a covenant in his lease for not keeping and yielding up the house in good repair:—Held, that the jury were not compelled to give only nominal damages.

This was an action brought to recover damages for breach of covenant to repair and yield up in repair certain premises, and also to yield up certain fixtures. The defendant paid money into court. The real question between the parties was, whether the plaintiff was entitled to more than nominal damages in respect of the non-repair of the premises; and at the trial the following were agreed to be the facts of the case: The defendant was tenant of a house under a lease for twenty-one years expiring on the 25th of December 1863, and containing the covenants on which the action was brought; and the plaintiff was owner of one-fifth of the reversion. For a considerable period before the expiration of the lease the premises were out of repair, and so remained up to its termination. In June 1863 the defendant made an offer for a new lease, but the offer was not accepted. Before the expiration of the lease the Messrs. Myers became the owners of a fifth of the reversion, and also before such expiration it was agreed between them and the reversioners (of whom the plaintiff was one) that the premises should be pulled down and a lease of the ground granted, at a greatly advanced rent from the 25th of December 1863, to the Messrs. Myers, who were to lay out a large sum in

new buildings. The defendant left at the termination of his lease, and the Messrs. Myers entered on the 26th of December 1863, and in January 1864 commenced pulling down the old house, which was demolished by June. The agreement between Messrs. Myers and the reversioners was reduced into writing in March 1864. The condition of the premises at the termination of the lease formed no ingredient in the Messrs. Myers' calculations in making their bargain. The sum paid into court was sufficient to cover the plaintiff's share of the fixtures and nominal damages for not repairing the premises and yielding them up in repair, and a certain sum was fixed on as the additional damage if the plaintiff was entitled to more than nominal damages for such non-repair and not yielding up in repair.

The learned Judge directed a verdict for the plaintiff for the agreed sum, with leave to the defendant to move to set it aside and enter a verdict for the defendant if on the above agreed facts the plaintiff was only entitled to nominal damages.

A rule nisi was obtained pursuant to such leave.

O'Malley and Holl now shewed cause.—The legal title was in the plaintiff at the end of the tenancy. Even if there had been a written agreement at law, there would only have been an action for the breach; but here it was only oral, and did not bind even in equity. Even if nominal damages were only recoverable during the tenancy, the right of action for substantial damages accrued at the end of the tenancy, and cannot be affected by what took place subsequently. It does not lie in the defendant's mouth to say that his breach of covenant did not cause damage—*Clow v. Brogden* (1), *Smith v. Peat* (2), *Nickson v. Denham* (3), *Doe v. Rowlands* (4), *Turner v. Lamb* (5), *Dalby v. the India and London Life Assurance Company* (6).

(1) 2 Man. & G. 39; s.c. 2 Sc. N.B. 302.

(2) 23 Law J. Rep. (N.S.) Exch. 84; s.c. 9 Exch. Rep. 161.

(3) 1 Irish Law Reports, 100.

(4) 9 Car. & P. 734.

(5) 14 Mees. & W. 412.

(6) 15 Com. B. Rep. 365; s.c. 24 Law J. Rep. (N.S.) C.P. 2.

Huddleston and Beasley, in support of the rule.—In all breaches of contract the damages ought to be in proportion to the benefit which would have accrued from its performance—*Marzetti v. Williams* (7). Here there was an offer in June by the defendant to repair and to give a higher rent. The offer was not accepted; but during the tenancy an agreement was made with the Messrs. Myers which involved the necessity of pulling down the house. The plaintiff, therefore, never intended that the house should be repaired; its non-repair became immaterial, and he sustained no damage. The decisions in *Davis v. Underwood* (8) and in *Clow v. Brogden* (1) were based on the liability to the superior landlord. They also cited *Marriott v. Cotton* (9).

ERLE, C.J.—I am of opinion that this rule should be discharged. The action is brought against the defendant as tenant for breach of a covenant to keep and leave the premises in repair. In general when an agreement is broken the plaintiff is entitled to recover such a sum of money as would enable him to have what he contracted for. Why in this case should he not recover that sum, or at least more than nominal damages? The defendant says that there was an advantageous agreement with the Messrs. Myers. I think there is nothing in that. The Myers's agree to pull down the premises; but the agreement was only oral, and it was a proposal not binding on either party. Such a proposal is not a matter I should put to the jury as worth much consideration, though I should not exclude it. The question is, whether in law the Judge would be bound to direct the jury to find only nominal damages, and I think that he would clearly not be so bound. We are not called on to say what the amount should be; that is agreed on. If before the cause of action accrued, and during the term, there had been a binding agreement to assign, that would have been more material; but I do not say that even then the jury

would be compelled to give only nominal damages.

BYLES, J.—I am of the same opinion. There being only a parol agreement by the plaintiff during the term, there was no legal obligation on either party in equity or law; and at the end of the tenancy the plaintiff was entitled to sue for non-repair. It is true that he afterwards parted with the reversion; yet he may have been damaged. He may have got less from the Myers's, or had a smaller market from the state of the premises. It seems to me that even if there had been a binding agreement these observations would apply. I think in such cases the proper direction is, not "You can only give nominal damages," but "You are not bound to give more than nominal damages."

KEATING, J.—I am of the same opinion. The term ended, and the agreement with the Myers's was not in an enforceable form till after. If an action had been brought during the intervening period the plaintiff would clearly have been entitled to recover. Subsequent circumstances cannot deprive the plaintiff of that right. Even if there had been a binding agreement before the end of the term, I should doubt whether there would be any difference; but it is not necessary to decide this.

SMITH, J.—I am of the same opinion. The premises being out of repair at the end of the term, a right to sue accrued; but it is said that there was an agreement with the Myers's which shews that there was no damage. This agreement, however, was not binding; and even if it had been, I should doubt if it could be taken into consideration, though it is not necessary to decide this. How an agreement between the plaintiff and the Myers's can be an estoppel I cannot see; it does not seem to be one either in law or good sense: but I should be sorry to say that a binding agreement would not affect the question of damages without further consideration.

Rule discharged.

(7) 1 B. & Ad. 415.

(8) 2 Hurl. & N. 570; s. c. 27 Law J. Rep. (N.S.) Exch. 113.

(9) 2 Car. & K. 553.

1865. }
May 9. } HARTLEY AND OTHERS v. MARE.

Bankruptcy Act, 1861 — Deed of Inspectorship — Fieri Facias.

After action commenced and before judgment a deed of inspectorship, executed by the defendant, was duly filed and registered, and a certificate thereof obtained; judgment was signed and the defendant's goods taken under a fi. fa. On an interpleader summons the sheriff was ordered to withdraw on the payment into court by the inspectors of a certain sum of money. The plaintiffs obtained a rule to shew cause why part of this money should not be paid to them in satisfaction of their judgment, on the ground that the deed ought to have been pleaded:— Held, that without leave of the Court of Bankruptcy they could not make their execution available, and that the inspectors were entitled to the money.

Whitmore v. Wakerley (1) distinguished.

This was a rule calling on the defendant to shew cause why the sum of 159*l.* 3*s.* 11*d.* and the costs of the application should not be paid out of court to the plaintiffs out of the sum of 165*l.* paid into court in the cause by the sheriff of Kent under a Judge's order.

The action was brought by the plaintiffs as drawers against the defendant as acceptor of a bill of exchange. A writ was issued on the 29th of December 1864 under the Bills of Exchange Act. On the 2nd of February 1865 a Judge's order was obtained giving the plaintiffs liberty to proceed, three days after service of a copy of the order at the defendant's office, as if personal service of the writ had been effected. The copy was so served on the 3rd of February; judgment, for want of appearance, was signed on the 7th of February; costs were taxed on the 8th of February, and a writ of *fi. fa.* lodged with the sheriff on the 9th of February. On the 3rd of January 1865 the defendant had executed a deed of inspectorship, which was registered on the 2nd of February, the day on which the Judge's order giving leave to proceed was obtained. The sheriff having levied,

notice of this deed was given to him, and, on the 11th of February, he served a summons, under the Interpleader Act, on the plaintiffs and the inspectors. The summons came on for hearing, before Byles, J. on the 14th of February, who decided on referring the whole matter to the Court, and made an order directing the sheriff to withdraw, referring the validity of the deed to the Court, and ordering that unless 165*l.* was paid into court, the inspectors were to give security.

After various proceedings (which are immaterial) such money was paid into court, and the present rule obtained.

It is unnecessary to set out the deed, which was admitted to be a good deed of inspectorship, binding on all the creditors; it need only be stated that it contained no assignment of the debtor's property, provided for his carrying on his business under inspection, and contained a clause making the deed pleadable in bar.

J. Brown and Lanyon shewed cause.— The inspectors are entitled to this money. The argument on the other side is that we could have pleaded this deed, and that as we have not done so, we cannot now avail ourselves of it. But, first, the twelve days for appearing to defend under 18 & 19 Vict. c. 67. s. 2. elapsed before the registry of the deed, and it therefore could not be pleaded. But, secondly, whether that be so or not, the 24 & 25 Vict. c. 134. ss. 197, 198, are conclusive in our favour. By section 198, after notice of the filing and registration of this deed, no execution against the debtor's property could be available without leave of the Court, which, according to *Skelton v. Symonds* (2), means the Court of Bankruptcy; and there has been no leave of any Court in this case. This protection is for the benefit of the creditors, as appears from section 197, and therefore no laches of the debtor can be of any effect here; he cannot prejudice their rights by neglecting to plead a deed which may or may not be good. *Whitmore v. Wakerley* (1) will be relied on by the other side, but in so far as it may bear on the present case, it is contrary to *Skelton v. Symonds* (2) in this Court. Under the old Bankrupt Act it was held that if an execution was levied on a trader's

(1) *Ante*, Exch. 83.

(2) *Ante*, C.P. 151.

goods after he had obtained a protection order, the assignees, and not the execution creditor, were entitled to the proceeds—*Backhouse (or Bellhouse) v. Mellor* (3) and *Williams v. Dray* (4).

Lush and R. E. Turner, in support of the rule.—This deed could have been pleaded. The deed provides that in any action by a creditor the deed “shall operate . . . as an order of discharge, . . . and may be pleaded . . . in bar.” This would have constituted a good plea in bar—*Walker v. Nevill* (5), and should therefore have been pleaded, and as it has not been pleaded, cannot now be made available. An *audita querela*, which is an application to the equitable jurisdiction of the Court, “does not lie where there is any other remedy at law, either by plea or otherwise, and therefore, where the party had time to take advantage of the matter which he has in discharge of himself and neglected it, he cannot afterwards be relieved by *audita querela*”—*Turner v. Davies* (6). *Whitmore v. Wakerley* (1) is in point, and *Skelton v. Symonds* (2) is not contradictory to it; and as to *Backhouse v. Mellor* (3), that was an application to set aside process: here the process stands, and as there is no assignment in the deed, the goods are still the defendant's. Section 198. is limited to those cases where, but for the interference of the Court of Bankruptcy, the deed could not be made available, and there is no discretion in this Court.

ERLE, C.J.—I am of opinion that this rule should be discharged. The action is by one of several creditors against a debtor. After action a deed of inspectorship was executed, which is valid under the 192nd section of the Bankruptcy Act, 1861. After the execution of the deed, its registration and the granting of a certificate of its registration, a *fi. fa.* issued and the property of the debtor was taken. The inspectors interfered, and an interpleader summons was applied for. The money was paid into court, and we are to say whether the in-

spectors are entitled to it. The deed of inspectorship gives Mare the privileges of bankruptcy, and section 198. of the Bankruptcy Act, 1861, says, that after notice of the filing and registration of such deed no execution, sequestration or other process against the debtor's property shall be available to any creditor or claimant without leave of the Court. There has been no leave of the Court in this case, but the plaintiff here seeks to make the execution available. We are to carry out the intention of the legislature. It is said that this section applies only to deeds executed after it is too late to plead them; but it is a universal enactment. I am of opinion that the money must be handed over to the inspectors. We were much pressed in argument with the case of *Whitmore v. Wakerley* (1). The application there was to set aside the execution, and I cannot exactly see from the report whether or not the argument was, that the defendant was to lose the benefit of the release; our judgment does not conflict with that case, if the judgment of the Court of Exchequer meant that the defendant was trying to get the benefit of a release which he might have pleaded. Again, it may well not be right to set aside the execution; the plaintiff may go through all the regular process up to judgment and execution; but directly he acts and attempts to levy by a *fi. fa.* section 198. comes into operation, and the Court has power to say you must not make it available. The argument as to laches does not apply, for the sections of the Bankruptcy Act are in the interest of the body of creditors.

BYLES, J.—I am of the same opinion. I rely on section 198, which says that if three requisites be fulfilled, viz., the execution of the deed, its registration and the proper statutory notice, the execution is not to be available. All these requisites are fulfilled in this case. There is no conflict with the decision of the Court of Exchequer. The writ of execution is in force till execution is attempted to be levied. It may be prejudicial to set it aside, and we are not here asked to do so, but merely to enforce section 198. so far as is necessary.

KEATING, J.—I am of the same opinion. If we decided otherwise, we should be doing what section 198. says we shall not

(3) 28 Law J. Rep. (N.S.) Exch. 141; s.c. 4 Hurl. & N. 116.

(4) 29 Law J. Rep. (N.S.) Q.B. 86.

(5) *Ante*, Exch. 73.

(6) 2 Wms. Saund. n. 148 a.

do, i. e. give over to one creditor money which belongs to all.

SMITH, J.—I am also of the same opinion. Section 198. is general in its terms, but if it were read as is contended on behalf of the plaintiff, it would then apply only where the deed is not pleadable. Sections 197. and 198, when read together, shew that this was not the intention of the legislature. If we made this rule absolute, we should, as my Brother Keating says, be making the proceeds available to one creditor.

Rule discharged, the money to be paid to the inspectors.

1865. } PRISTWICK (OR PRESTWICH)
May 9. } AND ANOTHER v. POLEY.

Attorney and Client—Authority of Attorney to compromise Action.

An action was brought to recover the price of a piano. The plaintiff's attorney agreed to settle the action by the return of the piano and payment of costs.—Held, that, in the absence of a distinct prohibition from his client, he had authority to do so; and the defendant was entitled to have all further proceedings stayed.

This was a rule calling on the plaintiffs to shew cause why all further proceedings in the cause should not be stayed, the action having been settled.

The action was brought to recover the price of a piano sold and delivered by the plaintiffs to the defendant. After action brought, the defendant's attorney called at the office of the plaintiffs' attorney with a view to the settlement of the action, and saw the plaintiffs' attorney and his managing clerk.

The accounts given of this interview differed. According to the attorney for the plaintiffs and his clerk, the defendant's attorney having proposed a settlement by the return of the piano and the payment of costs, the attorney for the plaintiffs said it would be better, under the circumstances, to take back the piano, and partly agreed as to the amount of the costs, but objected to a Judge's order and letter containing the terms, as, although he should say the terms would be accepted, he must first advise with

his clients. According to the defendant's attorney, the plaintiffs' attorney would not agree to a Judge's order, but himself proposed that there should be a letter containing the terms (viz. the return of the piano and payment of costs), arranged that the defendant's attorney should call next day, and told his clerk to then carry out the arrangement by letter, and never said anything about advising with his clients. The next day the defendant's attorney again called, and saw the clerk, and they signed an agreement or letter, which stated that the matter had been settled, upon the terms that the piano was to be given up in full discharge of the debt, and that the costs should be paid by the instalments therein mentioned. The defendant's attorney proceeded to fulfil this arrangement; but the plaintiffs' attorney refused to receive either the piano or the costs, on the ground that his clients would not agree to the settlement.

An application was made to Keating, J. at chambers to stop the action. The learned Judge thought the agreement binding; but in consequence of the case of *Swinfen v. Swinfen* (1), declined to make an order, without prejudice, however, to an application to the Court.

Prentice shewed cause.—The case of *Swinfen v. Swinfen* (1), in Chancery, shews that an attorney has no authority to make such a compromise; and the observations of Pollock, C.B., in delivering judgment in *Swinfen v. Lord Chelmsford* (2), with respect to counsel, are in point. He says, that although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, he has not power over matters collateral to it; and that however desirable it might be, in order to stop litigation, to compromise an action for nuisance by a sale of the property, he would have no authority to agree that it should be done. The compromise here was not a matter incident to the suit; instead of being a step to recover the money, it was an annulling of the sale on which the action was brought. (He also argued that the compromise, being by the attorney's

(1) 27 Law J. Rep. (N.S.) Chanc. 35, 491; a. c. 2 De Gex & J. 381.

(2) 5 Hurl. & N. 890; a. c. 29 Law J. Rep. (N.S.) Exch. 382.

clerk, was not binding; and cited *Bingham v. Allport* (3) and *Pennell v. Stephens* (4); but, on reference to the affidavits, the point was dropped.)

Needham, in support of the rule.—There is a distinction as to the effect of the agreement between party and party, and between attorney and client. It may bind between party and party, and yet the client may have an action against his attorney. *Swinfen v. Swinfen* (1) is not in point. There the attorney had no authority, and said so; yet counsel compromised. In *Thomas v. Harris* (5) Pollock, C.B. decided that counsel had authority to agree to reduce the damages in the absence of his client. In *Fray v. Vowles* (6) the attorney compromised the action against the wishes of the client; and Lord Campbell said that he would have been authorized in reasonably, skilfully and *bona fide* compromising if he had not had express instructions not to do so. The case of *Chown v. Parrott* (7), in this court, shews also that the attorney may conduct the cause in such manner as appears to him most beneficial to his client.

ERLE, C.J.—I am of opinion that this rule should be made absolute. The action was to recover the price of a piano; and the plaintiffs' attorney agreed to settle the action by the return of the piano, and the payment of the costs by instalments. The plaintiffs repudiate this agreement, and say it was made without authority. The defendant says that the attorney had authority. The question is here between third parties; but I do not limit my judgment to that. It is clear that there was no express prohibition in this case; and the question is, whether his employment gave the plaintiffs' attorney a general authority to compromise as he did. It is admitted that he has a general authority over the common procedure of the suit. It is admitted that he might agree to take a lesser amount after verdict; and, in my mind, there is no distinction in the

present case. If the whole process was gone regularly through up to execution, the sheriff might have taken this very piano; and I think the attorney might compromise for goods as well as for money. The case of *Chown v. Parrott* (7) lays down principles sufficiently wide to authorize us in this judgment. In *Fray v. Vowles* (6) the compromise was made in spite of the express prohibition of the client. *Swinfen v. Swinfen* (1) was a case remarkable in all its circumstances. I look on it as a singular case. The judgments of the Master of the Rolls and the Lords Justices are given on the ground that in an issue directed by the Courts of Chancery, it is extraordinary to give up the claim to an estate.

BYLES, J.—I am of the same opinion. No authority has been cited to shew that an attorney has no power *bona fide*, and with the exercise of reasonable skill and care, to compromise an action. In the case of *Swinfen v. Swinfen* (1) in this court, the first discussion was as to the authority of counsel. *Cresswell, J.* there says—"It is said that the compromise entered into by the counsel for the parties was made without the authority of the plaintiff. I think the Court cannot listen to such an objection." *Williams, J.* says: "With respect to the objection that the plaintiff's counsel agreed to the compromise without authority from his client, it is perfectly clear, without pretending to define the limits of counsel's authority, that the plaintiff was bound by her counsel's consent;" and *Willes, J.* says: "I entirely agree with my Brother *Cresswell* as to the authority of counsel." Afterwards the question was, whether an attachment should issue, and the Judges agreed that it should not; but *Crowder, J.* says: "I have the misfortune to differ from the opinion expressed by my learned Brothers when the former rule was discharged, and to which opinion they still adhere." The rule, therefore, in the Common Law Courts is laid down in wide terms, and the adverse opinions which have been expressed in the Courts of Equity must have been given on the peculiarity of the case before them.

KEATING, J.—I am of the same opinion. If this were not the rule, great inconvenience and protracted litigation would ensue. Here the attorney compromises.

(3) 1 Nev. & M. 398; s. c. 2 Law J. Rep. (N.S.) K.B. 86.

(4) 7 Com. B. Rep. 987; s. c. 18 Law J. Rep. (N.S.) C.P. 291.

(5) 27 Law J. Rep. (N.S.) Exch. 353.

(6) 28 Law J. Rep. (N.S.) Q.B. 232.

(7) 32 Law J. Rep. (N.S.) C.P. 197; s. c. 14 Com. B. Rep. N.S. 74.

by taking the piano (though any goods perhaps might do)—taking the very subject-matter of the action. This seems to me within the most limited extent of his authority. I would remark that I believe the case of *Swinfen v. Swinfen* (1), so far as decided in this Court, has not been fully understood. The learned Judges adhered to their former opinion; but the motion being one for an attachment, the opinion of the majority did not prevail because of the peculiar nature of the motion. The case of *Swinfen v. Swinfen* (1) is a peculiar one.

SMITH, J.—I am of opinion that an attorney has authority in all matters which may reasonably be expected to arise in a cause. It often must happen that a cause may not come to its usual conclusion, but to a compromise. The cases shew that an attorney may compromise a suit; and the question is, whether this compromise is one within his authority in the suit. It seems to me that none could be more so than this. If the action had been successful, the plaintiffs might have had execution, and the sheriff might have taken this very piano or other goods; and the attorney, as it were by anticipation, takes it. It would be most unfortunate for clients if attorneys could not compromise. Moments occur in a case when a fortunate compromise may be made, moments which may never occur again, and on the loss of which moments protracted litigation ensues. I think, on principle and authority, the attorney might make this compromise.

Rule absolute.

1865. } BARKER AND ANOTHER v.
May 16. } M'ANDREW.

Charter-Party—Commencement of Voyage.

A charter-party stipulated that a certain steamer then at N, being tight, staunch, and in every way fitted for the voyage, should proceed to the usual place of loading at N, or as near thereunto as she could safely get (guaranteed for cargo in a certain month), there load and then proceed to A. It contained the usual exception of dangers and accidents of seas, rivers and navigation during the voyage:—Held, that the voyage

commenced from her starting from her then berth for the loading place, and that the exception applied to that portion of the voyage.

This was a demurrer to a plea.

The declaration contained two counts, which were as follows: The first count stated, that by a charter-party, made the 3rd of October 1863, it was mutually agreed between the plaintiffs and the defendant, that the defendant's steamer called the *Smyrna*, then at Newcastle, should with all convenient speed sail and proceed to the usual place there, or so near thereunto as she might safely get [the defendant guaranteeing the said steamer for cargo in all the said month of October], and there load for the factors of the plaintiffs in the customary manner a full and complete cargo of about 1,500 tons of coal, and that being so loaded the said steamer should therewith proceed to Alexandria, Egypt, and there deliver the same on payment of freight, the act of God, the Queen's enemies, restraints of rulers and princes, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted; and the plaintiffs say that they did all things on their part to be done, and all things happened to entitle them to have the said charter-party performed by the defendant on his part, yet the said steamer did not with all convenient speed sail and proceed to such usual place of loading, at Newcastle, as before mentioned, nor was the said steamer ready to receive and load on board the said agreed cargo during any time in the said month of October; and the plaintiffs, in fact, say, that the said steamer was not ready to receive and load on board, and did not in fact receive and load on board the said agreed cargo until long after the said month of October, and after long and unreasonable delay.

The second count was similar, except that the words in brackets were changed to ["being ready there for cargo in the month of October, or the early part of the month of November 1863,"] and the breach altered to meet this change; and following the two counts was an averment of damage accruing from the breaches.

The fourth plea (which was pleaded to both counts) stated, that the charter-party in the first count mentioned was as follows: "It is this day mutually agreed between Messrs. R. M'Andrew & Co., of the good ship or vessel called the new steamer *Smyrna* of the —, of — tons or thereabouts, now at Newcastle, and Messrs. T. Barker & Co., of London, merchants, that the said ship, being tight, staunch and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to one usual loading place guaranteed for cargo in all this month (i. e. October), or as near thereunto as they may safely get, and there load for the factor of the said freighters in the customary manner a full and complete cargo of about 1,500 tons of coal, which the said merchants bind themselves to ship, not exceeding what she may stow and carry over and above her tackle, apparel, provisions and furniture, and being so loaded shall therewith proceed to Alexandria, Egypt, or so near thereto as she may safely get (cargo to and from alongside and at merchant's risk and expense) and deliver the same on being paid freight, as follows: 30*l.* per keel of twenty-one tons and one-fifth, with fifteen guineas gratuity, in full of all port charges and pilotage (the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever during the said voyage always excepted); the vessel to be addressed to the charterer's agent, paying the one usual consignment commission of 2*l.* per cent., to have a lien on cargo for all freight, dead freight and demurrage, captain to sign bills of lading at any rate of freight, without prejudice to this charter, freight to be paid on unloading and right delivery of the cargo in cash at current exchange, 125 tons to be allowed the said merchant per weather working day (if the ship is not sooner despatched) for unloading, and all days on demurrage over and above the said laying days at 30*l.* per day; penalty for non-performance of this agreement, estimated amount of freight." And that the agreement in the second count mentioned was the same charter-party with an extension of time mutually agreed on by the plaintiffs and the defendant for being ready for cargo

until the early part of November 1863; and the defendant says, that at the times of the making the said charter-party and agreement in the first and second counts respectively mentioned, the said steamer so being at Newcastle as in those counts mentioned, was at a place there far distant from the usual place there for loading to which the said steamer was to sail and proceed, and the said steamer before reaching such usual place would necessarily be exposed to divers dangers of seas, rivers and navigation, all which the plaintiffs and the defendant at the said time well knew, and that the said voyage in the said charter-party mentioned and referred to was a voyage from the place at Newcastle at which the said steamer was at the time of making the said charter-party and agreement to the said usual place at Newcastle for loading, and from thence to Alexandria; and that the said steamer during the said voyage, that is to say, during such part of the said voyage as took place before the said steamer sailed or proceeded from the said usual place on her way to Alexandria, and after she had received on board a part of her said cargo, and before any breach of the said charter-party or agreement, was hindered and prevented by the dangers of seas, rivers and navigation then happening from receiving and loading on board the residue of the said cargo, and was thereby greatly and necessarily delayed therein, which are the supposed liabilities of contract in the first and second counts respectively complained of.

To this plea the plaintiff demurred.

Horace Lloyd (*Biron* with him), for the plaintiff.—The voyage contemplated was not to commence till the ship started with her cargo from the loading-place, and the exception as to accidents of navigation did not apply till then. The case of *Crow v. Falk* (1) is exactly in point; there the vessel was at Liverpool, and was to load and sail with a cargo from thence; and it was held that the voyage did not commence, and the exception did not apply till she quitted Liverpool. It is quite true that in *Bruce v. Nicolopulo* (2) Pollock, C.B. said, he could not subscribe to *Crow v. Falk* (1), but the

(1) 8 Q.B. Rep. 467; s. c. 15 Law J. Rep. (N.S.) Q.B. 183.

(2) 11 Exch. Rep. 129; s. c. 24 Law J. Rep. (N.S.) Exch. 321.

other Judges expressed no such opinion; and Martin, B. says, "Assuming *Crow v. Falk* (1) to be good law, this case is clearly distinguishable." And in the latter case of *Valente v. Gibbs* (3) *Crow v. Falk* (1) was upheld, the two cases being, in fact, identical; and Cockburn, C.J. expressly said, he did not dissent from it. The question here, no doubt, is, whether the present case falls within *Crow v. Falk* (1) and *Valente v. Gibbs* (3), or within *Bruce v. Nicolopulo* (2). The averment as to the commencement of the voyage does not further the matter, as it is merely an averment of a legal consequence from previous facts.

[WILLES, J.—The charter-party contemplates dangers in getting to the place of loading, "as near thereto as she can safely get."]

That is in our favour; she need not go nearer than is safe. The obligations of the shipowner are four: First, the ship with convenient speed is to proceed to the loading place within a guaranteed time; secondly, she is to take her cargo; thirdly, being loaded she is to proceed to Alexandria, where, as I say, the voyage commences; fourthly, she is to deliver her cargo. And then there comes an exception of certain risks "during the voyage," which does not apply till the voyage commences, i. e. till she starts loaded.

[WILLES, J.—It is quite consistent with the plea that she arrived at the loading place and there was run into.]

Even if so, the voyage had not commenced. But in addition to this, the word "guaranteed" is used, and there is an absolute and unconditional warranty that she will be at the loading place.

Res., for the defendant.—The exception applies during the voyage. In *Crow v. Falk* (1) the words are, "Should at Liverpool receive and load, and being loaded proceed," and therefore the voyage contemplated was from Liverpool. In *Valente v. Gibbs* (3) no one ventured to say that a voyage does not commence till the goods are on board. Here the words are, "shall with convenient speed sail and proceed to the usual place of loading," and the ship was as much bound to sail to the loading place to take her cargo as to pro-

ceed afterwards with it. I define voyage to be after the vessel has started and while she is on her way. Secondly, as to the word "guaranteed." Its use does not imply a condition; but that, if there be a failure in time, the charterer shall be exonerated.

Lloyd, in reply.—First, the definition of voyage on the other side is incorrect; for then in *Valente v. Gibbs* (3) the voyage would have commenced from Genoa. The charterer is not interested till the vessel is at the loading place. Suppose she started from another place for another person, that clearly would be another voyage. The voyage commences when the vessel starts with the cargo on board. Secondly, I say, that if the vessel is not at the loading place, a liability is incurred by the shipowner.

WILLES, J.—I am of opinion that our judgment should be for the defendant. The action is founded on a charter-party by which the ship was to proceed to the usual place of loading and there load, and then proceed to Alexandria, with the usual exceptions as to the dangers and accidents of seas, rivers and navigation during the voyage. It seems, on the facts stated in the plea, that the vessel broke ground to proceed to the usual place of loading; whether she arrived there is not quite clear, though I should conclude she did, as part of her cargo was shipped; but it is unnecessary to decide this, as it is clear she broke ground and went towards the place of loading, and if she had not arrived was prevented from doing so by the dangers and accidents of seas, rivers and navigation. One question then is, whether it can be said that the word "voyage" includes this preliminary transit to the place of loading; and the next question is, whether, assuming that the preliminary transit was part of the voyage, the use of the word "guaranteed" in the charter-party shews that the parties intended the exception not to apply. The first question is a general one, and the second question is one on the construction of the particular contract. The first and general question is, whether, if a charter-party provides that a vessel shall proceed to a port for cargo and then proceed on her voyage with such cargo, the exception in the charter-party as to the dangers of the seas, rivers and navigation

(8) 6 Com. B. Rep. N.S. 270; s. c. 28 Law J. Rep. (N.S.) C.P. 229.

applies only when the cargo is on board or to the preliminary transit. Now, what is the meaning and object of the exception? But for the exception the shipowner would be liable, except for the act of God and the Queen's enemies; this is well known, and an exception is inserted which includes every case of accident occurring without fault. It is clear the reason for the exception applies equally to the preliminary voyage and to the time when the cargo is on board: that fact does not make it more reasonable. The origin and object of the exception apply no more to one than the other. The question is, whether it is a part of the voyage contemplated. I think the voyage means the passing of the vessel over the whole of the agreed transit; that it commences when the vessel commences to sail, and continues while she does sail. It is said, by the plaintiffs, that the question is decided by the two cases of *Crow v. Falk* (1) and *Valente v. Gibbs* (3). As to *Crow v. Falk* (1), there was no preliminary transit in that case, there was no voyage till the ship broke ground, and it was held that the exception did not apply whilst she was at the port of Liverpool. As to *Valente v. Gibbs* (3), that was a peculiar case; it was a case of penalty for delay, and all the Court decided that a delay at the port of starting was not within the contract as a delay in the voyage. It is true that the Chief Justice and Mr. Justice Crowder express an inclination to hold that the voyage began at the place for loading the cargo; but that was not on the ground of taking cargo on board, but on the construction of the particular contract, which was not like the present one. Our decision does not conflict with *Crow v. Falk* (1), though I may say I do not concur with that case. There is no authority against our present judgment, and there is an authority for it, viz. *Bruce v. Nicolopulo* (2), where it was held that the preliminary voyage was to be considered part of the voyage contemplated by the contract; that is in point, and is the good sense of the matter. As to the second question, the word "guaranteed" has no technical meaning in such a case as this; it is no more than "I have promised," and means probably that the ship shall be ready in the month, provided she be not prevented by

accidents happening without any fault, and if not so ready the charterer may throw up the charter-party; it may be construed as a guarantee with an exception, a guarantee subject to the ship not being prevented by the excepted perils. I am of opinion, therefore, that the plea is good, and that our judgment must be for the defendant.

BYLES, J.—I am of the same opinion. The question is, what is meant by "dangers and accidents of the seas, rivers and navigation . . . during the voyage"? The word "voyage" standing alone has an extensive meaning; it means a passing by water from one place or port to another place or port. This definition, however, would assist us little here; and we must construe it according to the existing circumstances. The plea says, "that at the time of making the said charter-party and agreement in the said first and second counts respectively mentioned, the said steamer so being at Newcastle, as in those counts mentioned, was at a place then far distant from the usual place there for loading, to which the said steamer was to sail and proceed, and the said steamer, before reaching such usual place, would necessarily be exposed to divers dangers of seas, rivers and navigation, *all which the plaintiffs and defendant at the said times well knew.*" Therefore the plaintiffs and the defendant contemplated these facts, and so contemplating them, the defendant engaged that his ship should, with all convenient speed, sail and proceed to the usual loading place." So that, in the first place, there was a contract by which the ship was bound to proceed from where she was to the loading place—was bound to cross that distance and meet those dangers. And, further, the words are, "that the said ship, being tight, staunch and strong, and in every way fitted for the voyage, shall, with all convenient speed, sail and proceed to the usual loading place . . . and there load . . . and being so loaded proceed," not that she shall proceed to the loading place, and thence, being tight, staunch and strong, and fitted for the voyage, proceed; so that she is to be tight, staunch and strong, and fitted for the voyage, not merely from the place of loading, but also during the former part of the transit. Therefore, looking to the places in the contract where the voyage is mentioned, I think it was meant to in-

clude the previous part of the transit. Again, "sail" is a technical word, and means "start on voyage"; the case of *Valente v. Gibbs* (3) is a distinct authority. Therefore, taking into consideration the wording of the contract and the surrounding circumstances, I am of opinion that this is a good plea. I also agree as to the effect to be given to the word "guaranteed," which may mean either an absolute or a conditional guarantee.

SMITH, J.—I am of the same opinion. The voyage commenced from the place where the ship was. The provision of the charter-party is, "shall, with all convenient speed, sail and proceed to the usual loading place"; she was bound to make the voyage as described in the charter-party, and could not deviate in her course to the loading place; and therefore the place from which she started was the *terminus à quo*. The parties knew the place where she lay was distant from the loading place; and she was to sail to such place, and encounter the perils of such transit. Why should not the exception attach as much to the preliminary part of the voyage as to the rest of it? The fair meaning and intention of the matter must be considered; and the fair meaning and intention is, that these perils were to be encountered, and the exception to apply to them. As to the authorities, there are decisions in favour of this construction. In *Crow v. Falk* (1) Lord Denman says: "The words of the charter-party and declaration are perfectly clear. The end of the voyage is expressly marked out; the beginning is not; but the voyage could not begin before the ship's loading was completed;" that is, because in that case she would never sail till then. No argument can be brought to bear on the present case from the usual form of charter-parties; they vary in each case. In coming to the present conclusion, we are only giving effect to the intention of the parties. As to the use of the word "guaranteed," I think it does not interfere with the exception, which seems to me to apply to both parts of the voyage.

Judgment for the defendant.

[COUNTY COURT APPEAL.]

1865. { THE GREAT WESTERN RAIL-
May 5. { WAY COMPANY, appellants,
v. WILLIS, respondent.

Evidence — Statement by a Servant, when not made within the Scope of his Authority.

In an action against a railway company for not delivering, within a reasonable time, cattle which had been sent by their railway, the plaintiff gave evidence at the trial of a conversation which had taken place a week after the transaction, between himself and the company's night inspector, who had charge of the night cattle trains at a station through which the trucks containing the plaintiff's cattle would pass, and in which conversation the night inspector, in reply to the plaintiff's question, "How is it you did not send my cattle on?" had said that he had forgotten them,—Held, that such evidence was not admissible.

This was an action, tried before the Judge of the County Court of Staffordshire and a jury at Wolverhampton, to recover 21*l.* 7*s.* 6*d.* for the non-delivery within a reasonable time of seven cows, thirty-five sheep and six pigs, delivered to the defendants at Minety, on the 12th of July 1864, to be carried to Wolverhampton, the said cows, sheep and pigs being, as was alleged, thereby much injured, and the plaintiff put to expense, and the market at Wolverhampton being lost. The cattle were delivered at the Minety station by the plaintiff about five P.M. on the 12th of July, the plaintiff paying the carriage charges, 3*l.* 11*s.*, and signing a consignment note, with conditions attached, which were set out in full in the case, but which are unnecessary for the present report. The plaintiff proved that he saw the cattle loaded into trucks at Minety, ready for a goods' train which usually leaves Minety at about seven P.M.; that he had been in the habit of sending cattle by the defendants' railway for six or seven years, and that cattle loaded in time for that train usually arrived at Wolverhampton about seven the next morning; that he and other cattle-dealers had been in the habit of

sending cattle to Wolverhampton market by that train; that he informed the defendants' clerk at Minety that the cattle were intended for the next day's market at Wolverhampton; that he sent his man to meet the cattle the next morning by the first train, but they did not arrive by that train; that the next train was due at 10:30 A.M., but was late, and did not arrive till between twelve and one; that witness was in the market all day, waiting the arrival of the cattle; that the cattle were brought up to the market by his man Grant about one or half-past, and when the market was over; that he had the cattle turned out and fed, and sent them to the market at Birmingham the next day, where they were sold. That on their arrival the cattle were very dirty, and badly off for something to eat and drink, and were out of condition in consequence of the delay; and the sheep were also very dirty and out of condition in consequence of the delay.

The plaintiff further proved that he lost some 17*l.* or 18*l.* by the lot of cattle between what they cost him and what he sold them for at Birmingham; and he attributed that partly to the depreciation in the value from delay, and partly to having lost the market at Wolverhampton.

The plaintiff then proposed to state something relating to the cause of the delay in delivering the cattle by the company, which had passed in conversation about a week after the 12th of July between him and the defendants' night inspector named East, at Didcot, through which station the trucks in which the plaintiff's cattle were would pass, when the defendants submitted that a statement by a subordinate servant at Didcot, not in course of the transaction, but some time afterwards, was not admissible; but the learned Judge allowed the question to be put, and the plaintiff then stated that he said to East, "How is it you did not send my cattle on?" and he said in reply that he had forgotten them.

The plaintiff also stated that East had charge of the night cattle trains at Didcot, and that he would be on duty when the trucks in which the plaintiff's cattle were would pass through Didcot; that he knew

East well, and had frequently seen him on duty at Didcot.

In cross-examination the plaintiff was asked whether the cattle were not usually taken on by the empty coal train from Didcot, which train it was suggested by the defendants was the one which left Minety at seven in the evening and arrived at Wolverhampton about seven A.M.; but the plaintiff said that his cattle were generally carried by the same train by which he sent his cattle on the 12th of July, and that other persons sent their cattle by the same train; and that the cattle usually arrived at Wolverhampton on the following morning a little after seven; that he generally got his cattle at Wolverhampton at seven, sometimes at eight, and sometimes at half-past ten, or later.

The case here set out a letter by the plaintiff's attorney to the defendants' goods manager, specifying the items composing the plaintiff's claim, but on the effect of which nothing turned. The case afterwards stated that William Grant, the plaintiff's man, proved going to the station frequently, early on the morning of the 13th of July, and that the cattle had not come up to twelve o'clock, when he left without them; that he came down to the station about ten minutes to one, and they had just arrived; that he saw the train arrive; that he took them out of the trucks, and took them into the market at Wolverhampton at once; that the cattle were much out of condition, in consequence of being kept so long in the trucks. When he got to the market it was over, and he took the cattle and turned them out to feed against the next day.

George Foxall, a cattle salesman, proved seeing the cattle in Wolverhampton market, and that they were very dirty and out of condition, but that they would be all right again in the course of a week, by being properly fed and attended to.

The defendants upon this case submitted that the plaintiff ought to be nonsuited, having proved no breach of contract, and the company not being bound by the conditions of the consignment note to send the animals by any particular train, or to carry or deliver them within any certain or definite time, or in time for any particular

market; but the learned Judge refused to nonsuit the plaintiff.

The defendants called two of the defendants' servants, who proved that there were only two trains by which cattle could have arrived from Minety, viz., by a return coal-train which usually arrived at Wolverhampton at about seven A.M., and a goods train which was timed to arrive at Wolverhampton at 10.30, but which was late on the morning of the 13th of July 1864, and did not come in till a few minutes after twelve; that the cattle were delivered to the plaintiff's man without delay on arrival, and were not more out of condition than cattle usually are after a journey in trucks by rail.

The learned Judge ruled that the special conditions relating to the non-liability of the defendants, for detention or delay in conveying or delivering the cattle, were unreasonable, and left it to the jury to say whether there had been an unreasonable delay in the carriage or delivery of the plaintiff's cattle, and if so, to find for the plaintiff for the agreed damages, 21*l.* 7*s.* 6*d.*, stating, at the request of the defendants, whether the damages were for loss of condition in the animals, or for loss of market.

The jury found for the plaintiff that there had been an unreasonable delay, and assessed the damages, for loss of market 1*l.* and injury to the condition of the cattle 7*l.* 7*s.* 6*d.*

The questions for the decision of the Court were:

1. Whether the learned Judge was right in admitting the evidence of the conversation with East above set forth.

2. Whether the learned Judge was right in refusing to nonsuit the plaintiff, and whether he ought not to have ruled and directed that there was no evidence for the jury.

3. Whether the learned Judge was right in his direction to the jury.

T. Clarke (Digby with him), for the appellants.—The evidence of what was stated by East, the night inspector, was not admissible in evidence, and the learned county court Judge ought not to have received it. East was a mere subordinate servant, and had no authority to make any admis-

sion on behalf of the company.—(He was then stopped by the Court.)

Macnamara, for the respondent.—It is submitted that a person like East, who had the superintendence of the night department in the appellants' business, and charge of the night cattle trains at Didcot, was their agent to answer inquiries respecting matters done there in the course of such business, and that what he might state, in answer to any *bond fide* inquiry, by a person who had an interest in making such inquiry, would be admissible in evidence against the appellants. It is the same as if the respondent had been referred by the appellants to such person for information in the matter; in which case it is clear, that what he then said would be within the scope of his authority and admissible in evidence, and this ought especially to be the case, where those by whom he is employed are a body corporate. There is a dictum of Tindal, C.J., in *Garth v. Howard* (1), which supports this proposition. That learned Judge there says, "If the transaction out of which this suit arises had been in the ordinary trade or business of the defendant as a pawnbroker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawnbroker."

The case of *Clifford v. Burton* (2) shews that where a wife served in her husband's shop, and carried on the business of it in his absence, admissions made by her on application to pay for goods before delivered at the shop, are admissible in evidence against her husband.

ERLE, C.J.—I am of opinion that this night inspector is not to be presumed to have been authorized by the company to make admissions on their behalf of things gone by. The present case does not fall

(1) 8 Bing. 451; s.c. 1 Law J. Rep. (N.S.) C.P. 129.

(2) 1 Bing. 199; s.c. 1 Law J. Rep. C.P. 61.

within those which have been referred to by Mr. Macnamara, and there must therefore be a new trial.

BYLES, J., KEATING, J. and SMITH, J. concurred.

Case remitted for a new trial.

1865.

May 5. }

COLES v. TURNER.

Debtor and Creditor—Deed of Assignment under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134. s. 192.)—Clause verifying Debts.

A clause in a deed of assignment, registered under the Bankruptcy Act, 1861, by which the trustee is empowered to require any creditor of the debtor to verify the nature and amount of his debt, with full particulars, by statutory declaration proved before the Commissioners of Bankruptcy, "or otherwise as the trustee may think fit," is unreasonable, and a deed with such a clause is not binding on a non-assenting creditor.

The declaration contained a count against the defendant as acceptor of a bill of exchange, drawn on him by the plaintiff, for 46l. 9s. 3d., and counts for goods sold and delivered, for work done, for money paid, and money due on accounts stated.

The defendant pleaded, as a defence thereto, a deed of assignment, registered under the Bankruptcy Act, 1861, (24 & 25 Vict. c. 134.) as being binding on the plaintiff, a non-assenting creditor, as if he had executed the same.

The deed, which was set out in full in the plea, was dated the 19th of May 1864, and was a conveyance and assignment by Richard Turner, the defendant, to George Molyneux of all the real and personal estate of the said Richard Turner whatsoever (subject to the existing incumbrances thereon, and except the wearing apparel of the said R. Turner and of his wife and children), upon the following trust: "Upon trust that he the said George Molyneux, his heirs, executors, administrators or assigns (all of whom are hereinafter referred to as "the said trustee or trustees") do

and shall as soon as may be, and in such way or manner as to him or them may seem best, call in, collect and receive the said personal estate, effects and premises, and sell and convert into money all the saleable parts of the said personal estate and all the said real estate, with power nevertheless for the said trustee or trustees, in his or their discretion, to postpone the sale of all or any part thereof, and to lease such unsold portion either from year to year, or for a term of years, for such rents as he or they may think fit, and with power for the said trustee or trustees to make any such sales, either by public auction or private contract, or partly in either mode, and either with or without the concurrence of any mortgagees or mortgagees of the property, and subject to such conditions, upon such terms, and generally in such manner as he or they may think fit, and as to any policies of insurance, either by way of surrender to the office or offices which may have granted the same or otherwise, and to give credit for the whole or any part of the purchase-money, either with or without taking security for the same."

The deed contained a declaration of trust as to the monies to arise from such collection, leasing and sale, and which after payment of certain costs, was to pay rateably and without preference the debts due from the said R. Turner. There was then the following clause: "Provided always, and it is hereby agreed and declared, that the said trustee or trustees shall have full discretion from time to time to determine the amount of dividends which shall from time to time be declared and paid out of the monies in hand to and among the said creditors in respect of their respective debts, and to pay such dividends, at such place and in such manner as he or they shall think fit. *And it is hereby further agreed and declared that it shall be lawful for the said trustee or trustees to require any person or persons claiming to be a creditor or creditors of the said Richard Turner, notwithstanding that he or they may have executed these presents, and that the amount, or alleged amount, of his or their debt or debts may have been inserted in the schedule hereto, to verify the nature and amount of such debt or claim,*

with full particulars, shewing the consideration thereof by statutory declarations proved before the Commissioners of Bankruptcy, or otherwise, as the trustee or trustees may think fit."

The deed also contained the following: "Provided always, and it is hereby agreed and declared, that these presents shall not in anywise prejudice or affect the rights or remedies of any of the said creditors against any surety or sureties, or any person or persons other than the said Richard Turner, his heirs, executors or administrators, nor shall these presents in anywise prejudice or affect any security which any of the said creditors may have or claim for his debt; but nevertheless if such security shall be enforceable against the said Richard Turner, or his estate or effects, then and in that case such creditor, unless he shall consent to abandon the said security, shall be entitled to receive dividends under these presents upon so much only of his said secured debt as may remain after such security shall have been realized, or after credit shall have been given for the full value thereof, such value to be agreed upon between the said creditor and the said trustee or trustees, or in case of dispute, to be ascertained by two impartial valuers, one to be chosen by such creditor and the other by the said trustee or trustees, or an umpire to be named by such valuers before proceeding to the valuation."

There was also in the deed a declaration that the trustees should not be answerable for the acts or defaults of each other, nor for any loss which might befall the trust estate otherwise than through his or their wilful default, and that it should "be lawful for him or them to reimburse himself or themselves out of the trust estate all costs and expenses actually incurred in the execution of the trusts."

Demurrer to the plea and joinder in demurrer.

Prentice, in support of the demurrer.—This deed is not binding on the plaintiff, a non-assenting creditor, as several of the clauses in it are unreasonable. In the first place, there is a clause by which the trustee has power to postpone the sale of the property, and to lease it for such rents as he may think fit, and in case of sale he may give credit for the purchase-money without

taking security, so that by a lease or sale to the debtor himself the debtor would be able to continue in possession of the property without the creditors deriving any benefit under the deed. Then there is a clause by which the trustee may require any creditor to verify the nature and amount of his debt by statutory declaration or otherwise as the trustee may think fit. There is then no limit to the kind of proof the trustee may insist on, and the clause altogether is unreasonable. A similar one was held to vitiate the deed in the case of *Leigh v. Pendlebury* (1), from which the present case is not distinguishable. There are other clauses in this deed which are also objectionable, such as that the trustee may pay dividends at such place and in such manner as he may think fit; also the clause as to the mode of valuing securities in which nothing is said as to what is to be done in case of any creditor being a lunatic or infant; and lastly, the clause enabling the trustee to reimburse himself all costs incurred, without reference to their having been reasonably or even properly incurred, and differing from the case of bankruptcy, in which if assignees were to bring any action without leave of a majority of the creditors or of the Commissioner, they would do so at the peril of losing their costs—*Ex parte Whitchurch* (2).

Hannay, contra.—Many of the clauses which are now objected to have passed without objection in other similar deeds which have come before the Court.

[The COURT called on him to answer first the objection to the clause which relates to the creditor being required to verify his debt.]

It is submitted that there is an important distinction between such clause and the clause which was held bad in *Leigh v. Pendlebury* (1). In that case the clause empowered the trustee to reject the debt altogether if the creditor failed to prove it to the satisfaction of the trustee, but there is no such forfeiture of the debt in the present case.

[SMITH, J.—What do you say would happen here if the creditor should not prove his debt in the mode required by the trustee?]

(1) 15 Com. B. Rep. N.S. 815; s.c. 33 Law J. Rep. (N.S.) C.P. 172.

(2) 1 Atk. 210.

The clause only means that the creditor may be required to verify his debt by a statutory declaration, and there is nothing unreasonable in requiring this to be done. In *Strick v. De Mattos* (3) a clause in a deed of inspectorship under the Bankruptcy Act, by which every creditor before being entitled to a dividend should if required by the inspectors deliver a statement in writing of his claim, with all the particulars usual in a proof in bankruptcy, and should upon the like request verify such claim by statutory declaration, was held not to be unreasonable.

[SMITH, J.—There it was not left, as here, to the caprice of the trustee to say what proof should be required.]

It is submitted that the words "or otherwise, as the trustee or trustees may think fit," are only added to the clause in the present deed, in order to enable the trustee, if he pleases, to dispense with the proof by statutory declaration, and are not inserted there to authorize him to insist on having further and stricter proof. As said by Cockburn, C.J., in *Wells v. Hacon* (4), *prima facie* a deed agreed to by three-fourths of the creditors must be taken to be reasonable, and the Court should not presume that the trustee will act improperly.

ERLE, C.J.—I think that the provision in this deed requiring the creditor to prove his debt by statutory declaration or otherwise, as the trustee may think fit, has the same effect as the clause referred to and held bad in the case of *Leigh v. Pendlebury* (1), and that in case of failure by the creditor to comply with the terms of this provision, he would lose his right of having the benefit of dividends under the deed. There are two or three other objections to the deed in the present case, which are, I think, equally strong, but as this one is sufficient to invalidate the deed, it is unnecessary and would be a waste of time to discuss them. The rest of the COURT (5) concur in thinking that this case is substantially the same as, and is not distinguishable from, that of *Leigh v. Pendlebury* (1).

Judgment for the plaintiff.

(3) 23 Law J. Rep. (N.S.) Exch. 276.

(4) Ibid. Q.B. 204.

(5) Byles, J., Keating J. and Smith, J.

1865.) WHYMPER, appellant, v.
Jan. 25. } HARNEY, respondent.

Factory—Covering Crinoline Steel with Cotton-thread—3 & 4 Will. 4. c. 103. s. 1. —7 & 8 Vict. c. 15. s. 73.—13 & 14 Vict. c. 54. s. 1.

The premises of a manufacturer of crinoline skirts, in which steam-power is used to work machinery which by the interlacing or plaiting of cotton threads together around and over every part of the strips of steel, which are afterwards placed in the crinoline skirts, effects a covering for such strips, are a factory within the meaning of the Factory Acts.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 113.]

1865.
April 28;
May 10.

THE OVERSEERS OF THE POOR
OF THE PARISH OF SUNDER-
LAND-NEAR-THE-SEA, appel-
lants, v. THE GUARDIANS OF
THE SUNDERLAND POOR-
LAW UNION, respondents.

Poor-Rate—Rateable Value—Tied Public-Houses and Brewery—Small Tenements.

An assessment committee, appointed under "The Union Assessment Committee Act, 1862," amended the valuation list of a parish which had adopted the "Small Tenements Rating Act," by inserting in the column for rateable value the full rateable value of the small tenements:—Held, that they were right.

The occupiers of certain public-houses were obliged by contracts to take their beer from a particular brewery, and paid less rent in consequence:—Held, by Erle, C.J. and Smith, J., dissentiente Byles, J., that the rateable value of the public-houses was not to be decreased because of the burden, nor that of the brewery to be increased because of the benefit of such contracts, and that the case of Allison v. Monkwearmouth was both unsatisfactory and distinguishable.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 121.]

1865. }
May 10, 11. } LOCK v. FURZE.

*Lease—Covenant for Quiet Enjoyment—
Interesse Termini—Damages.*

The plaintiff being in occupation of premises under a lease from J. F., which would expire on the 4th of December 1864, obtained from J. F. a reversionary lease for twenty-one years and twenty-one days, to commence from the said 4th of December 1864, on payment of a premium. In November 1863 J. F. died, and it turned out he had no power to grant this reversionary lease. F. V., who was entitled to the premises on the death of J. F., refused to ratify the said lease, and the plaintiff was obliged to accept a lease from F. V., to commence on the 25th of December 1864, for seven years only, at a greater rent. The plaintiff brought an action against the executor of J. F. on a covenant for quiet enjoyment contained in the void lease:—Held, first, that a plea that the plaintiff had never entered into possession of the premises under such lease was bad; secondly, that on a plea that F. V. did not claim the premises from the plaintiff or threaten to oust him from the possession thereof, the plaintiff was entitled to judgment; thirdly, that the plaintiff was not merely entitled to recover the premium and expenses of the void lease, but was entitled to recover the difference between the expenses of the void lease and the lease granted by F. V., and also the difference between the respective values of such leases, but that in calculating such difference in value, the transaction was not to be considered in the nature of a compulsory sale, and that the expenses of counsel, &c. were not recoverable.

This was an action brought by the plaintiff against the defendant, as executor of one John Furze, for breach of a covenant for quiet enjoyment in a lease granted by the said John Furze to the plaintiff.

The declaration stated, that by an indenture made on the 14th of February 1860, between John Furze of the one part and the plaintiff of the other part, the said John Furze, in consideration of 400*l.* and the other considerations therein mentioned, demised to the plaintiff certain premises from the 4th of December 1864, at which

time an existing lease of the said premises would expire, for the term of twenty-one years and twenty-one days, paying 10*l.* for the first twenty-one days, and a yearly rent of 175*l.* during the remainder of the said term, and covenanted with the plaintiff that he should and might peaceably and quietly have, hold, use, occupy, possess and enjoy the said premises during the said term, without the lawful let, suit, trouble, denial, interruption, molestation or disturbance of and by the said John Furze, his heirs or assigns, or any of them, or any person or persons whomsoever lawfully claiming or to claim by, from, through, under or in trust for him, them or any of them. Yet after the making of the said indenture, and before suit, and during the said lease, one Frances Vickers, then lawfully claiming the said demised premises through and under the said John Furze, deceased, and having a good title to the same and to the possession thereof through and under him, claimed and demanded the said demised premises of, from and against the plaintiff, and threatened to oust him from the possession and enjoyment thereof, whereby the plaintiff could not and did not peaceably or quietly have, hold, use, occupy, possess or enjoy the said premises for and during the said term without the let, suit, trouble, denial, interruption, molestation and disturbance of the said Frances Vickers, so lawfully claiming through and under the said John Furze, deceased, by reason whereof the plaintiff was obliged to and did take and accept a lease or appointment of the said premises from the said Frances Vickers for the term of seven years, from the 25th of December 1864, at an increased rent of 300*l.* a year, and was put to great trouble and expense and costs in obtaining such lease and appointment, and also lost the benefit of the lease granted by the said John Furze, deceased, and the sum of 400*l.* paid for the same.

There was also a count for money had and received.

The defendant pleaded to the first count, first, a denial of the deed; secondly, that the plaintiff never had or entered into possession of the said demised premises under and by virtue of the said lease; thirdly, that F. Vickers did not claim the premises, nor had good title or possession thereof,

through and under the said J. Furze, deceased; fourthly, that the said F. Vickers did not claim or demand the said premises from the plaintiff, nor threaten to oust him from the possession or enjoyment thereof; and to the last count he pleaded never indebted, except as to 417*l*., and paid that sum into court.

The plaintiff took issue on all the pleas, and also demurred to the second plea.

The following facts appeared at the trial: The plaintiff, being in occupation of the premises as tenant of the said J. Furze, by virtue of lease (dated the 9th of February 1838), which would expire on the 4th of December 1864, obtained from him, on the 14th of February 1860, the lease on which the declaration was founded. In May 1863 J. Furze died; and in November 1863 the plaintiff was informed, on behalf of a married daughter of J. Furze, that this new lease would not be recognized, on the ground that J. Furze had no power to grant it. And it turned out that in 1841 J. Furze, on the marriage of his said daughter Frances Vickers, had made a settlement of this property, whereby he retained only a life interest, with a power of leasing for any term not exceeding twenty-one years, to take effect in possession, and not in reversion or by way of future interest; so that the lease of 1860 was invalid. This being so, protracted negotiations took place during 1864 respecting the grant of a new lease by Frances Vickers, in whom the power then vested, to the plaintiff. In September 1864 an agreement was entered into, whereby a lease was to be granted to and accepted by the plaintiff after Christmas 1864, and pursuant to such agreement Frances Vickers granted the lease mentioned in the declaration.

The defendant contended that, on the facts proved, he was entitled to a verdict on the second and fourth pleas, and that he was only liable for 400*l*. the premium, and 17*l*. the expense of the lease of 1860, making together the sum of 417*l*. paid into court.

The plaintiff contended that he was entitled to a verdict on those pleas, and that, in addition to the sum of 417*l*., he was entitled to damages for the difference in the lengths, rents, and other conditions of the

two leases, and that in calculating such damages he was entitled to consider the transaction in the nature of a compulsory sale. And he also claimed 65*l*., of which sum 45*l*. was the cost of the new lease, and 20*l*. the cost of consulting counsel and surveyors, &c. respecting the matter.

The jury assessed the damages (less the 400*l*. premium) consequent on the difference in the leases at 1,457*l*., assessing such difference on what are called the 6*l*. per cent. tables, and adding 137*l*. (calculated at 10*l*. per cent.) on the ground of the transaction being in the nature of a compulsory sale. To this sum was added the before-mentioned 65*l*., and a verdict was entered for the plaintiff for 1,522*l*., with leave reserved to the defendant to move to set aside the verdict for the plaintiff on the second and fourth pleas, and enter a verdict thereon for the defendant; and to reduce the damages to nominal damages, or such sum as the Court might direct, on the grounds that the plaintiff was not entitled to recover more than the sum of 400*l*. which he had paid, and 17*l*. expenses which the defendant had paid into court, and that the plaintiff lost nothing but what he had paid; that the plaintiff was not entitled to recover the 65*l*., the costs, &c. of the second lease, or any part of it; that the plaintiff must have paid the costs of one lease, and that he was not entitled to throw those costs, or any of them, on the defendant; and that the plaintiff was not entitled to the 10*l*. per cent. which the jury gave as upon a compulsory sale.

A rule nisi was granted pursuant to such leave, and also for a new trial, on the ground that the learned Judge misdirected the jury in directing them that the plaintiff was entitled to recover the difference in value between the lease that was avoided and the new lease that was granted, and that the plaintiff was entitled to recover the 65*l*., also in directing them that the plaintiff was entitled to recover the 10*l*. per cent. claimed as upon a compulsory sale; and that the learned Judge ought to have directed the jury that the plaintiff was not entitled to recover those several matters.

It was also arranged that the demurrer should be argued at the same time.

Lush, J. Brown and *Archibald* shewed cause.—The main question is, how the

damages are to be assessed; and we contend that the plaintiff had the actual estate, and is entitled to recover damages in respect of the value of it. It makes no difference, whether the defect be discovered before or after the lease begins to run. An actual, present and assignable interest is conveyed, and if the term had commenced and the lessee entered, the matter would have been beyond controversy—*Williams v. Burrell* (1), *Bac. Abr.*, tit. 'Leases,' (N), and *Took v. Glascock* (2).

[*BYLES, J.*—And *Shep. Touch.*, by *Atherley*, p. 267, n. (e).]

This is not a case of a mere contract like *Pommett v. Fuller* (3) and *Sikes v. Wild* (4), but of a conveyance, and therefore full damages are recoverable—*Smith v. Compton* (5); and, further, the circumstances bring it within *Hopkins v. Grazebrook* (6) and *Robinson v. Harman* (7). Again, entry, whatever its value may be for various other matters, has nothing to do with the right of lessor or lessee to sue on covenants—*Bac. Abr.*, tit. 'Lease,' (M), *Doe v. Walker* (8) and *Williams v. Bosanquet* (9); and an averment of entry is not traversable—2 *Chitt. on Plead.* 7th ed. p. 392, n. (t). With respect to the 10l. per cent., it was not, in truth, added as for a compulsory sale, but only used as an ingredient in arriving at the amount of damages. As to the second plea, if the plea means actual entry, it is bad; if only legal possession, it was disproved. As to the fourth plea, an actual eviction is not necessary—*Platt on Covenants*, 326.

Bovill and *Garth*, in support of the rule. —As to what has been said about the case of *Hopkins v. Grazebrook* (6), it is sufficient to say that the point of knowledge is not raised on the pleadings, and that it was not taken at the trial, where it could have been met by evidence; and without knowledge there can be no fraud. As to the second

and fourth pleas, the defendant claims the verdict, because possession under the lease was necessary, and as there was none, there was no eviction from possession. With respect to the main question, the case falls within the rule that only the deposit and actual expenses can be recovered—*Mayne on Damages*, 96, *Sedgwick on Damages*, 1st ed. 160, 161, 168, 169, 179, and 180 (n.), 4 *Kent's Commentaries* (ed. of 1860), 580, *Ireland v. Birch* (10), and *Sikes v. Wild* (4). As to the 10l. per cent., it was clearly given on the ground that the transaction was in the nature of a compulsory sale, and the verdict cannot therefore be sustained to that extent; and as to the 65l., the portion for counsel's fees, &c. of course cannot be recovered, and the portion for expenses of the new lease cannot be recovered, for the plaintiff has got the lease, and we have paid into court the expense of the abortive one.

ERLE, C. J.—This was an action brought by the plaintiff for a breach of covenant against the defendant. The covenant on which he relies is a covenant that he should have quiet enjoyment of the premises during twenty-one years, without the lawful let, suit, trouble, denial, interruption, molestation or disturbance of the lessor, or any one lawfully claiming under him; and the breach is, that one Frances Vickers, lawfully claiming under the lessor, and having good title, claimed and demanded the premises from the plaintiff, and threatened to oust him from the possession thereof, whereby the plaintiff could not peaceably and quietly enjoy the premises. The declaration and the breach were proved. The second plea is, that the plaintiff never had or entered into possession of the demised premises under or by virtue of the said lease. The lease was granted in the year 1860, and was to commence in the year 1864, and down to 1864 the plaintiff had possession of the premises under a prior lease; therefore the lease in respect of which this action is brought was a reversionary lease, conveying an *interesse termini* to the plaintiff; and in the sense of having corporeal possession of the premises, the plaintiff did not have it under the reversionary

(1) 1 Com. B. Rep. 402; s. c. 14 Law J. Rep. (n.s.) C.P. 98.

(2) 1 Wms. Saund. 250 f. n. (1).

(3) 17 Com. B. Rep. 660; s. c. 25 Law J. Rep. (n.s.) C.P. 145.

(4) 4 B. & S. 421; s. c. 32 Law J. Rep. (n.s.) Q.B. 375.

(5) 3 B. & Ad. 407.

(6) 6 B. & C. 31; s. c. 5 Law J. Rep. K.B. 65.

(7) 1 Exch. Rep. 850; s. c. 18 Law J. Rep. (n.s.) Exch. 202.

(8) 5 B. & C. 111.

(9) 1 B. & B. 238.

(10) 2 Bing. N.C. 90.

lease. It was an *interesse termini*; the land was to vest in possession in 1864, and he was turned out by the claim of Frances Vickers in 1863. Then the allegation in the declaration is, that the covenant was broken by the demand of Frances Vickers, who had good title to claim the premises. And we think that the plea, in the sense contended for by the plaintiff, is entirely irrelevant to the declaration, and bad on demurrer. The claim is in respect of an *interesse termini*, and there is no allegation, express or implied, in the declaration that the plaintiff had entered into possession of the demised premises under the reversionary lease; and therefore, upon the demurrer to that plea, our judgment ought to be for the plaintiff. There is also a fourth plea to the same count, which alleges that Frances Vickers did not claim or demand the premises from the plaintiff, nor threaten to oust him from the possession or enjoyment thereof. Now, it is clear that she had title under John Furze, and had a right to say that the lease was a nullity; and it was acknowledged that she did say so, and demanded that her right should be acknowledged by the plaintiff, and that the plaintiff by reason of the demand lost the *interesse termini*. It is clear, therefore, that the verdict for the plaintiff on this plea should stand. The remaining question is, whether the plaintiff is entitled to recover more than the 417*l.* paid into court. It was contended, that this covenant was to be dealt with as if there had been a contract for sale, and a contract to make title to the premises sold, and that it was subject to the rule of law, which holds good in actions by a vendee against a vendor under a contract of sale which goes off through a defect in the title,—the rule by which the vendor is only bound to pay back the money he has received and the expenses to which the vendee has been put, and the vendee cannot recover for the value of the premises. I am of opinion that this contention cannot be maintained. It is a known rule of law as to contracts for sale, and, if it were necessary to go into the question, it might perhaps be shewn that the convenience of mankind justifies the rule. In my opinion, however, the rule is confined to contracts of sale; and I think that the line is to be drawn between a contract for sale and a conveyance of an estate or

interest in that to which the conveyance relates. It is clear that, if there be a lease of land in possession containing such a covenant as the present one, an entry by the lessee under the lease, and afterwards an ouster of the lessee by a person claiming under the lessor, the lessee is entitled to recover the value of the term he has lost. Thus, in *Williams v. Burrell* (1), the only decided case upon the point which has been cited in argument, it was held that a lessee under a void lease, who had been ejected by the successor of his lessor, had a right, in an action against the executors of the lessor for breach of a covenant for quiet enjoyment contained in his lease, to recover the value of the term. But it is contended, on behalf of the defendant, that, because this was a reversionary lease, only conveying an *interesse termini*, the plaintiff stood in the situation of a vendee, with whom a vendor had contracted to sell and make title, and not in the position of a lessee, to whom a term has been granted, and who is in possession of that term. I am of opinion that this distinction is not maintainable. This reversionary lease conveyed to the plaintiff an *interesse termini*, which was a valuable and assignable interest, and he was in one sense in possession, for the interest was conveyed to and vested in him by a legal document containing this covenant; and therefore, to my mind, there is a strict analogy with the case of a document conveying a present term, under which the lessee has entered. And wherever that is so, the case of *Williams v. Burrell* (1) decides that the ordinary rule applies, namely, that a party who breaks his contract must pay the damages approximately arising from such breach. The dicta which have been cited from the American authorities are neutral, there being as many one way as the other, and the learned authors, whose books have been cited, do not sustain the contention of the defendant. Mr. Mayne, in his book *On Damages*, limits his statement of the rule to the case where nothing has passed under the instrument containing the covenant, and here an *interesse termini* clearly passed. It appears from *Sedgwick on Damages*, that although in many of the American Courts the rule is as contended for by the defendant, yet the impression of the writer is the

other way. There is, therefore, no authority against our judgment; there is an authority for it; and there is the almost universal rule, that a party who breaks his contract ought to pay the damages approximately arising from such breach. The plaintiff, therefore, is entitled to the value of the term. The jury have given the value of the term, and the expenses to which the plaintiff has been put, up to the fullest extent, and we think that there ought to be a substantial deduction from that amount. The jury have given 10*l.* per cent. for compulsory sale, and have taken the 6*l.* per cent. tables, and we think that the plaintiff must lose the 137*l.* Then there was 65*l.* given for the expenses. It is agreed that 20*l.* shall come off for counsel's fees and such matters, and then there remains 45*l.* for the expenses of the new lease. The expenses of the old lease were 17*l.* (which have been paid into court), and Mr. Garth has convinced me that the plaintiff is not entitled to have the expenses of both leases; the plaintiff wanted a lease, and he must pay for one of them. I do not very clearly see which lease he is entitled to charge to the defendant; but I am inclined to think that he is entitled to charge the 40*l.*, the expenses he has been put to by the breach of covenant; and therefore under this head he is to have 40*l.* minus the 17*l.* Consequently the plaintiff is only entitled to 28*l.* of the sum of 65*l.*, and is not entitled to the sum of 137*l.*; and the damages must be reduced accordingly.

BYLES, J.—I am of the same opinion. The main question is a very important one, namely, how the damages for the breach of the covenant for quiet enjoyment are to be computed. Now it is quite plain that in the case of an ordinary contract for the sale of land, where the contract is silent as to title, the law implies a contract for title. This, however, would operate with the greatest possible hardship in many cases. For example, suppose a man had contracted to sell a thousand acres of land in Northamptonshire some years ago, and it turned out he had no title, and the purchaser were to say, I demand from you not merely the money I paid, and my expenses, but I demand compensation at the rate of 1,000*l.* per acre, because the land you sold me is of that value now, and I

ought to be put, not in the same position as that in which I should have been if I had never made the contract, but in the same position as if you had performed the contract. This would lead to such an enormous hardship, that, as it seems to me with very good reason, a rule of law has been firmly established, that in cases of ordinary contracts for the sale of land the purchaser is to be, not in the same position as if the vendor had performed his contract, but in the same position as if the contract had never been made. He is entitled, on the contract being broken, to a verdict for nominal damages, and he is also entitled to the money he may have paid, and the expenses he has incurred, and to nothing more. This is an anomalous rule. In all other cases, where a man gets damages for breach of a contract, he is to have, not such damages as will place him in the same position as if the contract had never been made, but such damages as will place him in the same position as if the contract had been performed. It is here sought to apply this anomalous rule, not to the case of a contract implied by law on a contract for the sale of land, but to an express contract running with land to the end of the term, a contract for quiet enjoyment. It seems to me that the same rule does not apply. There is but one authority, *Williams v. Burrell* (1), in this country, and that is plain. This question never seems to have arisen before, except in that case, and there the Lord Chief Justice of this Court, one of the most eminent legal authorities that ever presided on this Bench, not only says "the plaintiff is entitled to recover the value of the term," but he says, "it is too clear for argument," and the two learned counsel, Sir Thomas Wilde and Mr. Serj. Channell, who appeared for the defendant in that case, did not contest that that was not the true rule as to the damages. That being so, the law, so far as the authorities are concerned, is clear. I agree with what my Lord has said about the American authorities, and will not repeat it; it is sufficient to say they are equally preponderating and throw no weight into either scale. The only remaining question upon this portion of the case is this:—it being plain that in this case the plaintiff had only an *interesse termini*, will that take him out of the rule which

holds good in respect of a contract by which the lessee is bound, having entered into possession? I conceive that an *interesse termini* is a valuable marketable interest assignable at law, and that there is no substantial difference between a man who has a reversionary lease and a man who has a lease in possession. It seems to me that an *interesse termini* falls within the same considerations as a term upon which a man has entered. There is another point in this case on which possibly the plaintiff might be entitled to recover, viz., upon the doctrine laid down in *Hopkins v. Grazebrook* (6), where it is said that even in the case of an ordinary contract for the sale of land, if the vendor knew he had no title, the ordinary rule as to damages is to be applied. There are two observations to be made upon this. In the first place, *Hopkins v. Grazebrook* (6) has been spoken of with some dissatisfaction by the highest legal authority on this subject, Lord St. Leonards, and even if it be law, it may possibly apply only to cases of fraud: "*omnia presumuntur contra spoliatores*"; but in this case there is no doubt that the plaintiff and defendant have acted with the most perfect *bona fides*. On the other branches of the case, I agree with what has fallen from my Lord.

KEATING, J.—I am of the same opinion. There is no doubt that our judgment upon the main point that has been raised is a judgment on a point of very great importance, because, so far as the argument has disclosed, this point has never arisen before in any Court in Westminster Hall. The case nearest to it is the case of *Williams v. Burrell* (1), and the distinction between that case and the present no doubt is, that in that case there was an actual entry on the premises, whereas here, the interest of which the plaintiff has been deprived was an *interesse termini*. But an *interesse termini* is a well-defined interest, as pointed out in the note to *Took v. Glascock* (2), being described in pleading as an interest of which a party becomes possessed by virtue of the conveyance to him, which is assignable, and which therefore seems to me to be very different from a mere contract to sell land which is not carried into execution by anything like a conveyance. That appears to me to establish at once a very distinct line upon which we can safely act in the present case. It

appears to me that there is no sound distinction between the case of an *interesse termini* and the case of an estate where there has been an entry for a single day. The judgment of the Court therefore proceeds on that ground only. I may say as to the distinction supposed to have been established by *Hopkins v. Grazebrook* (6), that I do not in any way found my judgment upon the present occasion on anything supposed to have been established by that case. That case, as has been observed by my Brother Byles, has been remarked on with dissatisfaction by a great authority, and also it seems to me that the facts here do not raise the principle upon which I think the case of *Hopkins v. Grazebrook* (6) must have proceeded, viz., a suppression or misleading amounting to legal if not moral fraud. Upon these grounds I agree with the rest of the Court, and I also agree in the reduction of damages mentioned by my Lord.

SMITH, J.—I am of the same opinion on all the points. In regard to the main question, it is not intended by this decision to throw the slightest doubt on the rule established by the case of *Flureau v. Thornhill* (11), and the cases which follow it, that where the contract goes off for want of title, the vendee is entitled to recover no more than the amount he has paid and his expenses. That rule depends on considerations which seem to me to have no relation to the present case. It was said by Parke, B. in the case of *Robinson v. Harman* (7), speaking of *Flureau v. Thornhill* (11), "The case of *Flureau v. Thornhill* qualified that rule of the common law. It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding that if he fail to make a good title the only damages recoverable are the expenses which the vendee may be put to in investigating the title." Here the conveyance is not on condition that the vendor has a good title. The conveyance has taken place, the lease has been made, and has passed, as far as the lessor can, the right and title to the estate. The lessor has nothing more to do; the lessee may turn his right and interest into an estate at any time

by taking possession. Again, in contracts for the sale of real estate, the Courts have implied the contract respecting title, and annexed the particular consequences which attach to a breach of it. Here we are dealing not only with an actual conveyance or grant of an interest and title in the land, but with an express covenant that the lessee shall quietly enjoy the premises during the term. The first is the case of an executory contract to which the Court has annexed certain implied conditions; this is a case where the contract is fully executed, where the lessor has nothing more to do, and where he has entered into an express covenant. It seems to me, therefore, that the cases are entirely different, and that where a covenant of this description is broken, the covenantee is entitled, as in all other cases, to full compensation for the loss he thereby sustains. It is admitted that if the lessor had lived till the 5th of December 1864, and the lessee had entered, this case would be precisely the case of *Williams v. Burrell* (1), in which it was held that the value of the term was recoverable. It is said that the consequences of this judgment will be very serious; but it is well known that these covenants are limited to acts against which the parties are able to guard; and in this case, as in most others, the covenant is limited to the acts of the lessor. Here there is an express covenant that the lessee shall hold and enjoy the premises for the whole of the term without any let or molestation arising from the act of the covenantor, or any one claiming under him. The lessee is molested in consequence of an act of the covenantor, namely, his having made a marriage settlement. I agree, also, with the rest of the Court, that the facts do not seem to bring this case within *Hopkins v. Grazebrook* (6). It seems to me that here a right and title to the land has passed. There is an express covenant that the plaintiff shall have the land for the whole term; this covenant is broken, and the plaintiff is entitled to full compensation. With regard to the other points, it is plain the jury first considered what was the saleable value, and then gave 10% per cent. as for a compulsory sale. It does not seem to me that this can be likened to a compulsory sale. It is not a wilful or voluntary act on the part of the defendant; she is in equal misfortune with

the plaintiff. In the case of a railway company, they act for their own interests, and voluntarily take possession. And I agree with the rest of the Court, that the plaintiff is entitled to succeed on the demurrer to the second plea.

Judgment accordingly.

1865. } FARNWORTH AND ANOTHER
Feb. 10, 27. } v. HYDE.

Shipping—Insurance on Goods—Total Loss—Justifiable Sale—No Notice of Abandonment.

Where a stranded vessel was in danger of falling to pieces, and the captain sold her cargo consisting of timber, because the expense of forwarding it to its destination would have exceeded its value there, when so forwarded, the assured was held entitled to recover against the underwriter on a policy on such cargo, for a total loss without having given notice of abandonment.

Action against the defendant as underwriter for 150% of a policy of assurance on a cargo of timber shipped on board the vessel *The Avon*, on a voyage from Quebec to Liverpool, the value of which cargo was declared at 2,500% by indorsement on the policy. The plaintiff claimed a total loss. The defendant paid into court the sum of 34% 10s. as for a partial loss to the extent of 23% per cent.

The cause was tried, before Pigott, B., at the last Liverpool Summer Assizes. The evidence was, that *The Avon* sailed on her voyage on the 1st of December 1861, and in a few days afterwards got aground in the St. Lawrence, when, in consequence of the ice which surrounded her, it was impossible for her to proceed on the voyage, and she lay there on the ground during the winter. A survey was made of her, both on the 16th of December and afterwards on the 16th of January, when the surveyors advised that she should be sold; but Lloyd's agent at Quebec being of a different opinion, it was resolved not to sell her at that time. On the 29th of April the ice in the river began to break up, and then, on the 2nd of

* Decided in the Sittings after Hilary Term.

May, a further survey was made, when the surveyors recommended the ship to be sold where she lay, for the benefit of all concerned, and that, as it would be necessary, from her exposed position, to discharge the cargo before the vessel was taken off, the most prudent course would be to sell the cargo at the same time the vessel was sold. Accordingly, on the 7th of May, the vessel and her cargo were sold, and they were both bought by the same purchaser, Messrs. Julien; the ship for 450*l.* and the cargo for 750*l.* Messrs. Julien ultimately succeeded in bringing both ship and cargo to Quebec, where they sold the latter for 1,400*l.* No notice of abandonment was ever given to the underwriters, but evidence was given that the supposed value of the timber, if it had arrived in Liverpool, would have been 4,300*l.*, and the following estimate was put in at the trial of what would have been the expense of landing and carrying the timber to its destination, and its depreciation in value from having been so long in the water, viz.—

	£.
Cost of landing	350
Do. rafting it off to another vessel ...	700
Original freight	1,556
Extra freight	700
Rising freight (freight having risen between the time when <i>The Avon</i> was loaded, and the re-opening of the navigation after winter)	289
Deterioration, 12 per cent.	516

£4,091

This sum deducted from 4,300*l.*, the value of the timber, left 209*l.*, as to which the learned Judge left it to the jury to say whether anything was to be deducted for loss of quantity, and having also directed the jury that the question as to whether it was right to sell the cargo depended upon whether the cargo could have been practically carried, in a mercantile sense, to its destination, that is, whether the cost of bringing the cargo, added to the amount of depreciation, would have left any appreciable margin of profit, he left it to them to say, whether it was right to sell the ship, and also whether it was right to sell the cargo. The jury found both questions for the plaintiff, and the verdict was therefore entered for the plaintiff for a total loss.

In Michaelmas Term last, *E. James*, for

the defendant, obtained a rule nisi, to set this verdict aside and to enter it for the defendant, or a nonsuit, pursuant to leave reserved, on the grounds, first, that there was no evidence of a total loss; and, secondly, that there was no evidence of a partial loss exceeding the sum paid into court, or why the damages should not be reduced to the sum actually due as for a partial loss. Against this rule—

Brett, Mellish and *C. Russell* shewed cause.—The question here is, was the sale of the cargo justifiable and binding on the underwriter? If it was, the property passed to the purchaser and no notice of abandonment was necessary, as in the case of a constructive total loss. It is submitted that the evidence shews that the sale was necessary. The goods were on board a wrecked ship, and there is ample evidence that the ship was lost and that her sale was proper; then, what was the duty of the assured as to the cargo? He must have got the cargo out of the ship before he sold the latter; but that could not have been done (as the evidence shews) except at a great loss, and therefore, as recommended by the surveyors, it was better to sell the cargo and ship together. The element of risk in the present case distinguishes it from that of *Rosetto v. Gurney* (1). Taking into account the certain expenses and the indefinite risk, it is submitted that it was not a practicable thing to send the goods on. The sale was therefore necessary and justifiable. The loss was not a constructive, but an actual loss, and the omission to give notice of abandonment would have no effect on the right of the assured against the underwriter—*Roux v. Salvador* (2). [They also argued that if the plaintiff was entitled only to recover in respect of a partial loss, he was entitled to a larger sum than what had been paid into court. They also referred to the following authorities—*Reimer v. Ringrose* (3), *Knight v. Faith* (4), *Arnould on Insurance*, 1st edit. 2nd vol. page 973,

(1) 11 Com. B. Rep. 176; s.c. 20 Law J. Rep. (N.S.) C.P. 257.

(2) 3 Bing. N.C. 266; s.c. 7 Law J. Rep. (N.S.) Exch. 329.

(3) 6 Exch. Rep. 263; s.c. 20 Law J. Rep. (N.S.) Exch. 175.

(4) 15 Q.B. Rep. 649; s.c. 19 Law J. Rep. (N.S.) Q.B. 509.

2 *Phillips on Insurance*, section 1463, *Cambridge v. Anderton* (5), *King v. Walker* (6), *Stevens on Average*, 2nd edit. p. 40.

E. James and T. Jones, in support of the rule.—There is a great distinction between an actual and a constructive total loss. In the case of a ship, to make out an actual total loss, the ship must exist no longer as a ship, and must merely serve as materials for another ship. The present is a case of goods, and in order to make out an actual total loss of goods the specific character of the articles must be gone. In *Roux v. Salvador* (2) the hides would have altogether lost their character as hides had they been carried on. That would not have been the case with the timber here had it been sent on; there was no impossibility of the timber arriving in England as timber, through the deteriorated condition in which it was sold. It is because there is a possibility of recovery that the necessity of a notice of abandonment exists—*Arnould on Insurance*, 2nd edit. p. 1025. There is no difference between the present case and that of *Knight v. Faith* (4). The vessel here was repairable, and was so treated by the plaintiffs; notice, therefore, should have been given to the underwriters, and even if the vessel was totally lost, her cargo of timber existed in specie and ought to have been sent on, and the expense of so doing would have been only a partial loss. The sale here of the goods was not justifiable; it was not the case of perishable goods, and the authorities shew that it was not a question for the jury what a prudent owner uninsured would have done in the circumstances—*Reimer v. Ringrose* (3). The principle is the same for goods as for a ship, and if the goods can be sent on at an expense less than their value at their place of destination, it is then a case only of a partial and not a total loss, and here it is found that there would have been a margin of 209% over the expense of bringing the timber to Liverpool, so that in no way can the plaintiffs be entitled to recover for a total loss, and they have not shewn a partial loss beyond the sum paid into court. —[They cited 1 *Park*

on Insurance, 280 and 281, and *Stewart v. Steele* (7).]

Cur. adv. vult.

SMITH, J. now delivered the following judgment (8).—This action was on a policy on timber in the ship *Avon*, from Quebec to Liverpool. The *Avon* was frozen up in the passage down the St. Lawrence; and after survey, the ship and the cargo were sold by the master to one purchaser at separate sales. At the trial, the jury found in effect—first, that the sale of the ship was justified, on the ground that the cost of repairs would have been greater than the value of the ship when repaired; and, secondly, that it was right to sell the cargo, because it was not practically possible, in a mercantile sense, to have carried it to its destination; that is to say, because the cost of bringing the cargo, added to the amount of depreciation, would not have left any appreciable margin of profit to the owners. Upon these findings, the verdict was entered for the plaintiffs for a total loss; and the rule nisi to alter the verdict, and enter it for a partial loss, on the ground that there was no evidence on which the finding of the total loss could be supported, is now to be disposed of. Upon the first question, relating to the ship, we have to say whether there was evidence to support the finding that the sale was justifiable; and our answer is in the affirmative. We do not propose to state the evidence at length; but taking the report of the surveyors on the 2nd of May, and the statement of Julien, who purchased on the 7th of May, we think there was evidence for the jury that the ship was in imminent danger of destruction, and that a sale appeared to afford the only reasonable hope of saving any part of her value. Then, upon the second question, relating to the cargo, we have to say whether there was evidence to support the finding that it was right to sell it, because the cost of bringing the whole or any part of it to its destination would have exceeded the value thereof there; and our answer is again in the affirmative. We are not called on to say on which side, in our opinion, the balance of evidence inclines. If there was reasonable evidence

(5) 2 B. & C. 691.

(6) 33 Law J. Rep. (N.S.) Exch. 325.

NEW SERIES, 34.—C.P.

(7) 5 Sc. N.R. 927.

(8) This is the judgment of Erle, C.J., Keating, J., and Smith, J.

for the jury, the verdict is to stand; and we think there was. We have been embarrassed by the estimate appended in sequel to the Judge's notes, by which it appears that a comparison of the supposed cost of carrying the timber to its destination, with the supposed value thereof there, showed a possible profit of 209%. That estimate, taken alone, seems at first sight inconsistent with the finding in respect of the cargo; but, as this estimate is followed by the note that the jury might say if anything was to be deducted for loss of quantity, we consider that there was evidence to the effect that in the process of saving the timber there would probably be a loss of 25 per cent. in quantity; and, although it might follow that in the case of a diminution of the quantity of timber a deduction should be made for some of the estimated expenses, such as freight, in the like proportion, yet some of the expenses might be a constant quantity subject to no deduction, such as the expense of bringing labourers to make rafts. All this was for the jury; and we cannot say that there was not evidence to support the verdict. Then, upon the facts so found by the jury, is the plaintiff entitled to recover for a total loss? As the cost of carrying the cargo to its destination would have been greater than its value on arrival, it is not disputed that there would have been a constructive total loss, if notice of abandonment had been given—*Rosetto v. Gurney* (1) and *Reimer v. Ringrose* (3). But no such notice was given; and we are therefore to say what is the legal effect of this sale so found by the jury to have been right and necessary. We answer, that such sale supervening on the existing state of things was an actual total loss. A right sale passes the property; and when the property is passed from the assured by reason and in consequence of a peril insured against, the cargo is actually lost to him, as much as if it was destroyed. We are aware that the interest of the underwriter may at times be sacrificed by a sale, where the ship or cargo might have been saved wholly or partially, if notice of abandonment had been given; but we are also aware that, if a right sale, such as was here proved, is not held to be an actual total loss, it would be for the interest of the assured, where a notice of abandonment would make a constructive

total loss, to give a notice of abandonment, and leave the ship or cargo to perish unsold; and so the benefit of salvage from a sale would be lost by reason of the delay required for notice of abandonment. It must rest with the tribunal that has to deal with the questions of fact to guard against fraud and wrong; and the sale by the master ought not to be found right or valid, unless it was the best that could be done for the interest of those concerned, with reference to all the circumstances, including the time and manner of sale, and so, in a mercantile sense, necessary. The opposing considerations for and against requiring notice of abandonment where the property insured exists in specie are stated in *Roux v. Salvador* (2) and *Knight v. Faith* (4). In *Roux v. Salvador* (2) the policy was on hides from Valparaiso to Bordeaux. The ship was forced into Rio, and decomposition of the hides began by reason of a peril of the sea; and, because it was found not to be practicable to carry them to their destination, on account of the expected progress of decomposition, they were sold at Rio; and the loss was held to be total, although there was no notice of abandonment. The judgment is of a Court of error; it is powerful in reasoning and in learning; and, although it relates to a cargo of perishable goods in the course of decomposition, yet it extends to all cases where the adventure is brought to an end by a peril, and the goods are taken out of the power of the assured in the course of their voyage, either by physical laws working decomposition, or by political laws working detention and sale by a Court, or by circumstances of distress and danger creating what may be described as a mercantile necessity for a sale. The present case is an example of such circumstances, where a stranded ship was in danger of falling to pieces, and the expense and risk of rafting the timber, and reloading it on transshipment, and carrying it to its destination, was supposed to exceed the value of the cargo when there. Such a case seems expressly included in the part of the judgment in *Roux v. Salvador* (2), where it is said "that if goods damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, in the case of perishable goods, in such a state that they cannot in

safety be reshipped; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if, by any circumstances over which he has no control, they can never be brought to their original destination; in any of these cases the circumstance of their existing in specie at that forced termination of the risk is of no importance; the loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation, or other insuperable necessity." The judgment in *Knight v. Faith* (4) accords with *Roux v. Salvador* (2) in holding that there may be a total loss without abandonment, when there has been a right sale caused by urgent necessity, with full proof that everything was done *optima fide*, and for the real benefit of all concerned. There is an apparent difference of opinion in these two decisions as to the degree of imminent danger which should be held to be such urgent necessity as would justify a sale. But the sufficiency of the degree of danger is within the province of the jury, and it is useless to attempt to define a degree without a standard for measure. Lord Campbell observes on the degree of fraud; but those observations are relevant to the caution required from the jury, not to the law of the case when the necessity for the sale has been properly found. In *King v. Walker* (6) it was not necessary to decide that a valid sale from necessity was an actual total loss without any notice of abandonment, because it was there held that there was notice of abandonment; but the Court clearly sanctioned the rational principles respecting the effect of a valid sale from necessity laid down in *Roux v. Salvador* (2), saying, "It may not be easy to understand why notice of abandonment should be required in a case where the vessel cannot be made to sail except at an expense for repair which no reasonable man would incur, and is therefore properly and, in a sense, necessarily sold for the old materials." In these three cases all the authorities relating to abandonment are fully reviewed, and no useful object would be gained in repeating the review. We consider that we act on the principles laid down in *Roux v. Salvador* (2) in holding that the jury, finding that the sale was

right under the circumstances in evidence before them, found that there was an actual total loss with benefit of salvage, although the cargo existed in specie at the time of the sale, and there was no notice of abandonment. This is the judgment of the Chief Justice, my Brother Keating and myself. My Brother Byles assents to it, subject to the remarks upon the preliminary point above mentioned.

BYLES, J.—I agree with my Lord and the rest of the Court, that if the cargo had been sold by the captain of the vessel because the expense of forwarding it to its destination would have exceeded its value when so forwarded, it was rightly so sold; that a sale under such circumstances would have changed the property; and that there would then have been, not merely a constructive, but an actual total loss of the timber. I also agree that, in the case of such an actual total loss, no notice of abandonment is necessary. But in all cases of alleged constructive loss, where the captain takes upon himself to sell the ship, and still more so when he sells the cargo, the necessity of so doing ought to be strictly proved, and the jury are not at liberty to act on conjecture. It is plain, on the figures appended to the report of the learned Judge, that the expenses of bringing the cargo to Liverpool would not have equalled the value of the cargo, when brought there in its integrity, by 209%. The jury have found that there would have been a diminution of the quantity of timber to this extent, and therefore that the expenses would have equalled the value of the diminished cargo, which alone could have been actually brought home. But I can find no evidence on the Judge's notes to support this amount of deduction from the original quantity of the cargo. It may be that there would be some deduction; but it may also be that, if any, there would be a very much smaller deduction. Again, on the assumption that such a diminution of quantity were proved, the expenses of bringing home the cargo should be calculated on the diminished quantity, but they are all calculated on the larger quantity of timber contained in the whole original cargo. It is possible (but I see no evidence to prove it) that the expenses of landing and rafting would be the same whether

any portion of the cargo were lost or not. This might depend on the period at which the loss of quantity took place, of which there is no evidence that I am aware of. But, assuming the landing and rafting to be constant quantities, yet the freight, both original and additional, is at so much per load, and is calculated by the assured on the quantity contained in the entire cargo. But the freight actually payable for sending a smaller quantity would be less. Therefore, in calculating the expense of sending the diminished cargo home, too much is charged for freight. But any deduction from the charge for freight makes the sale unlawful, and indeed destroys the claim for a constructive total loss; for it does not appear on the figures that, even if the freight could be charged on the original quantity, it would do more than bring the expenses of sending home the cargo up to the value of the cargo so sent home; no excess of charge beyond the value of the cargo is shewn. I much regret that on this preliminary question I am unable to concur with the rest of the Court; but though I fear I must be in error, I do not feel at liberty to yield my opinion; for, if it be correct, the plaintiff will still be entitled to hold his verdict to the extent of a partial loss, the amount of which loss is by agreement to be settled by competent parties. And on a careful consideration of the evidence, I feel strongly that this result would be more likely to advance the real justice of the case than the verdict as it now stands.

Rule discharged.

[COUNTY COURT APPEAL.]

1865. } LEE, *appellant*, v. RILEY,
May 5. } *respondent*.

Negligence—Damage through Neglect to keep up Fences—Horse straying—Remote-ness of Damage.

Through the defect of a gate which the defendant was bound to repair, the defendant's horse got out of the defendant's farm into an occupation road and strayed into the plaintiff's field, where it kicked the plaintiff's horse:—Held, that the defendant was liable for the trespass by his horse, and that it was

not necessary for the maintenance of the action to prove that the defendant's horse was vicious and that the defendant was aware thereof.

Held also, that the damage the plaintiff had sustained by the injury to his horse was not too remote, but was sufficiently the consequence of the defendant's neglect to be recoverable in such action.

The case stated that a plaint was entered in the county court of Yorkshire, holden at Halifax, by the plaintiff, the now respondent, on the 10th of November 1864, whereby he sought to recover the sum of 22*l.*, and that the following was a copy of the particulars attached to the summons served upon the defendant—

“Charles Lee to Samuel Riley.

“Nov. 8, 1864.

1864, Oct. 26, one black horse . . . 22*l.*”

The action was brought to recover the sum of 22*l.*, the value of a horse belonging to the plaintiff, which had its leg broken in the night time. The horse had been left safe and sound in the plaintiff's field on the evening of the 25th of October last, and was found the following morning standing there on three legs, the fourth having been broken, as was alleged, by the kick of a horse of the defendant, the now appellant. The plaint was tried before a jury, and it appeared in evidence that the plaintiff and the defendant occupied two adjoining farms, and that an occupation road extended from a highway through the defendant's farm, of which it formed part, into the plaintiff's farm, where it formed part of the plaintiff's farm, and it terminated some two or three fields' lengths within the farm. That there was a gate across the occupation road at the point where the two farms adjoined, which belonged to the defendant to repair, and had been erected by the occupier of his farm immediately preceding him some seven or eight years ago, and that being broken in two pieces, the plaintiff had given notice to the defendant to repair it about three weeks before the occurrence which gave rise to the action, and had apprised him that it was his duty to repair it. It appeared further that the defendant's horses, and particularly a large grey mare of his, had on several occasions passed through this gateway along the plaintiff's

portion of the occupation road, and thence through a small gateway opening from the occupation road into a meadow field of the plaintiff, called the Rye Bank, and thence through a hedge into another field of the plaintiff, called the Pasture, being the field in which the plaintiff's horse had been left sound and well on the evening of the day in question. That the last-mentioned gateway was a small one (half a yard wide) for the plaintiff's cows to enter the close called the Rye Bank from the occupation road, and that there was a gate raised against the opening and stones placed against it on the field side to support it, but that if a horse pushed his breast against it the gate would fall down, and it was in evidence that the defendant's horses, including the grey mare, had on several previous occasions pushed the gate down, and entered the plaintiff's land through the gap. It further appeared that on the night before the horse was found lamed this gate had been fastened by one of the plaintiff's sons. Further, that the hedge separating the two fields of the plaintiff (the Rye Bank and the Pasture) had been of sufficient strength during all the summer previous to prevent the plaintiff's cattle from passing out of one field into the other. This gate was found thrown down, and recent footmarks of a horse were observed on the morning of the 26th of October on each side of it, and traced across the close called Rye Bank and through the hedge into the field called the Pasture; and in the latter field, close to where the plaintiff's horse was found standing on three legs, strong marks of horses "scuffling" were observed, and patches of black and of grey hair were found at the same spot corresponding with the colour of the plaintiff's horse, which was black, and that of the defendant's grey mare. The off hind-leg of the plaintiff's horse was broken and the horse was obliged to be killed, and on a post-mortem examination the bone exhibited an appearance of having been struck, and a piece of it knocked out by a violent blow. Such shoes as the defendant's mare had on, it was in evidence, might have caused it. About twelve o'clock the same day the plaintiff's sons went to the defendant's stable and there found his servant fomenting the off hind-leg of the defendant's

grey mare with hot water. Hair was found knocked off in several places, and the colour of the mare corresponded with that of the patches of grey hair found in the field.

The defendant's mare was a large powerful animal of seventeen hands and a half high, and its shoes had attached to them large strong "caulkens," formed by the shoes being turned down at the heels. The plaintiff's horse was about fifteen hands high. There was no evidence of the defendant's mare being a vicious one. No evidence was given on the part of the defendant, except as to the value of the plaintiff's horse.

A letter was put in, dated the 28th of October 1864, from the plaintiff's attorneys to the defendant, charging the death of his horse to have been occasioned by a kick from the defendant's mare, and claiming compensation, to which no answer had been returned. On the close of plaintiff's case the attorney for the defendant submitted there was no evidence to go to the jury, and directed the Judge's attention to the case of *Cox v. Burbridge* (1).

The Judge decided there was evidence for the jury, and that it was not necessary for the plaintiff to prove that the grey mare of the defendant was a vicious animal; that there was a distinction between the two cases; that it might not be in the ordinary course of nature for a horse to kick a child, but that it was so for one horse to kick another, particularly a strange one when they met in a field.

The Judge, in summing up to the jury, told them that the case depended mainly on circumstantial evidence. That there was no direct evidence bringing the plaintiff's horse in contact with the defendant's, and shewing that the defendant's mare caused the injury, but that he thought there was sufficient evidence for them to take the case into consideration, and in the exercise of their judgment to consider whether sufficient ground of complaint had been made out by the plaintiff. That the plaintiff was bound to furnish them with reasonable evidence from which they might presume that the defendant's mare was the cause of the accident. That was one

(1) 32 Law J. Rep. (N.S.) C.P. 89.

question; but in order to make the defendant liable, supposing that his mare had done the mischief, it must be shewn that the defendant's mare was wrongfully in the plaintiff's land. That if the defendant was bound to repair the gate, it was also his duty to keep his cattle from trespassing on other people's land. The Judge directed the attention of the jury to the fact that no evidence had been offered on the part of the defendant as to where the grey mare was on the night in question, and he told them that the points for consideration were first of all and mainly,—did the jury think the circumstances given in evidence were sufficient to satisfy them that the defendant's mare caused the death of the plaintiff's horse? If so, then whether the defendant was liable. His mare would become a trespasser as soon as it passed the gate leading to the plaintiff's portion of the occupation road. The main difficulty was, whether there was sufficient evidence to lead the jury to a conclusion that it was the defendant's mare that did the mischief. It was entirely a matter for their consideration. As to whether the defendant was liable, supposing the plaintiff did not give evidence of notice to the defendant that his mare was a violent animal, the Judge said, that he was of opinion that had nothing to do with the present question. He added, that if the defendant's mare got into the plaintiff's field, whether the plaintiff's horse began to kick first or not did not affect the question, if the defendant's mare was a trespasser. It was for the jury to consider, first of all, whether the death of the plaintiff's horse was caused by the defendant's mare; secondly, whether the defendant's mare was trespassing, and then the amount of damages. The jury found a verdict for the plaintiff; damages, 14*l*.

The following were the grounds of appeal:

1. That there was no evidence to support the claim of the plaintiff.

2. That the Judge of the said court was wrong when, at the end of the case for the plaintiff, he determined that it was not necessary for the plaintiff to prove that the grey mare of the defendant was a vicious animal.

3. That the Judge of the said court was wrong when, at the end of the case of the

plaintiff, he determined that there was evidence for the jury in support of the case of the plaintiff, if the plaintiff proved that the grey mare of the defendant had committed a trespass by entering the fields of the plaintiff, and had, whilst committing a trespass, kicked the horse of the plaintiff.

4. That the Judge of the said court misdirected the jury at the trial, and particularly when he observed that no evidence had been offered on the part of the defendant as to where the grey mare was on the night in question. Further, when he said that, whether the defendant's mare was a violent animal or not, he was of opinion that had nothing to do with the question; nor, if the defendant's mare got into the plaintiff's fields, whether the plaintiff's horse began to kick first or not.

Maule, for the appellant.—Assuming that the defendant's mare did trespass into the plaintiff's field, and that in a kicking match between the mare and the plaintiff's horse the latter got injured, still the defendant would not be liable unless he knew that his mare had a vice of this kind; and there was in this case no evidence of the mare being vicious at all. The case of *Cox v. Burbridge* (1) is directly in point. There the defendant's horse had strayed on to a highway in which the plaintiff, a child, was playing, and without any fault on the part of the child the horse kicked it in the face and seriously injured it, and the defendant was held not to be liable unless he knew the horse was of a vicious temper. The county court Judge distinguished that case on the ground that though horses have not a natural tendency to kick children, they have to kick one another. That is not so; people are not in the habit of considering horses to be of that vicious disposition, and at races and on other occasions where horses are brought together, they are frequently left with little or no barrier between each other, and it is seldom found that any injury happens from that practice.

[KEATING, J. referred to *Read v. Edwards* (2).]

There the owner of the animal was aware of its peculiar mischievous disposition, and yet neglected to restrain it.

(2) 17 Com. B. Rep. N.S. 245; s. c. *ante*, C.P. 31.

Horace Smith, for the respondent.—The evidence shews that the injury complained of arose from the defendant neglecting to repair the gate, which was part of the fence of his field, and the authorities establish that such a damage as the one in question is not too remote, and that, as it arose in consequence of the defendant's neglect of duty to repair his fences, he is liable for it in this action. In *Star v. Rookesby* (3) the plaintiff had declared that he was possessed of a close adjoining to the defendant's, and that the tenants and occupiers of that close had time out of mind made and repaired the fence between the plaintiff's and the defendant's close, and that for want of repair the defendant's cattle came into the plaintiff's close, and it was held that either trespass or case would lie: trespass, because it was the plaintiff's ground and not the defendant's; and case, because the first wrong was a nonfeasance and neglect to repair, and that omission was the gist of the action, and the trespass was only consequential damage. So in an *Anonymous case* (4), which was an action on the case for not repairing fences, *per quod una equa* of the plaintiff went through a gap and fell into a ditch, there was no question raised that the action did not lie; and in *Powell v. Salisbury* (5), where the plaintiff had declared in case against the defendant for not repairing his fences, *per quod* the plaintiff's horses escaped into the defendant's close and were there killed by the falling of a haystack, it was held that the damage was not too remote, and that the action was maintainable. The case of *Rooth v. Wilson* (6) is a further authority to the same effect. The plaintiff was entitled to the free and safe use of his own field, but that right the defendant interfered with by his neglect to repair the fences he was bound to repair, and he is liable to the damage which arose from such neglect. This was not a case in which it was a question whether the horse which did the injury was vicious or not; if the two horses were in play, and so the kick was given, still the action would lie. The case resembles that of *Powell v.*

Salisbury (5), and not that of *Cox v. Burbridge* (1).

Maule, in reply.—In the cases cited for the respondent there was no question as to the liability of the defendant, but merely whether the damage sought to be recovered was the consequential result of the trespass complained of. That is not this case; here it is whether the defendant had such knowledge of the vicious character of his horse as to make him liable at all.

ERLE, C.J. — In this case I am of opinion that our judgment should be for the respondent. The action is, in substance, either an action of trespass for entering the plaintiff's close, and doing damage there to his horse, or an action on the case for allowing the fences which the defendant was bound to repair to get out of repair, by reason of which the defendant's mare got out of his field into the plaintiff's field, and did the damage complained of. In the county court there are no pleadings, and the cause of action is stated in the plaint to be merely "one black horse, 22*l.*" Still the evidence shews what was the nature of the cause of action, and what the county court Judge had in his mind when he used the words complained of. The evidence shews that through the defect of fences, which the defendant had to repair, his mare got out of his farm into the occupation road, and passed into the plaintiff's field, where his horse was, and that afterwards there had been a conflict between the two horses, in which the plaintiff's horse was killed. The counsel for the defendant has contended that the defendant cannot be made liable for this, unless the defendant's mare was a vicious horse, and the defendant knew that it was so; and he has referred us to the case of *Cox v. Burbridge* (1), to shew that, where damage is done by a tame animal, the owner is not liable, unless the animal has a ferocity which is known to its keeper. I am of opinion, however, that it was not the duty of the county court Judge to lay that down to the jury in this case, because the point which has been made by Mr. Maule would not avail him here, as this is an action for a trespass, in respect of which the defendant is clearly liable to some damage, and the only question is as to the remoteness of the damage. Therefore, I think it was not

(3) 1 Salk. 335.

(4) 1 Vent. 264.

(5) 2 You. & J. 391.

(6) 1 B. & Ald. 59.

necessary for the learned Judge to have left the question to the jury, whether the defendant's horse was ferocious, and whether the defendant knew of that vice, because the nature of the injury was not dependent on the vice of the horse, or the defendant's knowledge of such vice ; but whether such animal strayed, through the defective state of the defendant's fences, into the plaintiff's field, and there did the damage complained of. The present case falls, I think, within the category of those which have been cited for the plaintiff, and not of those depending on the ferocious disposition of the animal, and knowledge of such character by its owner. The main objection being thus disposed of, it is sufficient to say that the others are untenable, for I think there is abundant evidence that it was the defendant's mare which did the injury.

BYLES, J.—I am of the same opinion. Mr. Maule complains that the jury were not told that the plaintiff was bound to have proved that the defendant's mare was vicious, and that the defendant knew of it. I do not think that this was necessary. The case on the part of the plaintiff was, that the defendant's mare, which was a strong animal, with particular shoes on, of a heavy character, had made the marks found on the plaintiff's horse. Now might not such an animal as this of the defendant's have produced the injury complained of, such injury being the proximate consequence of the defendant's negligence? I think it might, and it is sufficient to say that the proximate cause of it was the defendant's neglect to keep up his fences.

KEATING, J.—I am of the same opinion, and on the ground that the damages sought to be recovered were not too remote.

SMITH, J.—It is said that the plaintiff ought not to recover, because he did not prove that the horse was vicious; but it seems to me that it was not necessary for him to prove this. It is enough that the accident which occurred arose from the defendant's neglect, and was the natural consequence of two horses meeting under the circumstances stated in this case. I do not think the damages are too remote.

Judgment for respondent.

1865. } MATTHEY, administratrix, &c.,
May 5, 10. } v. WISEMAN AND ANOTHER.

Foreign Attachment—Mayor's Court of London—Proceedings after Death of Defendant—Impeaching Judgment of the Mayor's Court—Debt not attachable.

Proceedings by foreign attachment in the Mayor's Court of the city of London, commenced after the death of the creditor of the garnishee, whose debt is attached, are null and void.

In an action by an administratrix for a debt due to M, the intestate, the defendants pleaded to the further maintenance that the debt sued for had been attached in the Mayor's Court, in a suit instituted by K. against the intestate, that a regular judgment had been obtained by K. in such court, and that execution had issued thereon against the defendants as garnishees, and that after the commencement of this action the defendants as garnishees paid the said debt to K. for the purpose of satisfying such judgment. Replication, that at the time of affirming the plaint in the Mayor's Court, M, the intestate, was dead. Rejoinder, that at the time of affirming the said plaint, no one had administered to the estate of M, the intestate, but that before execution was had by K. the plaintiff took out letters of administration to the estate of K, and might, according to the practice of the Mayor's Court, and the custom of the city of London, have appeared to the said plaint and defended the same, or might have dissolved the said attachment and defended the said plaint :—Held, on demurrer, that the plaintiff was not estopped as against the defendants from shewing the nullity of the proceedings in the Mayor's Court, and that the defendants could not avail themselves of the payment to K. as any defence to the action.

Quære—whether the debt sued for by the administratrix was attached at all, inasmuch as there was no debt due to the intestate at the time of the attachment as the intestate was then dead.

This was an action by the administratrix of Frederick Matthey, deceased. The declaration contained counts for money had and received by the defendants to the use

of the said F. Matthey, and for money due on accounts stated.

The defendants pleaded, thirdly, to the further maintenance of the action, a plea which, after setting out at length the custom of foreign attachment in the city of London, stated that Charles Kelson, Vincent Briscoe Tritton, Edward Pakenham Alderson, Peter Godfrey Chapman, and Earnest Thomas Hankey, trading under the style or firm of "Messrs. Kelson, Tritton & Co.," and thereafter called "Messrs. Kelson, Tritton & Co.," before the commencement of this action, to wit, on the 3rd of March 1863, in their own proper persons came into the Court of our Sovereign Lady the Queen, before the Mayor and Aldermen of the city of London, in the chamber of Guildhall, of and within the said city, according to custom, and then and there affirmed a certain plaint against F. Matthey, now deceased, in a plea of debt upon demand of 2,183*l.* 17*s.* 9*d.* of lawful money of Great Britain, and the same Messrs. Kelson, Tritton & Co. then, in the same court, according to such custom, found pledges to prosecute such suit, to wit, John Doe and Richard Roe, and then and there appointed in their stead John Michael Pearson, their attorney, against the said F. Matthey, in the plea of the said plaint, according to such custom, and it was granted to them, &c.; whereupon, at the petition of the said Messrs. Kelson, Tritton & Co., then and there made to such court by their said attorney, and by virtue of such plaint, it was then and there commanded by the said Court to Christopher Fitch, then being one of the serjeants-at-mace of such Court, that he, according to such custom, should summon by good summoners the said F. Matthey to appear at the same court so holden before the Mayor and Aldermen of the said city, in the chamber of the Guildhall of the said city, to answer the said Messrs. Kelson, Tritton & Co. in the plea in such plaint specified, and that the said C. Fitch should return and certify what he should do by virtue of the said precept. And afterwards, at the same court, the said C. Fitch, according to such custom, returned and certified to the same court, that the said F. Matthey had nothing within the said city or the liberties thereof whereby he could be summoned,

nor was he to be found within the same, and thereupon the said Frederick Matthey was then and there at the same court solemnly called and did not appear, but made default, and thereupon afterwards and before the commencement of this action, to wit, &c. at the same court, it was alleged by the said Messrs. Kelson, Tritton & Co., by their said attorney, that the said James Wiseman and William Wilson, the now defendants, owed to the said F. Matthey 2,183*l.* 17*s.* 9*d.* in monies numbered, as the proper monies of the said F. Matthey, and then detained the same in their hands and custody. That they, the now defendants, at the time when it was by the said Messrs. Kelson, Tritton & Co., by their said attorney, so alleged as last aforesaid were and were found within the said city and within the jurisdiction of the same court, and thereupon the said Messrs. Kelson, Tritton & Co., by their attorney, then and there prayed process according to such custom to attach the said F. Matthey by the said 2,183*l.* 17*s.* 9*d.* so being in the hands and custody of the now defendants, so that the said F. Matthey might appear at the next Court to be held before the Mayor and Aldermen of the said city in the chamber of the Guildhall of and in the said city, to answer the said Messrs. Kelson, Tritton & Co. in the plea in such plaint specified. Whereupon, at their petition, it was then and there commanded by such Court, before the commencement of this action, to the said serjeant-at-mace and minister of the said court, that he, according to such custom, should attach the said F. Matthey by the said 2,183*l.* 17*s.* 9*d.* so being in the hands and custody of the now defendants as aforesaid, and the same in their hands and custody defend and keep according to such custom, so that the said F. Matthey might appear at the then next Court to be holden before the said Mayor and Aldermen, &c., according to such custom, &c.

The plea in like manner set out fully the rest of the proceedings in the Mayor's Court, viz., the warning to the now defendants by the said serjeant-at-mace not to part with the said 2,183*l.* 17*s.* 9*d.* without licence of the Court, but to keep the same so that the said F. Matthey might be attached thereby, that he might appear at the next court to answer the said Messrs.

Kelson, Tritton & Co. ; the return by the said serjeant-at-mace that he had attached the said F. Matthey by the said 2,183*l*. 17*s*. 9*d*. in the hands of the now defendants, so that he might appear at the next court to answer, &c. the first, second, third and fourth defaults of the said F. Matthey, after having been solemnly called, all which defaults were duly recorded according to the said custom ; the warning to the now defendants by the said serjeant-at-mace to appear at such court, &c. to shew cause why the said Messrs. Kelson, Tritton & Co. should not have execution of the said 2,183*l*. 17*s*. 9*d*. ; the return by the said serjeant-at-mace that he had so warned them ; the default of the now defendants to appear at such Court after being solemnly called ; the judgment of the said Court that the said Messrs. Kelson, Tritton & Co. should have execution of the said 2,183*l*. 17*s*. 9*d*. in monies so attached by sufficient pledges to be given by the said Messrs. Kelson, Tritton & Co. to restore to the said F. Matthey the said monies so attached if the said F. Matthey within a year and a day then next ensuing should come into the said court and disprove and avoid the same debt ; the finding of such pledges by the said Messrs. Kelson, Tritton & Co. ; and the suing out by the said Messrs. Kelson, Tritton & Co. and delivery to the said serjeant-at-mace of a precept for taking the now defendants in execution to satisfy the said Messrs. Kelson, Tritton & Co. 2,183*l*. 17*s*. 9*d*. attached as aforesaid.

The plea then averred that thereupon the now defendants, afterwards, and after the commencement of this action, and whilst the said precept was in the hands of the said serjeant-at-mace for the purpose of being executed—to wit, &c., being then within the city of London, and the jurisdiction of the said Court, were then and there forced and obliged, and then and there necessarily did, for the purpose of satisfying the said judgment, pay to the said Messrs. Kelson, Tritton & Co. the said sum of 2,183*l*. 17*s*. 9*d*., according to the exigency of the said precept, and thereby the said Messrs. Kelson, Tritton & Co. then and there, according to the custom of the said Court, had execution of the said debt of 2,183*l*. 17*s*. 9*d*. against the now defendants, the said garnishees, according to the tenor

of such judgment in that behalf given, and thereby the said execution then was executed, as by the record and proceedings thereof remaining in the chamber of the Guildhall of the city of London aforesaid more fully appears ; that the said 2,183*l*. 17*s*. 9*d*. so attached, and of which the said Messrs. Kelson, Tritton & Co. had execution by virtue of such judgment, accrued due from the now defendants to the said F. Matthey, and the said F. Matthey's cause of action in respect thereof, and the cause of action of the now plaintiff, as administratrix of the said F. Matthey, in respect thereof, arose within the city of London, and the jurisdiction of the said Court, and not elsewhere, and that the said 2,183*l*. 17*s*. 9*d*. were so attached before, and paid after, the commencement of this suit ; that the said execution was duly executed in the said city, according to the custom of the said city, and that the said judgment and execution are still in force, and not in the least by the plaintiff otherwise disproved or avoided ; and that the said sum of 2,183*l*. 17*s*. 9*d*. claimed by the plaintiff as such administratrix of the said F. Matthey, deceased, in this action, is the very same and identical sum of 2,183*l*. 17*s*. 9*d*. so attached and taken in execution by the said Messrs. Kelson, Tritton & Co., by virtue of the judgment aforesaid.

Replication to the third plea : That before the time of the affirming of the said plaint the said F. Matthey died and he was then dead.

Rejoinder to such replication : That the said F. Matthey, at the time of his death, was indebted to the said Kelson, Tritton & Co. in 2,183*l*. 17*s*. 9*d*. for money lent by the said Messrs. Kelson, Tritton & Co. to the said F. Matthey in his lifetime, and for money paid by the said Kelson, Tritton & Co. for the use of the said F. Matthey in his lifetime and at his request, and for money found to be due from the said F. Matthey in his lifetime, upon accounts stated between the said Kelson, Tritton & Co. and the said F. Matthey ; and that, at the time of the affirming the said plaint in the said Mayor's Court, as in the said third plea mentioned, neither the plaintiff nor any other person had administered to the estate and effects of the said F. Matthey, deceased,

and that the said Kelson, Tritton & Co. were entitled to recover against the estate of the said F. Matthey, deceased, the said sum of 2,183*l.* 17*s.* 9*d.*; and that they, the said Kelson, Tritton & Co., affirmed the said plaint in the said Mayor's Court, as in the third plea mentioned, according to the custom of the said city of London; and the plaintiff afterwards, and before execution was had of the said sum as in the third plea mentioned, took out letters of administration to the estate and effects of the said F. Matthey, deceased, and had notice of the premises; and thereupon the plaintiff, as such administratrix as aforesaid, afterwards, and before execution was had of the sum as aforesaid, might, according to the practice of the said Mayor's Court, and the customs of the said city of London, have caused an appearance to be entered to the said plaint of the said Kelson, Tritton & Co., and might have defended the same, or she might, according to the practice of the said Mayor's Court and the custom of the said city of London, have dissolved the said attachment in the third plea mentioned, and defended the said plaint so affirmed by the said Kelson, Tritton & Co., against the said F. Matthey, deceased; and that all proceedings were had in the matter of the said plaint, and the said attachment, as in the third plea mentioned, according to the practice of the said Mayor's Court, and the custom of the said city of London, and in pursuance thereof. Demurrer thereto and joinder in demurrer.

Hannen (May 5), in support of the demurrer.—The pleadings raise the question, whether the custom to sue a dead man by the process of foreign attachment in the city of London is a valid custom. *Pulling on the Laws and Customs of London*, 2nd edit. p. 189, shews that the original object of the process was to compel the defendant's appearance, though in actual practice the defendant is not really served with any process or notice at all. And in *Andrews v. Clerke* (1), it was agreed by all, that a foreign attachment in London is to no other purpose but to compel an appearance of the defendant in the action; for if he appear within a year and a day and put in bail to the action the garnishee is discharged. At the

time of its origin the proclamations which were made were well known in the city, and the mode of summoning must originally have been something equivalent to notice, and although now the summons may have become merely a matter of form it is still an essential part of the proceedings, and there must therefore be a living defendant against whom the plaint can be affirmed in the Lord Mayor's Court. The case of *Fisher v. Lane* (2) also establishes that in proceedings on foreign attachment, the creditor of the garnishee must be summoned or have notice (though it is alleged to be the custom of London to give no notice), otherwise the judgment against the garnishee will be erroneous, and the money paid or levied in execution of it will not discharge the garnishee of his debt to his creditor.

Henry James (*Gates* with him), contra.—According to the custom and practice in the Mayor's Court, if the defendant has goods in the city within the jurisdiction of the Court capable of being attached, it is not necessary that the defendant himself should be within the jurisdiction. The defendant is never served with any notice of the proceedings, but a summons is issued and entered on record and the goods are seized; but it is competent for the defendant at any time during a year and a day from the time of the judgment to appear and put an end to the attachment. The whole process is a kind of bail or security for the defendant's rendering to the jurisdiction of the Court, and the time which is required to elapse before the judgment is entered up and complete is for the purpose of giving the garnishee the opportunity of communicating with the defendant on the subject of the attachment. In the present case there is a judgment of a proper Court of record and execution issued under it against the now defendants as garnishees; they had no means of contesting that judgment, and were bound to pay under it to the parties to whom they have paid this money. It is also admitted, on the present pleadings, that the plaintiff, the administratrix, had notice of the proceedings in the Mayor's Court, and might, according to the practice of the Mayor's Court, have dissolved the attachment, but that she took no steps to do so.

(1) Carth. 26.

(2) 3 Wils. 297.

Under these circumstances it is submitted that the judgment of the Mayor's Court was a good protection to the now defendants who so paid under it, and they cannot be compelled to pay the debt over again to the plaintiff in this action. It has been held, that money paid by a garnishee under a judgment of the Mayor's Court is a good discharge of the debt due from the garnishee to the creditor, although the Mayor's Court had no jurisdiction over such debtor—*Harrington v. Macmorris* (3), *Banks v. Self* (4), *De Haber v. the Queen of Portugal* (5), and *Westoby v. Day* (6). In that last case Lord Campbell, C.J., in delivering the judgment of the Court, said, "This replication allows that the plea replied to is good within the custom of foreign attachment in the city of London, and raises the question, whether the garnishee after a regular judgment and execution against him, having paid the debt, may be compelled to pay it a second time on proof in this suit that the debt did not arise within the jurisdiction of the Mayor's Court. The affirmative would often work great hardship and injustice to the garnishee, who may be entirely ignorant of the origin of the debt sued for, who has no means of contesting the debt, except by appearing and putting in bail to the original action, and who may be wholly unable to prove that the debt arose out of the jurisdiction of the Mayor's Court, although the fact be so. . . . In the recent case of *De Haber v. the Queen of Portugal* (5) we expressed an opinion that the process of foreign attachment can only be duly resorted to where the cause of action arose within the jurisdiction of the Court from which it issues. But we said, 'the garnishee is safe by paying under the judgment of the Court;' adding, 'the objection that the cause of action did not arise within the jurisdiction of the Court, if properly taken, must prevail.' But in the absence of fraud, the objection as against the garnishee comes too late after he has paid the debt to the plaintiff below under a regular judgment." In the present case there is no averment

that the now defendants had notice of the death of the intestate Matthey.

[SMITH, J.—The bringing of the present action was notice to them of the death before they paid the money.]

But between the judgment and execution it does not appear that they had any means of appearing and setting aside the attachment.

Hannen, in reply.—The case of *Westoby v. Day* (6) is distinguishable from the present, as there was nothing to impeach the proceedings on the face of them. But here the original defendant being dead before the proceedings were commenced, there was no debt which could be attached, and the object of the proceedings, which is to enable the garnishee to communicate with the defendant so that he might come in and set up what defence he might have to the action, could never be effected. It is stated in *Masters v. Lewis* (7), that "garnishment cannot be but where the garnishee is liable to the action of the defendant; for the garnishee may plead all things that the defendant might have pleaded." Now here, where the defendant was dead, there was no debt to the defendant for which the garnishee was liable. 2 *Bell's Commentaries on the Laws of Scotland*, p. 72, shews why the arrestee cannot object to the claim of the arrester, is because he has no right or interest to take up such a defence, but it is competent for him to shew that he is not a debtor to the arrester's debtor.

Curr. adv. vult.

SMITH, J. now (May 10) delivered the judgment of the Court (8) as follows: In the case of an action brought by the administratrix of Frederick Matthey, the defendants pleaded to the further maintenance of the action, that the debts sued for had been attached in the Lord Mayor's Court, in a suit instituted by Kelson and others against the intestate; the plea sets out the proceedings in the Lord Mayor's Court, and alleges that, after the commencement of this action, Kelson & Co. had execution of the debt against the defendants, and that they, as garnishees, paid it. To this plea the plaintiff replied, that, at the time of

(3) 5 Taunt. 228.

(4) Ibid. 234, n.

(5) 17 Q.B. Rep. 171; s.c. 20 Law J. Rep. (N.S.) Q.B. 488.

(6) 2 El. & B. 605; s.c. 22 Law J. Rep. (N.S.) Q.B. 418.

(7) 1 Lord Raym. 56.

(8) Erle, C.J., Byles, J., Keating, J. and Smith, J.

affirming the plaint in the Mayor's Court, F. Matthey was dead. The defendants, by their rejoinder, in substance allege, that when the plaint was brought in the Mayor's Court no one had administered to the estate of Matthey, but that, before execution had, the plaintiff administered, and might by the custom have appeared in the Mayor's Court and dissolved the attachment. To this rejoinder the plaintiff demurred, and we think that she is entitled to judgment on this demurrer.

It is admitted on the pleadings that all the proceedings in the Lord Mayor's Court took place after the death of the nominal defendant in that suit. It could not be contended, with any show of reason, that the custom alleged in the plea justified the prosecution of a suit against a dead man as if he were living, or that a custom to that effect, if alleged, would be good. Although it has been held that actual notice of the suit in the Mayor's Court need not be given to the defendant, certain proceedings must be taken, which by intendment are considered equivalent to notice, and which are essential to the validity of the attachment. These proceedings, the purpose of which is to compel the appearance of the defendant, are all averred in the plea to have been duly had and taken. But it appears to us they were all null and vain when there was no defendant to be affected by them. The principal contention of the defendants was, that the judgment of the Mayor's Court was conclusive, and that the garnishees having paid the debt under the attachment, the judgment, *quoad* them, could not be impeached. We think this contention is not well founded. No doubt the Lord Mayor's Court is a court of record, but it is an inferior court, and its jurisdiction may be questioned. The case of *Westoby v. Day* (6) decided, that in an action against garnishees to recover a debt paid by them under a process of foreign attachment in the Lord Mayor's Court, it could not be averred by the plaintiff (the defendant in the Mayor's Court) that the debt did not arise within the jurisdiction of that Court. But in that case the plaintiff, *Westoby* (the defendant in the Mayor's Court), might have appeared and raised the objection in the Mayor's Court by a plea to the jurisdiction, and, not having done so, it was held that *he*, when

suing in the superior courts the garnishees who had paid the debt under attachment, could not, as against them, impeach the judgment. The present case seems to us to be distinguishable from *Westoby v. Day* (6), on the broad ground that in this case there was no defendant in the Mayor's Court who could appear or plead. The suit was commenced and prosecuted against a non-existing defendant, and the judgment cannot, as it seems to us, be conclusive, when there was nobody as defendant to conclude. The garnishees (the now defendants) might, no doubt, when they had notice of the attachment, have appeared in the Mayor's Court, and if Matthey's death were then known to them they might probably have pleaded to the jurisdiction. But they took no step, and allowed the proceedings to go on to judgment and execution. It is not necessary for us now to decide whether the present defendants, as between *Kelson & Co.*, the plaintiffs in the Mayor's Court, and themselves, are estopped from disputing the attachment. But we are of opinion that the present plaintiff, who was no party to the suit, is not estopped, as against them, from shewing the nullity of the proceedings. It was further contended, by the counsel for the plaintiff, that the debt now sued for was not attached at all, inasmuch as the debt assumed to be attached was a debt due from the defendants to Matthey, whereas, at the time of the attachment, Matthey being dead, there was no such debt. Our decision being in the plaintiff's favour on the larger question, it is not necessary for us to say whether this objection should also prevail. It was held, in *Westoby v. Day* (6), that the plaintiff (the defendant in the Mayor's Court) was not estopped by the judgment from shewing that the debt there attached was not attachable by reason of the beneficial interest being vested in another. The rejoinder is founded on an alleged custom that the plaintiff, after she became administratrix, might have appeared in the suit in the Lord Mayor's Court and dissolved the attachment. We think that such a custom is unreasonable and void, if it is to be understood to mean the non-appearance of the administratrix is to give life to a suit which was a nullity from its inception; and if the custom does not mean this, we do not see how the fact that the plaintiff did not

intervene can affect the position of the parties. We think, therefore, that the defendants, who made no effort to avoid the attachment or to prevent the execution of it, and who did not pay the debt until after this action had been brought against them by the administratrix, cannot avail themselves of that payment, and our judgment is given for the plaintiff.

Judgment for the plaintiff.

[IN THE HOUSE OF LORDS.]

1861.*
June 11, 17, 24. { THE MOST HONOURABLE
THE MARQUIS OF SALIS-
BURY v. GLADSTONE.

Copyhold—Custom.

A custom in a manor that copyholders of inheritance may break the surface and dig and get clay, without stint, out of their copyhold tenements, for the purpose of making bricks, to be sold off the manor, is good in law (dubitante Lord Wensleydale).

Error was brought in this case by the plaintiff on a bill of exceptions to the ruling of Byles, J., before whom the case was tried, and under whose direction a verdict was found for the defendant.

The action was ejectment for a forfeiture of certain lands in the manor of West Derby, in the county of Lancaster. The defendant was a copyholder of inheritance of the manor of West Derby, of which the plaintiff was lord.

The defendant had broken the surface and dug clay on his own tenement, for the purpose of making bricks for sale, which he made, and afterwards sold, and contended that he was justified in so doing by an immemorial usage in the manor, for copyholders of inheritance without licence of the lord, to dig and get clay in their own tenements for the purpose of making bricks for sale. Evidence was given of this custom.

The learned Judge held that the custom, if proved, was good in law, and so directed the jury. Exceptions were tendered to this direction. The jury thought that the evidence did prove the custom in fact, and

so, under this direction, the verdict was found for the defendant.

On error to the Exchequer Chamber the judgment was affirmed (1). This proceeding in error was then taken.

Sir H. Cairns and Mr. Manisty (Mr. T. Jones was with them), for the appellant.—The custom here set up is a custom to commit waste, and waste of the very soil of the manor. Such a custom cannot be supported.

The Tanistry case, Sir J. Dav. Rep. 32.

Legal Maxims, by Broom, 824 to 829.

Broadbent v. Wilks, Willes, 360.

Hilton v. Lord Granville, 5 Q.B. Rep. 701.

Tyson v. Smith, 9 Ad. & E. 406.

Coke's Copyholder, a. 33.

Blackstone's Commentaries, Book ii. c. 6. Bracton, 26 a.

Rockey v. Huggins, Cro. Car. 220.

Badger v. Ford, 3 B. & Ald. 153.

Wilson v. Willes, 7 East, 121.

Clayton v. Corby, 5 Q.B. Rep. 415.

Attorney General v. Matthias, 4 Kay & J. 579.

Ely v. Warren, 2 Atk. 189.

Bishop of Winchester v. Knight, 1 P. Wms. 406.

Gilbert's Tenures, p. 328.

Scriven on Copyholds, 4th edit. 427.

Bourne v. Taylor, 10 East, 189.

Roue v. Brenton, 8 B. & C. 737.

Bateson v. Green, 5 Term Rep. 411.

Arlett v. Ellis, 7 B. & C. 346.

Paddock v. Forrester, 3 Sc. N.R. 715.

Mr. Rolfe, and Mr. Edward James (Mr. Mellish and Mr. Baylis were with them), for the respondent.—In copyholds of inheritance such a custom as this is good; it does not destroy the lord's estate.

Rutland v. Gie, 1 Sid. 152.

Stephenson v. Hill, 3 Burr. 1273.

Glasscock's case, 4 Leo. 236.

Fawcett v. Louthier, 2 Ves. 300.

Cage v. Dod, Styles, 233.

Denn v. Johnson, 10 East, 266.

Curtis v. Daniel, Id. 273.

Sir H. Cairns, in reply.

LORD CRANWORTH moved the judgment of the House.—It was argued, on behalf of

* This case has been accidentally omitted.

(1) 30 Law J. Rep. (N.S.) Exch. 3.

the plaintiff, that no such custom as that now set up could exist; for that a custom to be valid must be reasonable, and that the custom here was not reasonable, since the exercise of it tended to the annihilation of the lands themselves. It was not easy to define the meaning of the word "reasonable," when applied to a custom relating to a lord and his copyholders. The relation between them must have had its origin in remote times, by agreement, when he was the absolute owner of the soil, and they were its occupants as his tenants at will. Whatever restrictions he imposed, or whatever rights they demanded, were within the competency of the lord to grant, or the tenants to stipulate for. And if evidence could be given of what was then agreed on between them, and it was shewn that what was so agreed on had always been acted upon since, it was difficult to see how it could be declared void on the ground of its being unreasonable. Looking to the present case, it was impossible to say that such a custom as that here alleged might not have resulted from an agreement between the lord and the tenants before the time of legal memory. The only persons affected by it were the lord and the particular tenant. In *Broadbent v. Wilks* it affected other copyholders; and so again, in *Wilson v. Willes*, where the custom claimed was to take an unlimited quantity of turf from the common for the improvement of the tenements of those who took it, without reference to the other copyholders whose rights in the common might be thereby wholly destroyed. This was not a custom like that claimed in the case of *Hilton v. Lord Granville*, by which the houses of the tenants might all be undermined and destroyed without notice of what was to be done, or compensation for doing it. The custom here affected only the lord and the particular tenant, and there was no reason for saying that it might not have been the result of arrangement between these two parties. Such a custom relating to the sale of copper ore had been held good in *The Bishop of Winchester v. Knight*, where the tenant was not strictly a copyholder, but was a customary tenant, Lord Cowper directing an issue to try whether there was such a custom in fact, which he could not have done if he had thought that a custom of that kind would be void as

unreasonable. That case could not be distinguished from the present, for clay was not the only part of the soil adapted for profitable culture, even, if a custom would be bad which would lead to making the land useless for agricultural purposes. This was only a custom insisted on for this particular manor, and so limited. It might be good and reasonable; for it might have been thought that the clay here was present in such excessive quantity that its removal would tend to benefit and not to impoverish the soil. The alleged custom would not warrant the removal of soil consisting of mixed portions of clay, chalk, gravel, and vegetable mould; and it might be that the lord considered that the removal of pure clay would increase the value of the soil which would remain. The direction of the learned Judge at the trial was therefore right, and the exceptions were properly disallowed; and the judgment must be for the defendant in error.—His Lordship added, that Lord Brougham, who had heard the argument, concurred in the judgment.

LORD WENSLEYDALE confessed to not having a very decided opinion on the case, but he should not do more than express his doubts, and should not oppose the motion of his noble and learned friend. There was no doubt whatever but that the lord, being the original owner of the soil, could have given by grant such a power or even a larger one to his tenants; but when there was no express grant, the rule of law applied that a custom to be good must not be unreasonable, otherwise the use might be referred to the ignorance or carelessness of those whose property it affected, and not to their grant. For that reason the custom set up in *Wilson v. Willes* was held bad. And so in *Arlett v. Ellis*, it was held that it could not be a good custom for the lord to inclose without leaving a sufficiency of common. Yet in both these cases it might have been argued that the lord might originally have made a grant to that effect. So he might, no doubt, make a grant to take away the clay, however deep and extensive the stratum of that clay might be, and however much injury it might cause to the tenement, even though there was no countervailing benefit. But there the grant must be shewn. Here it was claimed as a custom. Such claim would be void if

it was unreasonable. Then was it an unreasonable thing for a copyhold tenant to have a right to destroy the natural surface of the soil, and remove it altogether, leaving only a substratum, sand or stone, or whatever it might be, which might be incapable of cultivation, exposed below? This custom differed much from the right to cut trees, for that might be highly beneficial to agriculture, and in particular soils they might be replaced by others: it also differed from the right to get minerals which might be done without injury to the surface. Under these circumstances he still entertained much doubt upon the question, but as all his noble and learned friends differed from him, and had formed a very decided opinion upon the validity of the custom proved, he did not mean to offer any advice to their Lordships, that the judgment of the Exchequer Chamber should be reversed.

LORD CHELMSFORD said that the existence of immemorial usage had been in this case fully established by the evidence. It was insisted, however, for the appellant, that the custom must be bad, because it could not be presumed that there was a convention between the lord and the tenant to permit the latter to destroy the copyhold, by taking away the soil itself. It was admitted that there might be a valid custom for a copyholder of inheritance to work mines, to dig and take clay, or to cut down and carry away trees; but it was said that it was the extent of this custom which made it unreasonable, and a distinction was drawn between trees which were perishable and renewable, and the clay which was the soil itself. The trees, however, were not properly described as "renewable," though they might be replaced by others. It was difficult to conceive in what way a custom to take the whole of a particular soil from a tenement could be called a destruction of the tenement itself. The tenement would remain though this particular portion of the soil was removed. There seemed nothing unreasonable in supposing that the lord might originally have licensed his tenants to use their copyhold tenements in the way in which alone, perhaps, any great benefit could be derived from them. There was little, if any, distinction between a custom to work mines and a custom to dig

clay for the profit of the tenant. In *The Bishop of Winchester v. Knight*, the freehold was in the lord, and the only difference between that and a copyhold case was that the tenants did not hold *ad voluntatem domini*. Lord Cowper recognized the legal validity of such a custom, or he would not have sent a case to try whether in fact it existed. There was little resemblance between this case and those where the clause was of a profit *à prendre in alieno solo*. In a copyhold tenement, though the soil was in the lord, he could not, any more than the tenant, work mines or cut down trees without a custom authorizing him to do so. The rights of the lord were those which had been reserved, those of the tenant those which had been granted. But in one as in the other the rights of one party must not be inconsistent with those which existed in the other. That was the principle which governed *Bateson v. Green* and *Broadbent v. Wilks*, in the former in favour of the lord, in the latter adverse to him, because of its utter inconsistency with the grant to the tenant. In *Wilson v. Willes* a custom for all the tenants of a manor, having gardens, to take pasturable turf at all times and in unlimited quantity, from a waste within the manor, for making and repairing grass plots in their gardens, and for making and repairing the banks and mounds fencing their customary estates, was held bad as being indefinite, uncertain and destructive of the common. These cases indicated the principle on which the unreasonableness of any custom might be ascertained. There could be no doubt that the lord on the original grant of the copyhold tenements in question might have reserved to himself the right to dig and carry away the brick-earth found upon them, and if a custom of that kind existed upon the manor it would be valid. But if the lord might have reserved such a right to himself, why might he not confer it on the tenants? And if it was not unreasonable to suppose that such a right might have been originally conferred, then the custom, which had been proved by the immemorial exercise of the right, was good in law, and the judgment in favour of the defendant in error ought to be affirmed.

*Judgment for the defendant
in error.*

1865. { DAY v. PEACOCK.
May 3. { COBB v. THE SAME.
BINDER v. THE SAME.

Metropolitan Burials Act, 15 & 16 Vict. c. 85. s. 32. — Rights of Incumbents to Burial Fees — Division of Parish into Districts.

By 15 & 16 Vict. c. 85. s. 32. the burial-ground provided under the act is to be the burial-ground of the parish for which it is provided, "and every incumbent or minister of the parish," "for which such burial-ground is provided, shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorize, perform the duties, and have the same rights and authorities for the performance of religious service in the burial in such burial-ground, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received;" and by the interpretation clause (s. 52.) to that act "parish" is to "mean every place having separate overseers of the poor and separately maintaining its own poor," and "incumbent" or "minister" is, "in respect of any fee made payable to an incumbent or minister under the act" to mean "the clergyman who would have been entitled to the fee had the body been buried in the churchyard or burial-ground of the parish from which it came, or in the burial-ground of the ecclesiastical district, in case such district had a burial-ground at the passing of this act."

Where, prior to this act, a township, which was a parish within the meaning of the interpretation clause, was divided into ecclesiastical districts, with separate burial-grounds, and afterwards a burial-ground was provided under the act for the whole township, it was held, that each incumbent of such district was entitled to the burial fees in respect of the burial service performed by him in the burial-ground provided under the act to which he would have been entitled before the act if the body had been buried in the burial-ground attached to his district.

These actions were brought, by the respective plaintiffs therein, against the Burial

Board for the township of Barnsley, in the county of York, for the recovery of fees claimed to be payable by the defendants to the plaintiffs respectively, for burials, and the erecting or placing of monuments, gravestones, tablets and monumental inscriptions in the burial-ground provided by the defendant for the township of Barnsley under the provisions of the statutes relating to the burial of the dead; and by the consent of the parties, and by an order of a Judge, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the Court without any pleadings.

CASE.

The township of Barnsley, in the county of York, forms a part of the parish of Silkstone. It has separate overseers of the poor, and separately maintains its own poor.

Up to the time of the making of the Order in Council of the 8th of August 1831, hereinafter mentioned, the said township formed one parochial chapelry, which had existed from time immemorial. The church of St. Mary was the parochial chapel of the said chapelry, and there was belonging to the said chapelry, and within the said township, an ancient burial-ground, in which from time immemorial the remains of the inhabitants of the said chapelry had been and were of right entitled to be buried; and for burials in this burial-ground, and for the erection of monuments therein and in the said church of St. Mary, fees had always been paid to the incumbent for the time being of the said chapelry.

In or about the year 1823 an additional church, called St. George's Church, was built within the said chapelry by Her Majesty's Commissioners for building New Churches, under the provisions of 58 Geo. 3. c. 45. and 59 Geo. 3. c. 134; and on or about the 16th of June 1824 a burial-ground within the said township was, under the provisions of the same statutes, purchased and appropriated by the said Commissioners as and for a burial-ground for the said church of St. George. This church and burial-ground were afterwards duly consecrated.

By an Order in Council, bearing date the 8th of August 1831, a district was divided from the said chapelry and assigned to the said church of St. George, under the provisions of the statutes above referred to, and of the statute 7 & 8 Geo. 4. c. 72.

The district so assigned to the said church of St. George has, since the said Order in Council, been called St. George's District. The residue of the said township has, since the same Order in Council, been called St. Mary's District. In this latter district are situate the said church of St. Mary, and the said ancient burial-ground belonging to the said chapelry. This ancient burial-ground was enlarged about forty years ago, and from the time of its being so enlarged until the formation of St. George's district as aforesaid was the burial-ground of the said chapelry, and since the formation of St. George's district as aforesaid has been the burial-ground of the said district of St. Mary; and for burials and the erection of monuments therein fees have always been paid to the incumbent for the time being of St. Mary's.

Since the formation of St. George's district as aforesaid, the burial-ground so appropriated as and for the burial-ground of St. George's Church as aforesaid has been the burial-ground of the said district of St. George's; and for burials and the erection of monuments therein fees have always been paid to the incumbent for the time being of St. George's district.

By an Order in Council, bearing date the 23rd of May 1844, a district called St. John's District was divided from St. George's district, under the provisions of the statutes above referred to. From the making of this order until the year 1858, divine service for St. John's district was performed in a schoolroom in that district; and in 1858 a church, called St. John's Church, was built in and for the same district in which church divine service has since been performed.

The district so assigned to St. John's church has, since the said last-mentioned Order in Council, been called St. John's District. The residue of St. George's district has, since the same Order in Council, been called St. George's District.

There has never been any burial-ground assigned to or belonging to St. John's district, but the remains of persons dying within the limits of this district have been accustomed to be buried in the burial-ground of St. George's district, of which St. John's district formerly formed part; and for such burials in the said burial-ground of St. George's district fees have always been paid, since the formation of St. George's district as aforesaid, to the incumbent for the time being of St. George's district.

By an Order in Council, bearing date the 2nd of February 1857, made under the provisions of the 16 & 17 Vict. c. 134, it was ordered (amongst other things) that (with certain exceptions therein mentioned) burials should, after periods in that behalf appointed, be discontinued in the said burial-grounds of St. Mary's and St. George's districts.

Upon the last-mentioned Order in Council being made it became necessary to provide a new burial-ground for the said township of Barnsley, and the vestry of the said township having refused to provide such burial-ground, the local board of health for the said township became, on or about the 3rd of February 1858, under the provisions of the 4th section of the 20 & 21 Vict. c. 81, the burial board for the said township.

The said burial board afterwards, under the provisions of the various statutes relating to the burial of the dead, duly provided a burial-ground for the said township.

The burial-ground so provided by the said burial board (except the portion thereof not intended to be consecrated, and upon which portion a chapel is erected and built,) was, with a chapel erected thereon, on or about the 6th of November 1861, duly consecrated, from which time it became the burial-ground for the said several ecclesiastical districts of the said township, within the meaning and according to the provisions of the said last-mentioned statutes.

The plaintiff the Rev. Henry Josiah Day is the incumbent of the said district of St. Mary, and claims to be entitled to perform the duties and have the same rights and authorities for the perform-

ance of religious service in the burial, in the burial-ground so provided by the said burial board, of the remains of parishioners or inhabitants of the said district of St. Mary, and also to be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received for burials in the said burial-ground of St. Mary's district, as if such burial-ground so provided by the said burial board was the burial-ground of St. Mary's district. He also claims to be entitled to fees for such monuments, gravestones, tablets and monumental inscriptions erected or placed in the consecrated part of the burial-ground so provided by the said burial board as aforesaid, or in the chapel erected thereon as may be so erected or placed over the remains or in memory of parishioners or inhabitants of the said district of St. Mary, in lieu of the fees or sums which he would have been entitled to for the erecting or placing of such monuments, gravestones, tablets and monumental inscriptions in the said burial-ground of St. Mary's district or in the said church of St. Mary.

The plaintiff the Rev. Clement Francis Cobb is the incumbent of the said district of St. George, and claims to be entitled to perform the duties and have the same rights and authorities for the performance of religious service in the burial; in the burial-ground so provided by the said burial board, of the remains of parishioners or inhabitants of the said district of St. George, and also to be entitled to receive the same fees in respect of such burials which he has previously received and enjoyed for burials in the said burial-ground of St. George's district, as if such burial-ground so provided by the said burial board were the burial-ground of St. George's district. He also claims to be entitled to fees for such monuments, gravestones, tablets and monumental inscriptions erected or placed in the consecrated part of the burial-ground so provided by the said burial board as aforesaid, and in the chapel erected thereon as may be so erected or placed over the remains or in memory of parishioners or inhabitants of the said district of St. George, in lieu of the fees or sums which he would have been entitled to for the erecting or

placing of such monuments, gravestones, tablets and monumental inscriptions in the said burial-ground of St. George's district, or in the said church of St. George.

The plaintiff the Rev. William John Binder is the incumbent of the said district of St. John, and claims to be entitled to perform the duties and have the same rights and authorities for the performance of religious service in the burial, in the burial-ground so provided by the said burial board, of the remains of parishioners or inhabitants of the said district of St. John, and also to be entitled to receive the same fees in respect of such burials which he would have been entitled to enjoy and receive for burials in a burial-ground provided for the said district of St. John, as if the burial-ground so provided by the said burial board were the burial-ground of St. John's district. He also claims to be entitled to fees for such monuments, gravestones, tablets and monumental inscriptions erected or placed in the consecrated part of the burial-ground so provided by the said burial board as aforesaid, and in the chapel erected thereon as may be so erected or placed over the remains or in memory of parishioners or inhabitants of the said district of St. John, in lieu of the fees or sums which he would have been entitled to for the erecting or placing of such monuments, gravestones, tablets and monumental inscriptions in a burial-ground provided for St. John's district, or in the said church of St. John.

If the Court should be of opinion that neither the said Clement Francis Cobb, as the incumbent of St. George's district, nor the said William John Binder, as the incumbent of St. John's district, has any right or title to fees, as above mentioned, then the said Henry Josiah Day, as the incumbent of St. Mary's district, claims to have the same rights, and to be entitled to the same fees in respect of parishioners or inhabitants of the whole of the said township, which before the said Order in Council of the 8th of August 1831 formed one parochial chapelry as hereinbefore mentioned, as he claims in respect of parishioners or inhabitants of the said district of St. Mary, as in this case is stated.

If the Court should be of opinion that the said Clement Francis Cobb, as incumbent of the said district of St. George, has the rights and is entitled to the fees claimed by him as in this case is stated, but that the said William John Binder, as the incumbent of the said district of St. John, has no right or title to fees as in this case mentioned, then the said Clement Francis Cobb, as incumbent of the said district of St. George, claims to have the same rights, and to be entitled to the same fees in respect of parishioners or inhabitants of the whole of the district of St. George, as it existed before the said district of St. John was formed out of it, as he claims in respect of parishioners or inhabitants of the said district of St. George as now existing as in this case is stated.

The said burial board, who are the defendants in the said several actions, deny that the plaintiffs, or any of them, have or has the rights, or are or is entitled to fees as above claimed by them respectively.

The questions for the opinion of the Court are, whether the plaintiffs, or any and which of them, have or has any, and, if any, what rights, or are or is entitled to any, and, if any, what fees as above claimed by them respectively.

Lush (*Kemplay* with him), for the plaintiffs.—The plaintiff Mr. Binder makes no claim to the fees; and the only question is, whether the plaintiffs Mr. Day and Mr. Cobb, or either of them, are entitled to the fees claimed by them, and that will depend upon section 32. of the 15 & 16 Vict. c. 85. By the 19th section of that act the expenses incurred by the burial board in carrying the act into execution are to be paid out of the poor-rate of the parish. Then the 32nd section provides that after the consecration of any burial-ground provided under the act, or from such time as the bishop of the diocese shall appoint, "such burial-ground shall be deemed the burial-ground of the parish for which the same is provided, and where the same is provided for two or more parishes, such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish, and every incumbent

or minister of the parish, or of each of the parishes (as the case may be) for which such burial-ground is provided, shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorize, perform the duties, and have the same rights and authorities for the performance of religious services in the burial, in such burial-ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received;" "and the parishioners and inhabitants of such parish, or of each of such parishes, shall have the same rights of sepulture in such burial-ground as they respectively would have had in the burial-ground or burial-grounds in and for their respective parish," subject to the provisions contained in the act. By section 52. (the interpretation clause) "parish" is to mean "every place having separate overseers of the poor and separately maintaining its own poor." Neither St. Mary's district nor St. George's district was a parish within the meaning of that word as given by this interpretation clause, and therefore, as neither of the gentlemen who are claiming as incumbents of those districts is incumbent of the whole parish, it will be contended by the other side that they are not entitled to these burial fees; but "incumbent" in the same interpretation clause is declared, "in respect of any fee made payable to an incumbent under the act," to mean "the clergyman who would have been entitled to the fee had the body been buried in the churchyard or burial-ground of the parish from which it came, or in the burial-ground of the ecclesiastical district in case such district has a burial-ground at the passing of this act." If the act be construed in the manner contended for by the defendants, it will amount to a confiscation of the incumbent's burial fees, where, as here, a parochial chapelry has been divided into districts, and there is therefore no incumbent who is the incumbent of the whole parish. That would be contrary to the object of the act, which was merely to provide new burial-grounds, preserving the rights of the

incumbents. It is submitted that "parish" in the 32nd section means "ecclesiastical district," and is not limited in its meaning to a parish maintaining its own poor.

Manisty (*Maule* with him), for the defendants.—The claims which these incumbents have to the fees in question are purely statutable rights. They have no common law right to them, for the burial-grounds of their respective districts have ceased to be used as such; then, to entitle them to a right to these fees, they must shew a right by statute. Now the 15 & 16 Vict. c. 85. gives the right to the fees only to the incumbent of the whole parish. The burial-ground which has been provided under that act by the burial board is a burial-ground for the one parish of Barnsley, and not for each district, and such a division into districts as was made here was never contemplated by the legislature. To entitle the plaintiffs to these fees the language of the statute must be altered, and instead of "every incumbent or minister of the parish . . . for which such burial-ground is provided," it must be either "every incumbent or minister of the *district*," &c., or else "every incumbent," &c., "for *whom* such burial-ground is provided."

[*BYLES, J.*—"Incumbent or minister," means incumbent or minister who would have been entitled to his fees had the burials been in the burial-ground of his district. *SMITH, J.*—He is to have the same rights and fees in respect of burials as he previously enjoyed.]

That is, with respect to the burials of "the inhabitants of the parish of which he is such incumbent." Here neither of these plaintiffs is incumbent of any parish, but only of an ecclesiastical district; neither of them is bound to perform the duties, nor entitled to the fees of burial, in the burial-ground provided under the act.

ERLE, C.J.—I am of opinion that the incumbent of the district of St. Mary is entitled to the burial fees in respect of the burial of the corpses of the inhabitants of the district of St. Mary; and that the incumbent of the district of St. George is entitled to the burial fees for the burial of the

corpses of the inhabitants of either St. George's or St. John's district, if such incumbent perform the burial-services in respect of such burials. Barnsley is a parochial district maintaining its own poor, and so is a parish within the meaning of the statute. There was anciently one burial-ground for the whole parish; but after the districts had been formed there were two burial-grounds, one for St. Mary's and the other for St. George's district, and though there were three places of worship in the parish, yet the burial-ground of St. George's district continued to be used for the inhabitants dying in St. John's district. There were thus two burial-grounds for the parish. Then the board of health established a burial-ground for the parish, and the question is, who is entitled to the fees for burials in the new burial-ground? It seems to me that the 32nd section is capable of the construction which, on behalf of the two incumbents, it has been contended by Mr. Lush it ought to receive. The section says, that "every incumbent or minister of the parish . . . for which such burial-ground is provided," shall "perform the duties and have the same rights and authorities for the performance of religious service in the burial, in such burial-ground, . . . of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received." Now, reading that section with the interpretation clause, it seems to me that the incumbent of each district having a burial-ground is entitled to the burial fees in the way I have already mentioned. The objection which has been made by Mr. Manisty is this, that "incumbent of the parish" means, in the 32nd section, incumbent of the whole parish, and that each of these two plaintiffs is only incumbent of a portion of the parish, and that therefore no one here answers to the description of incumbent of the whole parish. I think, however, that these two plaintiffs are incumbents within the meaning of the words of the 32nd section in some sense, and that they are entirely within the meaning of the legislature, if one puts, as I do, this construction on the

act, viz., that every incumbent of a district having a burial-ground is to have the same rights for the performance of the burial-service and to have the same fees in respect of burials which he previously enjoyed. I couple the fees with the performance of the service, for I think the words of the act of parliament have cast on such incumbent the duty of performing the burial-service as well as have entitled him to the burial fees, and I therefore read the section as if it were "and shall thereupon be entitled to receive the same fees" as before, that is, when he has performed the funeral service in the burial of the remains of such parishioners. It appears to me that the words of the 32nd section extend to cases where a parish has been divided into districts, and that it means that the incumbent or minister of each ecclesiastical district who would have been entitled to a fee in respect of the burial service performed by him in the burial of a body buried in his ecclesiastical district, is to have the same fees he so previously enjoyed.

BYLES, J.—I am of the same opinion. Nobody can doubt the desire of the legislature on passing this statute was, that clergymen should not be deprived of the rights and emoluments they previously had; and, secondly, that the public should have the burial-service performed as before. Therefore it seems to me that, that being clearly the intention of the legislature, we are bound to use some violent construction of the words, if necessary, in order to carry that intention into effect. But I do not think that it is necessary for us here to have recourse to such means. The only violence which it can be suggested is used with respect to the words of the 32nd section is, as to the word "of" in the sentence "every incumbent or minister of the parish." But it is not necessary to use any violence as to that word. One commonly hears the expression of Bishop of the province of &c., but that means not only a bishop resident in such province, but who is otherwise connected with it.

KEATING, J. and SMITH, J. concurred.

Judgment for the plaintiffs Day and Cobb.

1865. } BOALER AND ANOTHER v.
May 8. } MAYOR AND ANOTHER.

Deed—Merger of Simple Contract Debt—Principal and Surety—Time given to Principal Debtor.

The plaintiffs lent M. 650l. on the security of a mortgage of certain property, with a covenant by M. to repay the 650l., with interest at 5l. per cent., on the 22nd of June 1864; and as the mortgage was not a sufficient security for more than 500l., the loan was made on the further security of the promissory note of M. and two sureties for 150l., payable on demand, with interest at 4l. 10s. per cent. The promissory note, which it was agreed between the plaintiffs and M. should be a collateral security to the mortgage-deed, was made and given to the plaintiffs on the 7th of December 1863, when 150l., part of the loan, was advanced to M.; but the mortgage-deed was not executed until the 22nd of December 1863. The deed contained no reference to the note, and the sureties who signed the note were not parties to the deed:—Held, that the debt secured by the note did not merge in the deed, and that, though the remedy on the covenant could not be enforced before the 22nd of June 1864, time was not given to M. so as to discharge the liability of the sureties on the note.

Action by the payees against the makers of a promissory note for 150l., payable on demand, with interest thereon at the rate of 4l. 10s. per cent. per annum during the forbearance.

Pleas—Thirdly, that the defendants made the said note jointly with one Charles Mayor, and that after making the said note and before action the said Charles Mayor satisfied and discharged the said note, and the plaintiffs' claim thereon, by executing to them a deed whereby the said Charles Mayor secured to the plaintiffs and covenanted with the plaintiffs to pay them 650l. and interest, including the amount of the said note, for and on account and in satisfaction and discharge of the said note and the monies therein mentioned, which deed was executed by the said Charles Mayor at the request of the plaintiffs and accepted by the plaintiffs in full satisfac-

tion and discharge of the said plaintiffs' claim on the said note, and that the plaintiffs' claim was and is thereby extinguished, satisfied and discharged.

Fourthly, for defence on equitable grounds, that the defendants made the said note jointly with Charles Mayor as surety to the plaintiffs for the said Charles Mayor, and in consideration of 150*l.* advanced by the plaintiffs for the said Charles Mayor, whereof the plaintiffs had notice before and when they first received the said note, and they, the plaintiffs, received and always held the same on the terms that the defendants should be liable to them on the said note as sureties only for the said Charles Mayor; and that after making the said note and before action the plaintiffs, without the consent of the defendants or of either of them, for a good, valuable and sufficient consideration in that behalf, agreed with the said Charles Mayor to give and then gave him time for the payment of the monies in the said note specified, and thereby discharged the defendants from the said note. Issues thereon.

The following are the facts as they appeared in evidence before Erle, C.J., at the London Sittings after last Hilary Term. Mr. Charles Mayor, mentioned in the pleas, and who was the son of the elder and the brother of the younger of the two defendants, having occasion to borrow 650*l.*, applied for that purpose to the plaintiffs towards the end of 1863, and offered as security some property to which his wife would become entitled on attaining the age of twenty-five. This was found to be only a sufficient security for 500*l.*, and, according to the account given by the plaintiff Watson, and which the jury found to be the true account of the loan, it was agreed between the plaintiffs and Charles Mayor that, as security for the proposed advance of 650*l.*, there should be a mortgage-deed assigning the wife's interest, and containing a covenant by Charles Mayor and a surety for the repayment of the whole 650*l.*, and that, as a collateral and additional security to the deed, there should be a promissory note by Charles Mayor and two sureties for the payment of 150*l.* on demand. Mr. Charles Mayor accordingly applied to his father and brother, the present defendants, to join him in signing

the promissory note, the subject of this action. This they did, and the note was thus made and given to the plaintiffs on the 7th of December 1863, on which day the plaintiffs advanced 150*l.* to Charles Mayor as part of the agreed loan. No interview on the subject ever took place between the plaintiffs and the defendants. On the 22nd of December 1863 the mortgage-deed was executed, and 500*l.*, the balance of the loan, was then paid to Charles Mayor. The deed was made between Charles Mayor and Elizabeth his wife of the first part, William Warren (a surety) of the second part, and the plaintiffs of the third part. It contained no reference whatever to the promissory note, but recited the agreement by the plaintiffs to lend Charles Mayor and his wife 650*l.*, upon having the repayment thereof, with interest thereon at 5*l.* per cent. per annum, secured by the assignment of the interests of the said Elizabeth Mayor, under a certain will and codicils therein mentioned and of a policy of assurance, and it also recited an agreement by the said Charles Mayor and W. Warren as his surety to enter into certain covenants, and it contained a covenant by the said Charles Mayor and W. Warren for the payment of 650*l.* and interest thereon at the rate of 5*l.* per cent. per annum on the 22nd of June 1864.

It was contended on behalf of the defendants that the deed discharged the defendants either on the ground that it operated as a merger of the promissory note or because it gave time to the principal debtor for the payment of the debt. Under these circumstances a verdict was entered by consent for the defendants, with leave to the plaintiffs to move to enter the verdict for them for the amount claimed, if the Court should be of opinion that in point of law the deed did not so discharge the sureties.

Huddleston afterwards obtained a rule nisi to that effect, citing *Ansell v. Baker* (1). Against this rule—

Macaulay and *Cave* now shewed cause.—The effect of this deed was to give time to Charles Mayor, the principal creditor, for the payment of the debt, viz. until the 22nd of June 1864.

[KEATING, J.—The question is whether he might not have been sued on the note before June 1864.]

It is submitted he could not; it is clear that he could not have been sued on the deed before that time, and it is contended that the creditors having taken this security would not have been allowed by a Court of Equity to have enforced their debt against the principal debtor before the 22nd of June.

[SMITH, J.—If the debt be not merged in the deed, an action might be brought on the note against the principal debtor, and does not the case of *Sharpe v. Gibbs* (2) shew that the deed here does not operate as a merger, as the note is for a different debt?]

It is submitted that the deed operated as a merger of the liability of the principal debtor on the promissory note, and the case of *Price v. Moulton* (3) is an authority that it would have that operation irrespectively of the intention of the parties. So also was the joint liability of all the makers of the note likewise merged in the deed—*King v. Hoare* (4), where it was held that a judgment recovered against one of two joint debtors is a bar to an action against the other; and in *Bell v. Bankes* (5) Maule, J. expressed the opinion that taking security of a higher value from one of two joint debtors would cause a merger. That opinion is cited in *King v. Hoare* (4), and relied on as one of the grounds for giving judgment in that case. These authorities shew, it is submitted, that there was a merger of the liability of the principal debtor on the note, and that no action could have been brought against him on the note; if so, he was only liable on his covenant, and that could not be enforced until the 22nd of June; consequently, there was a giving time which would discharge the sureties. In *Boulbee v. Stubbs* (6), where a creditor who had, among other securities, a bond with a surety, took a mortgage from the principal debtor, and agreed to receive the residue by

instalments, it was held by Lord Eldon, C. that the creditor's right against the surety was gone, and an injunction was granted against the surety being sued on the bond. So even if Charles Mayor could have been sued at law upon this note, still the effect of the transaction was to give time, at least until the 22nd of June 1864, because until then no Court of Equity would have allowed the creditors to have sued Charles Mayor for any part of the 650*l*. But moreover, it is submitted, the deed is conclusive and can alone be looked to, and that parol evidence to shew that the note was taken by the plaintiffs by way of collateral security is not admissible. *Ex parte Glendinning* (7), and the opinion of Bailey, J., in *Lewis v. Jones* (8), are authorities to that effect.

[KEATING, J.—Without parol evidence, how is the deed connected with the note so as to be any defence to an action on the note?]

The money secured by the note is part of the sum secured by the deed.

Huddleston and *T. Salter* appeared, but were not heard, in support of the rule.

ERLE, C.J.—I think that the rule should be made absolute to enter a verdict for the plaintiffs. The action was upon a joint and several promissory note made by the defendants as sureties for Charles Mayor for the sum of 150*l*. advanced to him as part of a loan of 650*l*., the other 500*l*. being secured by a mortgage of some property, and by a policy of insurance. The mortgage-deed was to comprise the whole 650*l*.; but the mortgage not being a sufficient security for more than 500*l*., Charles Mayor and the lenders agreed that, in addition to the mortgage-deed, there should be a promissory note given for 150*l*. payable on demand with two additional names, these being those of the two Mayors who are the present defendants. The promissory note was made on the 6th of December, and the deed was executed on the 22nd of December, the note being payable on demand, and the deed in June the following year. Then, it is said, that this debt, due from the two sureties who signed the note, is merged in the deed which was executed by Charles

(2) 16 Com. B. Rep. N.S. 527.

(3) 10 Com. B. Rep. (N.S.) 561; s.c. 20 Law J. Rep. (N.S.) C.P. 102.

(4) 13 Mea. & W. 494; s.c. 14 Law J. Rep. (N.S.) Exch. 29.

(5) 3 Man. & G. 267.

(6) 18 Ves. 20.

(7) Buck's Cases, 517.

(8) 4 B. & C. 506.

Mayor, one of the makers of the note. I think it is very clear that it was not so merged, because the deed is between different parties for a different sum payable at a different time and with different interest; and I take the case of *Sharpe v. Gibbs* (2) as sufficient to shew that as between Charles Mayor and the lenders the deed did not merge the promissory note in the specialty. To do so would be utterly contrary to the intention of the parties. Still, if the law was so the law must have its way; but I think, according to the law, that, in this case, as the specialty was not co-extensive with the promissory note, the latter did exist as a collateral security and was not merged. Then, was there time given to Charles Mayor, the principal debtor, so as to operate as a discharge to his sureties? The deed contains a covenant that Charles Mayor will pay in June, that is, six months after the deed was executed, and the promissory note was payable *instantly*. I think also that the covenant to pay in June operated so as to prevent an action for breach of such covenant before June; but there is no stipulation in such deed that the creditors lending the money would not put in force any other remedy they might have before that time. It seems to me, therefore, that the deed did not operate to give time to the principal so as to discharge the sureties. The cases which have been cited by Mr. Cave about the effect of a mortgage-deed were soundly decided in respect of the facts then before the Court. A Court of equity must give effect to what it considers is the intention of the parties in respect of the mortgage-deed; and so in the present case I think our judgment does give effect to the intention of the parties; and with regard to the admissibility of parol evidence to shew what was the intention of the parties, it was well observed by my Brother Keating, that the promissory note and deed are unconnected with each other without parol evidence to explain the fact of the 150*l.*, the amount of the note, being part of the 650*l.* in the deed; but then when you give, as you must, parol evidence for that purpose, parol evidence becomes admissible to let in the whole matter before the Court. For the reasons I have mentioned, I think this rule should be made absolute.

NEW SERIES, 34.—C.P.

BYLES, J.—I am of the same opinion. I was at first struck with the argument of Mr. Macaulay; but on full consideration I think our judgment ought to be for the plaintiffs. With respect to the merger, it is now well established that unless the two instruments are co-extensive there is no merger. And as to satisfaction of the note by the deed (which I collect is the purport of the third plea), if the evidence of Mr. Watson be correct, so far from there being any agreement that the deed was to be such satisfaction, it was, on the contrary, agreed that it should not be a satisfaction. Then, with respect to the point about giving time, Mr. Watson's evidence shews that, according to the arrangement between the creditors and the debtor, there was to be no discharge of the sureties in consequence of the deed; and it is sufficient to prevent the discharge of the sureties that there is an agreement to that effect between the principal debtor and the creditors, although the sureties are not parties to it. That is now established, and was recognized to be the law in the recent case of *Webb v. Hewitt* (9), where Wood, V.C. says, "As to giving time, the authorities, which are almost innumerable, have settled that upon any giving of time to a principal debtor, if there be a reservation of rights against the surety, the surety is not discharged; for when the right is reserved the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him, for he was a party to the agreement by which that right was reserved to the creditor; and the question whether or not the surety is informed of the arrangement is wholly immaterial."

KEATING, J.—I am of the same opinion, for the reasons that have been stated. Mr. Cave relied upon the case of *Price v. Moulton* (3) as an authority that there must be here a merger irrespective of the intention of the parties; but that case does not lay down any such general proposition. In that case the question arose upon a demurrer, and it was admitted on the pleadings that the debt on the simple contract

(9) 3 Kay & J. 438.

was in every respect co-extensive with the specialty debt, and therefore the Court held that there was there a merger; but I observe in that very case my Brother Williams put the question to my Brother Willes, then at the bar, whether the deed would have operated as a merger if it had expressly stipulated that it should be a collateral security only, and my Brother Willes declined to answer that question. At first I was disposed to adopt Mr. Macaulay's argument, that non-communication to the sureties of the arrangement between Charles Mayor and the plaintiffs would protect the sureties; but then the question was, whether, during the time given by the deed, Charles Mayor could not have been sued. It is clear that he could have been sued, though not on the deed, and therefore no time was given to the principal; and I agree with the rest of the Court that this rule should be made absolute.

SMITH, J.—I am of the same opinion. It appears from the evidence that the promissory note was given as a collateral and additional security, and that it was part of the arrangement that such additional security should be so given. Then it is said that the effect of the deed which was subsequently executed was to merge the promissory note; but it is clear that that was not so, according to the case of *Sharpe v. Gibbs* (2). Then, was time given to the principal debtor on the note? None was given. The principal debtor could have been sued on the note, and, moreover, the understanding between the parties was that the sureties should not be discharged by the deed. I decide this case on legal grounds, but I should be surprised to find a Court of equity coming to a different conclusion. In the case of *Wyke v. Rogers* (10), where there were written securities, a bond given by a surety, and afterwards a promissory note taken from the principal debtor, and no suggestion of any agreement that the note should be collateral to the bond, the Court of equity referred it to the Master to inquire into the circumstances under which the note was given, and the Master afterwards reported that it was intended by the principal debtor

and the creditor at the time the note was given that the surety should not be discharged, and upon that finding the Court held that the surety had no equity.

Rule absolute.

1865. } ROBINSON v. THE SOUTH-WEST-
May 1. } ERN RAILWAY COMPANY.

Carriers by Railway—17 & 18 Vict. c. 31. s. 7.—Horse—Declaration of Value—Increased Rate of Charge.

Section 7. of the 17 & 18 Vict. c. 31. (Railway and Canal Traffic Act) provides that no greater damages shall be recovered from a railway company for the loss of or injury to a horse than 50l., unless the person sending or delivering the same shall at the time of such delivery have declared it to be of a higher value, in which case it shall be lawful for the company to demand and receive reasonable per-centage upon the excess of the value so declared, and which shall be paid in addition to the ordinary rate of charge:—Held, that the knowledge of the company as to the value of a horse not derived from a declaration to that effect by the sender does not give the company any right to demand an increased rate of charge under the above section.

Held, also, that to entitle the company to demand such increased rate, the declaration must be made with an intention by the sender of the horse that it should so operate.

The first count of the declaration stated that during all the times thereafter referred to, the defendants were common carriers of horses by railway, from their Liss station to their Waterloo station, London. And that before any of the said times the defendants made and published certain conditions upon which alone they declared that they would receive, forward and deliver horses, which conditions had not at any of the said times been rescinded or altered, and which conditions were so published as aforesaid, and contained in a certain printed notice by the defendants published, which notice was as follows:

"Notice as to horses, cattle, &c.—The London and South-Western Railway Com-

(10) 1 De Gex, M. & G. 408; s.c. 21 Law J. Rep. (N.S.) Chanc. 611.

pany hereby give notice, that they will receive, forward and deliver horses, cattle or other animals, solely on and subject to the following conditions: The company will not be responsible for any loss or injury to any horse, cattle or other animals in the receiving, forwarding or delivering, if such damage be occasioned by the kicking, plunging or unruliness of the same."

"Declaration as to the conveyance of horses, cattle, &c.—In pursuance of an act, 17 & 18 Vict., passed 10th of July 1854, entitled 'An act for the better regulation of the traffic on railways and canals,' it is provided in clause 7, in reference to the liability of railway or canal companies for loss or injury done to any horse, cattle or other animals, that no greater damage shall be recovered for loss of or for any injury done to such animals beyond the sum herein-after mentioned, that is to say,
For any horse . . . £50

For any neat cattle . . . 15 per head.

For any sheep and pigs . . . 2 "

Unless the person sending or delivering the same to such company shall at the time of such delivery, have declared them to be of respectively higher value than as above mentioned, in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable per-centage upon the excess of the value so declared above the respective sums, so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge. Notice is therefore hereby given, that from and after the date hereof a per-centage of 5 $\frac{1}{2}$ per cent. will be charged in addition to the usual charge for conveyance, by the London and South-Western Railway, upon any excess in the declared value of horses, cattle or other animals over and above the amounts fixed by the act aforesaid, viz.,

For any horse . . . £50

For any neat cattle . . . 15 per head.

For any sheep or pigs . . . 2 "

And notice is hereby further given, that all declarations of the value of horses or other animals where such value exceeds the above sums respectively, must be signed by the owner thereof, or by his agent, before they can be received by the Com-

pany for transmission by the railway. By order of the directors.

"L. Crombie, Secretary.

"Railway Office, York Road, London,

"October 5th, 1864."

And that the plaintiff, at a reasonable and proper time in that behalf, tendered to the defendants at their Liss station aforesaid, a mare to be by them carried from their Liss station to their Waterloo station aforesaid, and there delivered for the plaintiff according to the defendants' duty in that behalf, under the circumstances aforesaid, for hire to the defendants in that behalf, requested the defendants to receive, carry and deliver the said mare as aforesaid, and did not declare, or intend to declare, the said mare to be of any higher value than 50 £ ; and the plaintiff was then ready and willing, and offered to pay to the defendants their reasonable hire in that behalf, whereof the defendants then had notice; and the defendants then had sufficient time, means and conveniences to receive, and carry and deliver the said mare as aforesaid, and could and ought to have done so; yet the defendants did not nor would receive and carry the said mare for the plaintiff, whereby the plaintiff was put to great costs and charges in and about causing the said mare to be taken from Liss to London, &c.

The defendants pleaded, fourthly, to the said first count, that before and at the time of the tender and delivery of the said mare as alleged, the person sending the same had declared the said mare to be of higher value than 50 £ ., that is to say, of the value of 135 £ ., whereupon the defendants, under and by virtue of the said act mentioned in the said notice, demanded of the person so tendering the said mare as aforesaid, by way of compensation for the increased risk and care occasioned by the said higher value, a per-centage of 5 $\frac{1}{2}$ per cent. in addition to the usual charges of conveyance, upon the excess in the declared value of the said mare over and above the said sum of 50 £ ., being the amount limited by the act aforesaid, the said per-centage being a reasonable per-centage upon the excess of the value so declared above the said sum so limited as aforesaid. That the person tendering the said mare as aforesaid refused to pay to the defendants the said per-centage, where-

fore the defendants refused to receive and carry the said mare, as they lawfully might, for the cause aforesaid. Further, that such per-centage or increased rate of charge was notified in the manner prescribed in the statute 11 Geo. 4. & 1 Will. 4. c. 68.

Issue thereon.

At the trial, before Erle, C.J., at the London Sittings after Michaelmas Term, 1864, the following facts were proved : In December 1863, a Capt. Mainwaring, on behalf of the plaintiff, negotiated with a Mr. Ayling, of Liss, Hants, for the purchase of a mare. After some negotiation, Ayling ultimately accepted an offer of 135*l.* for the mare, and he received directions to send her by rail to London. This offer and acceptance of 135*l.* passed by telegraph on the defendants' railway, and by that means the station-master at Liss became aware of the value of the mare, and so refused to forward her by rail from Liss to London, unless in addition to 17*s.* 6*d.*, which was the charge for carriage, 4*l.* 5*s.* was also paid for insurance. Ayling communicated this by letter to Capt. Mainwaring, but before the latter received such communication he wrote to a Mr. Norwood, the company's inspector at the Waterloo station, as follows :

"Edmonscott Manor, Warwick, Jan. 3, 1864.

"Sir,—I should feel very much obliged to you to have the goodness to send a careful man who understands horses down to Liss by the last train to-morrow, Monday, to Mr. William Ayling's, there to bring a chestnut mare back to London with him, on Tuesday morning, by first train from Liss, and when he arrives in London take her and put her in the 12 o'clock train with inclosed address on her at King's Cross for York. He must take clothing (two rugs and hood), knee-caps and bridle with him to put on the mare, and be careful of her, as she is a valuable animal. This letter will be a sufficient order for the man to give the mare ; let him take it with him. Will you also pay the man's expenses, and let me know what they are and I will remit you post-office order; the clothing will be returned to you. It may be as well, perhaps, for a horse-box to go from Waterloo, as there may possibly not be one at Liss.

(Signed) "A. Mainwaring."

Upon the receipt of Ayling's note com-

municating the station-master's account for carriage and insurance, Capt. Mainwaring sent them inclosed in the following letter to inspector Norwood :

"Edmonscott Manor, Warwick, Jan. 4, 1864.

"Sir,—I am sorry to trouble you so much, but the receipt this morning of the note inclosed has placed me in a fix, and I should be very much obliged to you to give instructions to your station-master and to the man who goes to fetch the mare from Liss, that the mare may be sent by the man to-morrow, as directed in my letter to you of yesterday, without insuring her, the expense being so great ; and I must observe that I never heard of a case where a station-master has refused to load a horse unless insured. Are these the instructions on your line? If, however, the man who goes for the mare finds that she is dangerous in the train, or if he finds she has been in before and anything has happened to her through her own vice, then I think she ought to be insured, but not otherwise. Mr. Ayling, the man I bought her of, told me she never had been on the train in her life. I have had horses of 300*l.* and 400*l.* value often by train with nobody with them. I never insured a horse in my life, and never had an accident with one. It appears to me that your station-master at Liss is exceeding his powers. The value of this animal is 135*l.*

"Yours, &c.

(Signed) "A. Mainwaring."

The mare was on the 13th of January 1864 taken to the Liss station and tendered there for conveyance to London, when she was refused to be carried by the company unless the insurance in addition to the regular fare was paid. The mare was afterwards sent by road to London, and the present action was brought, and at the trial a verdict was found for the plaintiff on the first count, with leave to the defendants to move to enter a verdict for them if the Court should be of opinion that there had been a declaration, within the meaning of the statute, that the value of the mare was above 50*l.*

Ballantine, Serj. obtained, in Hilary Term last, a rule nisi to that effect, against which,

Denman and *Kingdon* now shewed cause.—The Railway and Canal Traffic Act, 17 & 18 Vict. c. 31. s. 7, after making a

railway company liable for neglect in the carriage of horses, &c., notwithstanding notice to the contrary, provides that "no greater damages shall be recovered for the loss of or for any injury done to any such animals" beyond, for any horse, 50*l.*, "unless the person sending or delivering the same to such company shall at the time of such delivery have declared them to be respectively of higher value than as above mentioned, in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable per-centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge." The only question in the present case is, whether there was such a declaration made within the meaning of that section as entitled the defendants to claim the charge for insurance. The case of *Harrison v. the London and Brighton Railway Company* (1) differs from the present, as there the notice was such as to free the company from all liability, unless the value of the animal was declared, whereas the notice here is in the terms of the statute, and is only to free the company from liability beyond the sum of 50*l.*, unless the higher value be declared and paid for. In *Peck v. the North Staffordshire Railway Company* (2) no declaration was made, and the goods were not insured. The case of *Hodgman v. the West Midland Railway Company* (3) was also a decision on this 7th section of the statute; but it is only of use here as shewing that the plaintiff is entitled to recover no more than 50*l.*, unless the higher value of the horse be declared before either the receipt of the horse by the company or before the injury has occurred. Indeed, there is no case in point, or which is of much use in determining the present question, which is one of fact only. It is submitted that neither the transmission by the telegraph nor the letter of Capt. Mainwaring of the 4th of January 1864 could amount to such a declaration as

would satisfy the statute. It is clear that mere knowledge of the carrier as to the value of the article is not enough, but that there must be an express declaration of value made by the sender with the intention that it should be such declaration, in order to satisfy the statute. That was the opinion of Lord Denman in *Boys v. Pink* (4). Then, as to the letter, it expressly states that the horse is to be sent uninsured, and the value is only given should it in the event there mentioned become necessary to insure. Besides, the declaration, to be within the act, must be made at the time of the delivery of the horse, or if made before it must at least be made with an intention that it should operate at the time of the delivery—*Hart v. Bazendale* (5).

Ballantine, Serj. and C. W. Wood, in support of the rule.—It is submitted that it is immaterial with what intention the declaration be made, provided it be made in fact. Supposing the company had taken this horse, and had become liable to an action for negligence in respect of an injury to the horse in the course of its carriage, the jury would have found that a knowledge of its value had been brought home to the company or its agents, and it would have been said that there had been a sufficient declaration of its value to entitle the plaintiffs to have recovered beyond the sum of 50*l.* It must perhaps be admitted that the knowledge derived from the telegraph would not have been sufficient had the matter rested there, but Capt. Mainwaring wrote the letter on the 4th of January, and that contained at the end of it a specific declaration of the value of the animal. The intention with which that was written is immaterial; it would have been a sufficient declaration if the sender had said, I don't intend to insure, but I declare the value to be so much. Here, however, there is evidence that Capt. Mainwaring did intend that that should be a declaration of the value. The case of *Behrens v. the Great Northern Railway Company* (6) decides that if the sender declares the value of the article, the

(1) 2 Best & S. 122, and in error 152; s. c. 29 Law J. Rep. (N.S.) Q.B. 209.

(2) 32 Law J. Rep. (N.S.) Q.B. 241.

(3) 33 Law J. Rep. (N.S.) Q.B. 233.

(4) 8 Car. & P. 361.

(5) 6 Exch. Rep. 769; s. c. 21 Law J. Rep. (N.S.) Exch. 123.

(6) 31 Law J. Rep. (N.S.) Exch. 299.

carrier may refuse to carry it unless he be paid the increased rate for carriage to which he may be entitled under the Carriers' Act, 11 Geo. 4. & 1 Will. 4. c. 68, but that if he does not insist on being so paid, and carries it without requiring such increased rate, he is liable then for the full value in case of an injury to it during the journey.

ERLE, C.J.—I am of opinion that this rule ought to be discharged. The question is, whether the railway company have made themselves liable to an action for refusing to carry a horse of the plaintiff without payment of an insurance according to its value. They did so refuse, because, as they say, the sender of the horse declared the value of the horse to be greater than 50*l*. The question has turned on one of fact, namely, whether the sender of the horse did or not declare its value to be greater than 50*l*. Now, I am of opinion that the knowledge of the railway company as to the value of the horse, not derived from a declaration to that effect made by the sender, gives no title to the company to demand a higher insurance. The 7th section of the statute protects the company, and it says that they shall not be liable for any injury to a horse conveyed by them on their railway to a greater amount than 50*l*. unless the sender, at the time of sending or delivering the horse, shall declare it to be of a higher value. Knowledge derived not from the declaration of the sender cannot be sufficient to give a right to the insurance money. But here the evidence shews that the company made their claim because the station-master who worked the telegraph had learnt through the telegraph that the actual value of the horse was 135*l*.; and it is clear that that gave the company no right to demand the insurance on a value above 50*l*. The strength of the defendant's case (if any) lies in the letter of the 4th of January, in which Capt. Mainwaring says he intends to send the horse without insurance; but that if the horse is vicious, he is willing to insure it, and states the value of the horse to be 135*l*. I think that the effect of that letter is, "I do not intend to insure, and I mention the value, not with the view of fixing you with a liability, but that if, on account of the

horse being vicious, it be insured, the value for that purpose is 135*l*. A declaration would be within the statute if so made as to create a liability on the part of the company to pay the higher value, as well as a liability on the part of the sender to pay the insurance thereon; but here the sender says that he does not intend to insure; but he mentions the value of the horse, and he calls upon the company to take the animal. I cannot find in that a declaration within the statute. If the company had said, "We do not understand what has passed; if you intend to send the horse uninsured as not exceeding the value of 50*l*., say so, and we will take the horse; but unless you say so, we shall consider that you intend to claim the higher value, and must require you, therefore, to pay the insurance on such value." Then, if the sender did not afterwards make it clear that he did not intend to claim the higher value, the company would have been justified in refusing to take the horse without such insurance being paid. On the whole, I am of opinion that there was no such declaration as would come within the meaning of the statute, and that this rule should be discharged.

BYLES, J.—I am of the same opinion. In the Carriers' Act and the Railway Act, 17 & 18 Vict. c. 31, the language is the same in substance: in one it is active, and in the other passive; but in both a declaration is required. It is impossible to contend that mere knowledge will do. The declaration must come from the sender, and must be so expressed as to be understood by the carrier as such, and, as I think, understood also as the foundation of a contract. Now, here it does not appear that it was so understood; and it is clear from the events which have happened that it was not intended that it should be so understood. The case of *Behrens v. the Great Northern Railway Company* (6) is no authority for the defendants, because in that case the company signed a receipt for the package as one containing a picture declared to be over the value of 110*l*. I think the plaintiff is entitled to recover.

SMITH, J.—I am of the same opinion. There was no such declaration here as would entitle the company to claim insur-

ance before receiving the horse. I agree with the rest of the Court that the declaration to be within the statute must be made with an intention that it should so operate as to entitle the company to charge the higher rate. Here the facts do not amount to anything of the kind. The knowledge of the station-master through the telegraph is no more than if he had overheard a conversation as to the bargain for the horse. What, however, is chiefly relied on is the letter from Capt. Mainwaring. It is plain that in writing that letter to the inspector, Capt. Mainwaring was writing to him very much as if he were writing to his own agent. He tells him to insure in a certain event, that is, if he finds the horse vicious; and the person who is to determine that is the man who is to be sent down by the inspector, and as it would be necessary for the inspector when he sends the man down to tell him the value of the horse, so that he might be able to declare the value if he should find it necessary to insure, he is told that in that case the value is 135*l*. It is a question of fact; and, upon the whole, I think that there was no such declaration in this case as is required by the statute, and that, therefore, the plaintiff is entitled to succeed.

KRATING, J.—As I did not hear the whole of the argument, I ought not to take any part in the judgment; but I may say that, so far as I have heard, I concur entirely in what has been said by the rest of the Court.

Rule discharged.

1865. } HEARD AND ANOTHER v. HOL-
May 2. } MAN AND ANOTHER.

Contract, Construction of.

The plaintiffs were owners of ship *W*. and one *M*. of ship *G*, which was insured in two companies, one of which was represented by the defendants, the other by *M*. himself. The *G*. ran into the *W*, and was arrested in the Admiralty Court; and an agreement was entered into by the plaintiffs, *M*, and the insurers, that the plaintiffs should release the ship, and the other parties should pay "the amount of damage which the ship *W*. had

received from the collision," and that in case of dispute about "the amount of damages claimed by Heard Brothers (the plaintiffs) by reason of the collision," the matter should be referred:—Held, that "ship" in the first clause must be read "owner of ship," and that the plaintiffs were entitled to recover for loss of profits as they would have done in the Admiralty Court.

The plaintiffs were the owners of a ship called the *Westward Ho*, and one Mitcheson the owner of a ship called the *Grenfells*, in respect of which he was insured (amongst other things) against damage or loss, by contract, which she might do to others), in two mutual insurance associations, viz. the Sunderland Insurance Clubs (managed by himself), and the Western Insurance Clubs of Topsham (managed by the defendants). The *Grenfells* ran down the *Westward Ho*, and the plaintiffs thereupon had the *Grenfells* arrested in the Court of Admiralty. An agreement was thereupon entered into between the plaintiffs of the first, Mitcheson of the second, the defendants on behalf of the Western Insurance Clubs of the third, and Mitcheson on behalf of the Sunderland Insurance Clubs of the fourth parts. It recited that the plaintiffs owned the *Westward Ho* and Mitcheson the *Grenfells*; that the latter had run into and injured the former and been arrested, and that on application of the parties of the second, third, and fourth parts the plaintiffs had agreed to release the *Grenfells* on the therein contained conditions. And it then witnessed, that the parties mutually agreed that the plaintiffs should forthwith release the *Grenfells* from arrest, and that in consideration thereof the parties of the second, third, and fourth parts, or some or one of them, would pay to the plaintiffs the amount of damage which the said ship *Westward Ho* has received from the said collision, and that the whole of the parties of the second, third, and fourth parts should be, in proportion to their respective interests, liable to pay the said amount of damages, and also the costs of the proceedings in the Court of Admiralty against the ship. And it was further agreed, that if any dispute or difference should arise between the plaintiffs and the other parties, or any of them, with

respect to the amount of damages claimed by the said *Heard Brothers* (the plaintiffs) by reason of the said collision, the amount should be referred to the award and determination of W. R., whose decision should be final. And it was provided that the agreement might be made a rule of Court. The amount was eventually referred to W. R., and a question arose as to whether, under the terms of the agreement, the plaintiffs were entitled to claim recompense for the loss of freight. The arbitrator separately assessed the amount of such loss, and its payment was resisted, whereupon this action was brought to recover it and raise the said question.

A verdict was entered at the trial for the plaintiffs for 519*l.*, with leave for the defendants to move to set aside the verdict and enter a verdict for the defendants, or a nonsuit, on the ground that the defendants were only liable for the damage which the *Westward Ho* sustained by the collision, and not for further damages sustained by the plaintiffs in respect of the detention of the *Westward Ho*.

A rule *nisi* having been obtained by *Mellish*, pursuant to the said leave reserved,

Lush and *Watkin Williams* now shewed cause on behalf of the plaintiffs.—The plaintiffs could have recovered these damages in the Court of Admiralty, and they clearly did not intend to give up this right; there was no reason for doing so; and the words "amount of damage claimed by *Heard Brothers* by reason of the collision" shew this.

Mellish and *T. Jones*, in support of the rule.—The words "the amount of damage which the said ship *Westward Ho* has received from the said collision," are conclusive.

ERLE, C.J.—The question here is, whether the plaintiffs are entitled to the same compensation as they would have got in the Admiralty Court, where the ship *Grenfells* was detained. I am of opinion that they are entitled to the same sum, *i. e.*, to the amount of the repairs rendered necessary by the damage from the collision and compensation for the loss of profits which but for the collision the plaintiffs would

have obtained. The agreement recites that it was agreed to release the *Grenfells* from the Court of Admiralty. Have the plaintiffs given up their rights against the ship? It is said they have, because the agreement says "the amount of damage which the said ship *Westward Ho* has received from the said collision," but it is not straining the language to hold that this means "which the owners of the ship have received." That is, the amount of damage which the ship has sustained. Further, we find the words "amount of damages claimed by the said *Heard Brothers* by reason of the said collision;" and, again, the policies provide for damage or loss by contact which any insured ship may do to others, and "loss by contact" is loss of profits.

BYLES, J.—I am of the same opinion. The question is, what is the meaning of the word "ship"? If the strict meaning is to be taken, then, although the costs of suit and matters both precedent and subsequent to the loss of profits may be recovered, the loss of profits which intervenes cannot. We must construe the word "ship" to mean "owner of ship" to carry out the intention of the parties.

KEATING, J.—It is plain what was meant when the state of circumstances is regarded. The *Grenfells* was detained in the Admiralty Court, and the plaintiffs might have recovered this sum. They give up everything in consideration of this agreement, and it is hardly conceivable that they intended to part with this right. If the agreement is susceptible of the construction contended for by the plaintiffs, we must so construe it.

SMITH, J.—We must see what the circumstances were under which the agreement was entered into, and look at the context. Great injustice would be done by giving any other construction. There can be no doubt as to the meaning. It was meant that all damages which could be recovered in the Admiralty Court should be recovered.

Rule discharged.

[IN THE HOUSE OF LORDS.]

1865.
 Feb. 13, 14 ; } ROBERTS v. BRETT.
 March 16. }

Contract—Condition Precedent—Mutual Covenants—“Forthwith,” Meaning of.

By indenture of the 15th of May, the plaintiff covenanted with the defendant to procure a ship to stow on board a certain telegraphic cable then lying at M. Wharf, to provision and rig the vessel, to provide and pay the crew and workmen, &c., to lay down the cable, and that he, the plaintiff, would perform the several acts aforesaid and have the ship ready equipped for sea at the Nore on or before the 15th of July, and would proceed forthwith to T. and lay down the cable; and if the plaintiff made default in having the ship ready with the cable on board at the Nore by the 15th of July, the defendant might deduct and retain as liquidated damages 20l. a week. The defendant covenanted, subject to his right to deduct and retain as liquidated damages, to pay the plaintiff 5,000l., by instalments, that is to say, 1,000l., part thereof, on or before the expiration of seven days after the arrival of the ship at M. Wharf; 2,000l., further part, on or before twenty-one days after the arrival of the ship at the wharf; the remainder when the ship should put to sea from the Nore. And it was by the same indenture agreed and declared, that for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing the penalties which he might incur under these presents, the plaintiff and two responsible sureties should, within ten days of the execution of these presents, give and execute to the defendant, his executors and administrators, a bond in the penal sum of 5,000l.; and for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should, within ten days from the execution of these presents, give and execute to the plaintiff, his executors and administrators, a bond in the penal sum of 5,000l.

It was held, by the Court of Exchequer Chamber, that the giving of the bond with sureties by the plaintiff to the defendant was a condition precedent to his right to recover

against the defendant for not performing his part of the contract with relation to stowing the cable and paying the money; and this decision was affirmed by the House of Lords on appeal, and it was also held that the plaintiff was not released from his obligation to give a bond by reason of the defendant not having given a bond.

“Forthwith” held not to mean “immediately.”

This was an action brought by the plaintiff, the appellant, a captain in Her Majesty's Royal Marine Artillery, against the defendant, the respondent, the gérant in this country of a joint-stock company established in France, called the Mediterranean Submarine Electric Telegraph Company, to recover damages for a breach of an agreement under seal entered into between the plaintiff and the defendant on the 15th of May 1855, for the laying down by the plaintiff of 150 miles of submarine telegraph cable, called in the agreement “The African and Sardinian Cable,” and which cable the plaintiff undertook to lay down between Cape Tabague, on the northern coast of Africa, and Cape Spartivento, in the island of Sardinia. The agreement, or so much thereof as is material to the present proceedings, is set out in the declaration in the action, which will be found in the report of the case in the Court of Common Pleas, 25 *Law J. Rep.* (N.S.) C.P. 280, but was shortly as follows:

By the agreement the plaintiff was bound forthwith, at his own expense, to procure a frigate called the *Cornwall*, or some other suitable ship or vessel, and to stow the cable on board, and which cable was in the agreement expressly stated to be then lying at Morden's Wharf, East Greenwich; the plaintiff was also bound, at his own expense, to rig, complete, fit out, provide and provision the said ship, with all things necessary, as set forth in the agreement, and to pay 600l. towards insuring the cable for 60,000l. The agreement then stated that the plaintiff was to have the ship ready for sea at the Nore on the 15th of July then next; and in the event of the plaintiff failing to have the ship fully equipped at the Nore on or before that day, the defendant was to be at liberty to retain out of any monies

payable to the plaintiff under the agreement 200*l.* a week as liquidated damages for every week, and so in proportion for less than a week of such default. The defendant covenanted to pay to the plaintiff the sum of 5,000*l.*, as follows : 1,000*l.* on or before the expiration of seven days after the arrival of the ship at Morden's Wharf; the sum of 2,000*l.*, further part thereof, on or before the expiration of twenty-one days after the ship should have arrived alongside Morden's Wharf, and the sum of 2,000*l.*, the remainder of the said sum of 5,000*l.*, as soon as the said ship should have proceeded to sea from the Nore; and besides these money payments the plaintiff was to have 500 10*l.* paid-up shares in the said company delivered to him.

By the agreement it was also agreed and declared, that for the true performance of the covenants by the plaintiff, and for securing any penalties which he might incur, the plaintiff and two responsible sureties should, within ten days after the execution of the agreement, give and execute to the defendant a bond in the penal sum of 5,000*l.*; and that for the due performance of the covenants on the part of the defendant, the defendant and two sureties should, within ten days from the execution of the agreement, give and execute to the plaintiff a bond in the penal sum of 5,000*l.*; and that the said bonds so to be given should not in any manner prejudice or affect the respective rights or liabilities of the plaintiff or of the defendant under or by virtue of the agreement.

The plaintiff, in his declaration, after setting out the agreement and averring performance of all conditions precedent, alleged as breaches of the agreement, that before the time arrived for the plaintiff to bring his ship alongside Morden's Wharf for the purpose of taking the cable on board, the defendant refused to perform his contract, and dispensed with the said ship being brought alongside the said wharf, and would not stow the cable on board the ship, but caused the same to be stowed on board another ship, and thereby prevented the plaintiff from completing the said contract on his part. There was also a further breach assigned, that the defendant did not, in pursuance of the covenant on his behalf in the said agreement contained, give a bond

with sureties to the plaintiff in the penal sum of 5,000*l.*

The defendant pleaded—

1. That the plaintiff did not procure a suitable ship.

2. That the plaintiff did not rig, complete, fit out and provision her.

3. That the plaintiff was not ready and willing to provide and pay officers, and crew, and workmen.

4. That the plaintiff did not give a bond with two sureties to the defendant in the penal sum of 5,000*l.*

5. And, in answer to the breach respecting the defendant not giving his bond to the plaintiff, the defendant paid into court the sum of 1*s.*

Upon the first three and fifth pleas issues in fact were raised, and to the fourth there was a demurrer: the question raised by the demurrer being, whether or not the performance by the plaintiff of the covenants on his part set out in the declaration, "That for the true performance of the covenants by the plaintiff hereinbefore mentioned, and for securing any penalties which he might incur under these presents, the plaintiff and two responsible sureties should, within ten days from the execution of these presents, give and execute to the defendant a bond in the penal sum of 5,000*l.*," was a condition precedent to the obligation of the defendant to perform those covenants on his part, to the breach of which the fourth plea was pleaded.

The demurrer came on to be argued in the Court of Common Pleas, on the 10th of June 1856, when the Court gave judgment for the defendant.

The report of the case upon this demurrer is to be found in 18 *Com. B. Rep.* 561, and in 25 *Law J. Rep. (N.S.) C.P.* 280.

On the 28th of June 1858, the issues in fact came on for trial before the Chief Justice of the Court of Common Pleas and a special jury. The jury found that the plaintiff did procure a suitable ship, properly equipped, according to the contract, and was ready to provide the officers and crew, and found all the issues in fact in favour of the plaintiff, and they assessed the damages which the plaintiff had sustained at 2,300*l.*

The plaintiff having obtained this ver-

dict for the 2,300*l.*, and which verdict was not disturbed, then appealed to the Court of Exchequer Chamber against the decision of the Court of Common Pleas on the demurrer, when the judgment of the Court of Common Pleas was unanimously affirmed.

The report of the proceedings in the Exchequer Chamber is to be found in 6 *Com. B. Rep.* N.S. 611, and in 28 *Law J. Rep.* (N.S.) C.P. 323.

It will be seen by reference to these reports of the case, that after the argument on the demurrer in the Court of Common Pleas there was a slight amendment in the original declaration; but which was not of importance to the present question. The plea demurred to was not amended in any way, and the pleadings went before the Exchequer Chamber as set out in the report of the proceedings in the Exchequer Chamber.

This was an appeal to the House of Lords against the judgment of the Court of Exchequer Chamber upon the fourth plea.

Bovill and *Massey Dawson* (*Beasley* with them), for the appellant.—It was never intended that the giving of the bonds should be a condition precedent to the contract being binding on either party. Where parties stipulate to have bonds as a condition precedent, they would wait till the bonds were given, and they were satisfied with the sureties before signing the contract, which was not done in this case. The contract also is, that the appellant is *forthwith* to do certain things, that is, before the expiration of the ten days within which the bonds are to be given. There is nothing in the contract to shew that anything was not to be done till after the bonds were given. The appellant might have brought the ship alongside the wharf, or offered to take the cable on board at any hour after the signing of the contract, and the respondent would have been bound within seven days to pay the 1,000*l.*, the first instalment of the 5,000*l.* If there is a thing that is to be done, or may have to be done before the act which is relied upon as a condition precedent is to be performed, then it cannot be a condition precedent—*Pordage v. Cole* (1). The intention of the parties must be looked at to see whether they intended that

the thing should be a condition precedent or not. It would lead to the most absurd consequences to hold this to be a condition precedent. The question is whether the fourth plea is a good plea. It is not, for the respondent should have requested the bond from the appellant, and must shew that he was ready to do the concurrent act on his part, which this plea does not allege. Where there are several stipulations in a contract, some of which have been performed and some of which have not been performed, the non-performance of those that remain will not afford an answer to a breach of contract by the other party—*Stavers v. Curling* (2), *Boone v. Eyre* (3). The not giving of the bond in the present case may be compensated in damages. The consequence of holding the giving of the bond to be a condition precedent in this case would lead to the greatest injustice. The appellant having established a claim for 2,300*l.* before a jury, would be unable to obtain it on account of this plea. The matter omitted to be done was not the consideration for what was to be performed on the other side. The giving of the bonds was an independent stipulation. The matter which has not been performed must go to the whole consideration—*Tarrabochia v. Hickie* (4), *Kingdon v. Cox* (5), *Clipham v. Vertue* (6). Where a time is fixed for performance, as in the present case, the procuring of the ship by the appellant, the money must be paid, whether the other stipulations, as the giving of the bond in the present case, have or have not been complied with, and on the ground that there may be a remedy by cross-action—*Campbell v. Jones* (7), *Mattock v. Kinglake* (8), *Dicker v. Jackson* (9). The appellant alleges that there was a positive breach by the respondent before the time arrived when the

(2) 3 Bing. N.C. 355; s.c. 6 *Law J. Rep.* (N.S.) C.P. 41.

(3) 1 H. Black. 273, n.

(4) 1 Hurl. & N. 183; s.c. 26 *Law J. Rep.* (N.S.) Exch. 26.

(5) 2 *Com. B. Rep.* 661; s.c. 15 *Law J. Rep.* (N.S.) C.P. 95.

(6) 5 Q.B. Rep. 265; s.c. 13 *Law J. Rep.* (N.S.) Q.B. 2.

(7) 6 *Term Rep.* 570.

(8) 10 Ad. & E. 50; s.c. 8 *Law J. Rep.* (N.S.) Q.B. 250.

(9) 6 *Com. B. Rep.* 108; s.c. 17 *Law J. Rep.* (N.S.) C.P. 234.

(1) 1 *Wms. Saund.* 320 c, n. 3.

bond was to be given, from which the respondent must absolve himself—*Hochster v. Delatour* (10), *Lovelock v. Franklin* (11), *Cort v. the Ambergate Railway Company* (12), *Ellen v. Topp* (13) and *Graves v. Legg* (14), relied on by the respondent in the Court below, are distinguishable from the present case. There is a contract entered into at once without the bonds being given; there has been a part performance, and the giving of the bonds is not a condition precedent. We also rely upon the stipulation that the giving of the bonds was not to prejudice the rights and liabilities of the parties. The declaration is a good declaration, and the plea is a bad plea. They also referred to *Helm v. Burness* (15), *Short v. Stone* (16) and 2 *Smith's Lead. Cas.* 11, notes.

Mellish and *H. Lloyd*, for the respondent.—It was a condition precedent to the respondent's liability to stow the cable on board the ship provided by the appellant that the appellant should have given his bond. This is a question of construction, and the instrument is to be construed for the purpose of carrying out the intention of the parties. The cases cited on the other side shew this. The giving of the bond in the present case was intended to be a condition precedent; if it is not a condition precedent, and the only remedy is in damages, the intention is frustrated. The word "forthwith" is a general and vague word, and only means that it is to be done with reasonable despatch and in a reasonable time. It does not follow, because the giving of the bond is a condition precedent at one time, that it would remain so if the cable had once been loaded on board—*Boone v. Eyre* (3); but that is not the case here. Here, both parties having failed to give the bond, either party is at liberty to rescind the contract, because that is carrying out the object of the contract. They

might mutually have agreed to go on with the contract, notwithstanding the failure to give the bond; but they did not do so. The declaration contains no averment that the appellant was ready and willing to give the bond, and that the respondent before the expiration of ten days refused to perform the contract and dispensed with the bond. If the declaration had contained such an averment, a plea alleging that the appellant had not given the bond would have been bad; but the declaration contains no such averment. The declaration simply alleges that the appellant has performed all the conditions precedent, and amongst others he has given the bond, and this is traversed. The cases cited by the other side are totally different from the present. The true construction of the clauses here is, that the respondent cannot be called on to carry out his part of the agreement, unless the appellant has within ten days given his bond. There was no necessity for a demand of it. Upon the question of pleading, upon the true construction of the declaration, the appellant alleges that he performed all the conditions precedent, therefore that he gave the bond. The plea is a good plea; it says that he did not give the bond. By demurring to that plea and not traversing it, the appellant admits that if the giving of the bond is a condition precedent, he did not comply with that condition; in *Hochster v. Delatour* (10) it is true there is not the allegation which in order to make the declaration complete there ought to be, but the question there arose on a motion in arrest of judgment, and it is a well-known distinction between a question so arising and one arising on a demurrer that every fair inference is to be taken for the plaintiff when the question so arises, and that small imperfections in his declaration will be looked over. But for that, there ought to have been an averment there that the plaintiff accepted the refusal as an absolute breach, and acted upon it—*Avery v. Bowden* (17).

Massey Dawson, in reply, cited *Bentley v. Davies* (18) with regard to the effect of the general averment.

(17) 6 El. & B. 953; s.c. 26 Law J. Rep. (N.S.) Q.B. 3.

(18) 10 Exch. Rep. 734; s.c. 23 Law J. Rep. (N.S.) Exch. 220.

(10) 2 El. & B. 678; s.c. 22 Law J. Rep. (N.S.) Q.B. 455.

(11) 8 Q.B. Rep. 371; s.c. 15 Law J. Rep. (N.S.) Q.B. 146.

(12) 17 Q.B. Rep. 127; s.c. 20 Law J. Rep. (N.S.) Q.B. 460.

(13) 6 Exch. Rep. 424; s.c. 20 Law J. Rep. (N.S.) Exch. 241.

(14) Ibid. 709; s.c. 28 Law J. Rep. (N.S.) Exch. 229.

(15) 8 Law Times, N.S. 207.

(16) 8 Q.B. Rep. 358; s.c. 15 Law J. Rep. (N.S.) Q.B. 143.

THE LORD CHANCELLOR (LORD WESTBURY).—My Lords, the question on this appeal is, whether, having regard to the true construction and intent of the agreement of the 15th of May 1855, the stipulation that the appellant should, within ten days after the date and execution of the agreement, give a bond, with sureties, for the due performance of the covenants on his part, is a condition the previous fulfilment of which, unless waived or released, was necessary to enable the appellant to maintain any action upon the agreement. The case has been learnedly argued at the bar, and many decisions were cited; but the question depends on simple principles. First, having regard to the subject-matter of the agreement between the appellant and the respondent, who was the representative of a company, it is reasonable to suppose that the company, who were about to intrust the appellant with the laying down of a very valuable telegraphic cable, should require from the appellant security for the due fulfilment of his contract; and the requisition that the bond should be given within ten days is sufficient to shew that it was intended to precede any material action under the agreement. The appellant indeed contends, that if he had brought the *Cornwall* frigate, or some other suitable vessel, alongside Morden's Wharf on the day of the date of the agreement, or the next day, the sum of 1,000*l.* would have been payable to him by the respondent within a week afterwards; and thus he insists that a material part of the contract might have been performed before the expiration of the ten days allowed for the bond, and that therefore the giving of the bond is not a condition precedent. I cannot think that any such great expedition, if it was possible, was contemplated by the parties, or that the appellant was bound to act with any such rapidity. His engagement is, that he will *forthwith* at his own expense procure the *Cornwall* frigate, or some other suitable ship or vessel, for the purpose required; the word "*forthwith*" does not necessarily imply that this was to be done by the appellant before he had received the bond of the respondent and his sureties, that is, before the expiration of ten days. But if the appellant had brought a suitable vessel alongside the wharf so expeditiously as to have entitled himself to the sum of

1,000*l.*, and had received that sum (which must be the hypothesis) within the ten days, and before the time for giving his bond expired, I should not have thought that it affected his liability to give the bond within the appointed time. It is urged that in the state of things supposed the 1,000*l.* might not have been paid as stipulated, and so a breach of covenant by the respondent might have occurred within the ten days. If it did, I should still be of opinion that the appellant was bound to give or tender his bond to the respondent within the prescribed time. The right to have the security of two responsible sureties for the performance of the appellant's covenant was a very material thing to the respondent's company and of the essence of the contract, and I do not think it could be affected by anything voluntarily done by the appellant within the ten days.

It was also contended, by the appellant, that the covenants to give the bonds by the appellant and respondent respectively were mutual covenants dependent one on the other; and that there was no default by the appellant until that instant of time at which there was a like default by the respondent, and that the respondent, being in like default, could not defend himself by pleading the default of the appellant. But I fear that this is not the true meaning and effect of the contract. The engagements to give the bond are not entered into in consideration one of the other; but the fulfilment of his own engagement by each of the parties is a necessary preliminary to his right to recover on the agreement. It is the true intent and object of the agreement that each party should find security within the time prescribed. If this be not done by either party, both may be in effect released from the contract, which may fall to the ground; but neither party can recover for breach of the covenants in the agreement unless he has performed this precedent obligation. I therefore move your Lordships that the judgment of the Court below be affirmed.

LORD CRANWORTH.—My Lords, I think that the judgment of the House ought to be for the defendant in error. I agree with the opinions of the learned Judges that the giving of the bond must have been intended

to be a condition precedent to any right of action for breach of any of the covenants contained in the indenture. On any other hypothesis the bond would be useless. No doubt, as there was a covenant by each party with the other, to give a bond with sureties within ten days, if default was made in giving a bond, a right of action would accrue for breach of that covenant; but such an action could produce no fruit to the party recovering in it. If brought before breach of any of the other covenants, it could only result in nominal damages. If brought after a breach, no damages could be recovered, except such as would have been recoverable in an action founded on the breach itself. It would give no right against any sureties, the obtaining of which right was the sole object of the bond. It was argued that the circumstance that the bonds were to be given not immediately, but within ten days, was inconsistent with the hypothesis of a condition precedent. A breach, it was suggested, might occur within the ten days, and so a right of action might accrue, before any bond need have been given. This does not appear to me inconsistent with the hypothesis of a condition precedent. Probably the parties knew that, practically, no breach could occur within the ten days; but even if that is not so, the party injured by a breach of covenant within ten days might, by giving his bond, put himself in a condition to sue for the breach, for it would certainly be no answer on the part of the defendant sued for the breach to say, that he had not given his bond. Suppose, for instance, that the plaintiff had on the day of the date of the indenture moored a proper ship alongside Morden's Wharf, but that after the expiration of seven days, the defendant refused to pay him the 1,000*l*. The plaintiff, if he had given a proper bond with sureties to the defendant, would then have been in a condition to maintain an action for breach of covenant against the defendant, whether he had or had not given a proper bond to the plaintiff.

But it was argued, that even assuming the giving of the bonds to be conditions precedent, still they must be treated as mutual and dependent conditions, and that the defendant, who had given no bond to the plaintiff, could not insist on the want of such a bond from him.

I do not feel the force of this argument. There is nothing in the indenture making it obligatory on either party to apply to the other for his bond. By giving the required bond, the party giving it puts himself in a condition of enforcing, if he thought fit, the performance of the covenants. If neither party, as was the case here, gave any bond, neither party could sue for any breach of covenant. This was the opinion of the Courts below, and in that view of the case I concur.

LORD CHELMSFORD.—My Lords, I agree with the decision in the Court of Exchequer Chamber, affirming the judgment of the Court of Common Pleas.

The question is, whether the fourth plea is an answer to the action; or, in other words, whether the giving the bond by the plaintiff was a condition precedent to his right to recover damages from the defendant for his non-fulfilment of his part of the agreement.

The only parts of the deed necessary to be noticed are, first, the covenants of the plaintiff, that he would forthwith, at his own expense, procure the *Cornwall* frigate, or some other suitable ship or vessel, and should and would stow or cause to be stowed on board the said ship or vessel the Submarine Telegraphic cable, which was 150 miles in length or thereabouts, and was then at Morden's Wharf, East Greenwich, and should do various acts in fitting out and provisioning the ship or vessel, and providing sufficient officers and crew, and should and would do and perform all the several acts thereafter covenanted to be performed by him the plaintiff, and have the said ship fully equipped in all respects, and ready for sea, at the *Nora*, on or before the 15th of July then next; secondly, the covenants of the defendant to pay the plaintiff 5,000*l*. by the instalments and at the times thereafter mentioned, that is to say, the sum of 1,000*l*. on or before the expiration of seven days after the arrival of the said ship or vessel alongside Morden's Wharf aforesaid, and the sum of 2,000*l*. on or before the expiration of twenty-one days after the said ship should have arrived alongside Morden's Wharf aforesaid, and the sum of 2,000*l*., the remainder thereof, when and so soon as the said ship

should put to sea from the Nore; and, lastly, the stipulation for mutual bonds, in these terms: "And it is hereby agreed and declared, that for the true performance of the covenants by the plaintiff hereinbefore contained, and for securing any penalties which he may incur under these presents, the plaintiff and two responsible sureties shall, within ten days from the execution of these presents, give and execute to the defendant a bond in the penal sum of 5,000*l.*; and for the due performance of the covenants on the part of the defendant hereinbefore contained, the defendant and two responsible sureties shall, within ten days from the execution of these presents, give and execute to the plaintiff a bond in the penal sum of 5,000*l.*"

The learned counsel for the plaintiff argued that the covenant on the part of the plaintiff to give the bond could not be intended to be a condition precedent, because he was *forthwith* bound to procure the ship or vessel; so that he was to do an act before the ten days had expired within which the bond was to be given; and also that the defendant having covenanted to pay the plaintiff 1,000*l.* on or before the expiration of seven days after the arrival of the ship or vessel at Morden's Wharf, and the money being appointed to be paid on a day which might happen before the expiration of the ten days within which the bond was to be given, the giving of the bond could not be a condition precedent, according to the first rule upon the subject of dependent and independent covenants laid down in the notes to *Portage v. Cole* (1). They also contended that the case fell within the third rule stated in these notes, as it was a covenant going only to part of the consideration, the breach of which might be paid for in damages. These rules are not proposed for the purpose of absolutely determining the dependence or independence of covenants in all cases, but merely as furnishing a guide to the discovery of the intention of the parties. For, as Lord Kenyon said, in *Porter v. Shepherd* (19), "Conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument;

and technical words (if there be any to encounter such intention) should give way to that intention."

Now, what may fairly be considered to have been the intention of the parties upon the whole scope and object of the deed in question? Putting the agreement into a short form, it amounts to this: the defendant says to the plaintiff, "In consideration of your doing certain acts, and giving me a bond, with sureties, to secure the performance of your covenants to do these acts, I will pay you a sum of 5,000*l.* and give you a bond with sureties to secure the payment." And the plaintiff, on the other hand, covenants to do the acts and to give the bond in consideration of the performance by the defendant of the covenants on his part to be performed.

Upon this short summary of the deed there could scarcely be a doubt that either party might refuse to perform his part of the agreement, until he was secured by the bond of the other.

But the counsel for the plaintiff say, that the particular terms of the deed shew that this could not be the intention. In particular they laid great stress on the word "*forthwith*," in the plaintiff's covenant, to procure the vessel, which they interpreted to mean "*immediately*," and they urged this as a proof that the giving the bonds could not be meant to be conditions precedent, because this act of the plaintiff must necessarily have been done before the expiration of the ten days, to the last moment of which the defendant was at liberty to delay the execution of the bond. And they also insisted upon the clause for payment by the defendant of 1,000*l.* before the expiration of seven days after the arrival of the vessel at Morden's Wharf, which might have happened within the ten days; and therefore they argued that the case in both these respects was within the first rule in the notes to *Portage v. Cole* (1).

It appears to me that too great force was attributed to the word "*forthwith*" in the agreement, and that all that was meant by it was that the plaintiff was, without delay or loss of time, to procure a suitable vessel for receiving the telegraphic cable. And to quicken his diligence the defendant covenanted to pay him 1,000*l.* within seven days after the arrival of the vessel at Mor-

den's Wharf. Out of regard to his own interest, too, the plaintiff would use all expedition in commencing the performance of the agreement, because, unless he had the vessel with the cable on board equipped and ready for sea by the 15th of July, he would have been liable to pay 200*l.* per week for his default. I think that the plaintiff could not have been compelled to take a single step, nor to incur the smallest expense towards procuring the vessel, till he was secured by having the defendant's bond; and that if he chose to proceed without having this security, everything he did was at his own peril. If the defendant wished to obtain the plaintiff's progress within the ten days, he might have executed and delivered his bond, and then he would have performed all that was required of him till the first instalment of the 5,000*l.* became due.

It is a strong circumstance indicative of the intention of the parties, that the stipulations with respect to the mutual bonds should be conditions precedent, that these stipulations follow all the covenants entered into on both sides, and that they are agreed and declared to be given "for the true performance of the covenants hereinbefore contained." They are obviously intended, therefore, to be mutual securities for the performance of all the covenants by each of the parties respectively. This, I think, takes away all ground for saying that the covenants for giving the bonds go only to part of the consideration, and that a breach of them may be paid for in damages. Though, strictly speaking, they enter into and form part of the consideration on both sides, yet they extend to the whole of the covenants contained in the deed, and are an essential and vital part of the agreement between the parties. Nor is it easy to see how a breach of them could be compensated in damages, or what estimate could be formed of the measure of damages for their non-fulfilment.

I do not think that anything in favour of the plaintiff can be made of the circumstance of the defendant not having given his bond. It appears to me that the mutual default of the parties had the effect of virtually putting an end to the agreement, because neither of them was in a situation to insist upon performance by the other.

A supposed case was put at the bar, of the plaintiff, after the ten days had expired without his bond having been given, going on to perform his covenants, and afterwards in an action to recover the amount stipulated to be paid by the defendant, being met by a plea of the non-performance of the condition precedent. I have no difficulty in saying that in such a case the party who may avail himself of the non-performance of a condition precedent, but who allows the other side to go on and perform the subsequent stipulations, has waived his right to insist upon the unperformed condition precedent, as an answer to the action.

Looking to the whole of the deed, I am satisfied that it was the intention of the parties that each should receive from the other a bond as a security for the performance of the covenants before either was bound to proceed to perform any of the stipulations contained in the deed. For these reasons I think the judgment of the Exchequer Chamber ought to be affirmed.

Judgment affirmed.

1865. } STACKY, appellant, WHITE-
Jan. 25. } HURST, respondent.

Game—Trespass in Pursuit of Game—Aiding and abetting—Evidence.

In support of an information, under the 11 & 12 Vict. c. 43. s. 5, against A. for aiding and abetting B. to commit the offence of trespass in pursuit of game, there was evidence that A. drove B. in a conveyance along a turnpike-road for a lawful purpose; that the conveyance was afterwards stopped, when B. got out and entered a field and shot a hare, which he gave to A. on returning to the conveyance, and A. then drove along the road:—Held, that there was evidence on which the Justices might find A. guilty of the offence so charged.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 94.]

1865. } HUNT AND ANOTHER v.
April 24, 25. } HARRIS.

Metropolitan Buildings Act (18 & 19 Vict. c. 122.)—Party-Wall, Expense of Repairing—"Owner."

The lessee of a house for a long term of years, who has underlet it in different portions to different tenants, and who is in receipt of the rents from such underlettings, is the "owner" of the party-wall of such house within the meaning of the Metropolitan Buildings Act (18 & 19 Vict. c. 122), notwithstanding the underlettings create a greater interest in the under-tenants than that of a yearly tenancy, and he is liable as such owner to pay to the adjoining owner a proportion of the expenses incurred by the latter in repairing the wall in obedience to the requisition of the Commissioners of Sewers made under that act.

This was an action to recover the sum of 86*l.* 9*s.* 9*d.*, as the defendant's proportion of expenses in respect of repairing a party-wall, situate on the west side of premises No. 37, Eastcheap, and on the east side of premises No. 38, Eastcheap, in the city of London. The party-wall being in a dangerous state, on the 16th of June 1863 the Commissioners of Sewers, acting under the powers given them by the clauses relating to dangerous structures in the Metropolitan Buildings Act, 18 & 19 Vict. c. 122, gave notice to both the plaintiffs and defendant, as the owners or occupiers of such party-wall to pull it down and have it repaired. In compliance with this notice, the plaintiffs, who occupied the premises No. 38, Eastcheap, did what was so required; and at the trial, before Erle, C.J., at the London Sittings after Michaelmas Term, 1864, the only question in dispute which it is now necessary to notice was, whether the defendant was owner of the premises No. 37, Eastcheap, within the meaning of the said Metropolitan Buildings Act, and therefore liable as adjoining owner to pay the plaintiffs the amount sought to be recovered in this action. With respect to this question it appeared the defendant held the premises No. 37, Eastcheap, for a long term of years under a lease from the freeholder, and that he had underleased the ground-floor of the premises to a Mr. Collins, for

twenty-one years, and had let the two upper-floors to a Mr. Berridge, under a written agreement, not under seal, for a term of seven years and a half, from November 1861, and that he was in receipt of rent in respect of both these underlettings. It did not appear whether the rest of the house was let by the defendant or not, but he did not himself occupy it.

On behalf of the plaintiffs it was contended that the defendant was "owner" within the meaning of the act, and that the underletting to Berridge did not give a greater legal interest to Berridge than that of a yearly tenancy, and therefore was not sufficient to prevent the defendant from being such "owner."

A verdict was found for the plaintiffs for the amount claimed, and the defendant afterwards, pursuant to leave reserved, obtained a rule *nisi* to set such verdict aside, and to enter instead a verdict for the defendant or a nonsuit, on the ground, *inter alia*, that the defendant was not liable, inasmuch as he had underlet all the premises for a greater term than a tenancy from year to year.

Coleridge and *Day* shewed cause.—The defendant would be liable as an adjoining owner within the meaning of the act, even if he had let all the premises for a greater term than a yearly tenancy. The interpretation clause, section 3, of the act (18 & 19 Vict. c. 122.) states that "owner" "shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will." Section 82, with reference to the provisions relating to party structures (and a wall is such,—see section 69), defines a "building owner" as "one of the owners of the premises separated by or adjoining any party structure as is desirous of executing any work in respect of such party structure," and calls "the owner of the other premises the adjoining owner"; and section 88. makes provision for expenses to be borne jointly by the building owner and adjoining owner, and states that, "if any party structure is defective or out of repair, the same shall be borne by the building owner and adjoining

ing owner in due proportion, regard being had to the use that each owner makes of such structure." Here the defendant is shewn to be in the receipt of the whole of the rents and profits issuing out of the adjoining premises, and he therefore comes within the words of the first part of section 3. The case of *Mourilyan v. Labalmondiere* (1) is distinguishable from the present. There the appellants, who were seised in fee of the building, had let it on lease for a term of years to one person, who was in occupation of the whole building, and therefore such lessee and not the appellants was held to be the "owner" within the meaning of this Metropolitan Buildings Act. That is very different from the present case, where the defendant has let out various portions of the premises to several persons, he alone being in possession of the profits of the entire building. So in *Evelyn v. Whichcord* (2), as the rent reserved to the lessor by the lease was only a peppercorn, he was not considered to be in possession of the profits, and was held not to be the owner, as defined by this statute. With regard to the interest which Berridge has in the premises, it is only that of a yearly tenant, the agreement not being under seal, and therefore void as a lease. The case of *Cowen v. Phillips* (3) will be relied on by the defendant as shewing that such a tenant would be treated in equity as an owner, but that was for the purpose of entitling him to notice before alterations could be made by an adjoining owner, and does not apply to the present question.

Hoggins, in support of the rule.—The defendant has underlet the premises, and is no longer the owner in possession, and therefore, according to the principle of the authorities, especially that of *Mourilyan v. Labalmondiere* (1), he is not the owner who is made liable for the repairs in question by the Metropolitan Buildings Act. In that case Crompton, J. says, "It seems to me that the statute contemplated that where, as in this case, there is both a first

owner in receipt of the rents and profits, and a second statutable owner by virtue of occupation for a longer term than from year to year, such last owner is to be the party liable for these expenses. One strong ground for this view is that no other party would have the right to enter the premises and pull down such part as was ruinous." To be "owner" within the act he must be more than landlord of the premises; he must be in possession, and so have the power to do the works required by the Commissioners to be done in order to make the dangerous structure safe. The present defendant having let the premises had no right to enter and repair the wall, and if he were made liable in this action he would have no remedy over. He has parted with the premises for a greater estate than that of a yearly tenancy, and is therefore according to the statute not liable as owner. The case of *Cowen v. Phillips* (3) is directly in point to shew that Berridge has a greater interest than that of a yearly tenant. In that case the Master of the Rolls held that a tenant in possession who had an equitable interest only under an agreement for a lease for a term of years was in equity an adjoining owner under the Metropolitan Buildings Act.

ERLE, C.J.—This was an action by one adjoining owner against another adjoining owner to recover a contribution in respect of a party-wall, which was found to be a dangerous structure, and was required by the Commissioners of Sewers to be pulled down by virtue of the powers in the Metropolitan Buildings Act. For the purposes of the present rule, it must be taken that the plaintiffs, the owners on the east side, had done all that was necessary under the act to make Harris, the defendant, liable for the contribution sought to be recovered. It appeared at the trial that Harris held the premises on the west side of the plaintiffs upon the terms upon which the greater part of the house property within the Metropolitan Buildings Act is held, namely, that he had a long lease, say for eighty or ninety years, probably at a ground-rent, and that he was making a profit by letting out the premises in floors; that is, the ground floor by lease to Collins for twenty-one years, and the two upper

(1) 1 El. & E. 533; s. c. 30 Law J. Rep. (N.S.) M.C. 95.

(2) 1 E. B. & E. 126; s. c. 27 Law J. Rep. (N.S.) M.C. 211.

(3) 33 Beav. 18.

floors to Berridge under an agreement for seven years, which, according to the case of *Cowen v. Phillips* (3), before the Master of the Rolls, gave him in equity all the rights of a legal estate for the seven years, though it was only good in equity. There is no evidence how the first floor was disposed of; but it was not occupied by Harris, and I assume for the purpose of the present judgment that it was occupied by a person unknown, for a term unknown. Harris being in receipt of the rents and profits in the manner that I have mentioned, the claim is made against him; and it seems to me that under section 3. he clearly is the "adjoining owner." By that section the word "owner" is applied to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation thereof other than as tenant from year to year. He was the owner in possession or receipt of all the rents and profits of this tenement, and he is the adjoining owner. Then the party-wall having been pulled down and a claim made against him as adjoining owner, he says, "I am not the owner, because I am not in the immediate possession of the premises, because it is let out in the way above mentioned." Is that any bar to this action? As I read the statute, it is not. Then the wall was a dangerous structure, and was required to be pulled down. It was pulled down by the plaintiffs, who were building owners within the statute; and section 73, as I read it, gives the building owner who pulls down the structure and builds up another in its place a right to demand repayment of the expenses. It says, "all expenses incurred"—(I leave out the words, "by the said Commissioners," because the building owner is in the place of the Commissioners—all expenses incurred by the building owner—as I read it) "in respect of any dangerous structure shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of the repairs." It seems to me to be perfectly clear that the party upon whom the duty of payment is cast is the owner of the structure within the meaning of section 3, namely, a person in possession or receipt of the rents or profits of the pre-

mises, that is to say, the person having a beneficial lease, and entitled to the rack-rent. The words "without prejudice to his right to recover the same from any lessee or other person liable to the payment of such expenses of repairs" clearly refer to the owner of a long term who has underlet the premises. There is a very great convenience in giving to the building owner, who has been called on to do the work required in the case of a party structure, a right of proceeding for the expenses against the owner of the entire premises, instead of against every one of the subtenants, where the premises are let out, as here, in different portions, namely, one floor to one tenant and another floor to another. And the contrary would not only be very inconvenient, but lead to great injustice. For, take the case of the man who has taken one floor of the house for a term, of which only four and a half years remain, it would be an enormous injustice to make him pay the entire expense of building up that portion of the party-wall which adjoins his floor. That the statute contemplated something in the nature of a permanent interest in the adjoining owner of the whole of the premises appears from section 84, which enables the adjoining owner to require the building owner to build chimneys, jambs, recesses, and other like works belonging to the permanent structure of the adjoining house. It seems much more reasonable to give the right to insist on modifications of the structure of the party-wall to the person entitled to the long lease of the entirety of the premises than to allow such a right to be exercised according to the caprice or convenience of the persons having leases of the separate floors. It seems to me that the lessee of the entire premises for a long term, who is in the receipt of the rents and profits is precisely the owner contemplated by the statute against whom the building owner is to have recourse; and I think that section 97, construed in this way, tallies exactly with it. That section enacts that in respect of expenses to be borne, the owner immediately entitled in possession to premises, or the occupier thereof, shall, in the first instance, pay such expenses, with this limitation, that no occupier shall be liable to pay any sum

exceeding the amount of rent due or to become due from him in respect of the premises. The owner immediately entitled in possession *prima facie* would be the person to pay, and the clause has not contemplated cases where the tenant in fee might be in possession of the land. I think that the clause refers to the definition in section 3. of the word "owner," and it means, "in the receipt of the rents and profits," and is put in contradistinction to an occupier of the premises, because the first is liable to the entire demand, and the other is liable only to the extent of the rent that might be due or become due from him. I think that what the legislature had in contemplation was making the party entitled to the permanent interest liable, since by section 74. if the "owner" cannot be found, or will not pay, the Commissioners have power to sell the structure, and it would be very inconvenient, to say the least, to think of selling in the case of the default of a sub-lessee, who might have, as in the present case, an interest only for four years and a half. To my mind the statute has a thoroughly rational and convenient interpretation, upon the principle I have stated. I do not mean to say but that the owner in fee simple, or somebody else, also may be liable. I do not pronounce any opinion upon that. But my opinion is clear that the owner of a long term, who has underlet the premises, and who is entitled to the rack-rents, is liable. The cases adverted to do not throw much light upon the question before us. In the case of *Evelyn v. Whichcord* (2), Evelyn was the owner in fee who had leased the land to one Searle at a peppercorn rent, with a covenant by Searle to build houses on the land so let, and the claim made by Whichcord, who was the district surveyor, was for surveying the houses which Searle was building, and in respect of which Searle was the person for whom the service was done, and on his becoming bankrupt Whichcord made a claim for his fees under section 51. of this Metropolitan Buildings Act on Evelyn, the owner of the fee simple. The judgment was that he was not liable, for he was not the owner within the definition in section 3; because, as stated in the judgment of Crompton, J., it is enacted that the word "owner" shall

apply to a person entitled to the rents and profits; whereas a peppercorn rent cannot be called a rent or profit. I am reported to have only said in that case, "Under the peculiar circumstances of this case I read the statute as my Lord does." It was very clear to my mind, in that case, that it was the duty of the Judges to look a long way round before they shifted the liability to pay the surveyor from the builder to the owner of the fee simple. The statute states that "owner" means the man entitled to the rents and profits, and I considered in that case that the beneficial interest was in the lessee of the term, and not in the person entitled only to a peppercorn rent. That case throws very little light upon the present one, because it has nothing to do with the rights between owners of a party-wall. The same observation, to my mind, applies to the case of *Mourilyan v. Labalmondiere* (1). There a chapel had been let by Mourilyan to one Neill for twenty-one years, with a covenant by Neill to keep it in repair. I do not understand that there was any question there of building owner or adjoining owner. The conditions of the lease were not performed, and the chapel was pulled down by the Commissioners because it was in a dangerous state, and was a nuisance; then, as between Labalmondiere, who was the Commissioner of Police, and Mourilyan, the owner in fee, the Court came to the conclusion that Mourilyan ought not to have been proceeded against for the expenses of pulling down the chapel. There is, I think, a distinction between that case and the present; but in one point of view it is in favour of the judgment I have come to. The Court there say that the action ought not to have been brought against the owner of the fee, but against the lessee who was entitled to the rents and profits. I consider that Neill, during his lease for twenty-one years under a covenant to repair, stood exactly *in pari jure* with Harris in the present case. Neill was making a profit of the chapel by letting parts of it, for I assume he was making a profit by letting the pews, and he had twenty-one years of the entirety under a covenant to put it in repair, and he was the person within the reasoning of that decision, who ought to have been called on to pay, for the very reason that Harris ought

to be called on here. It would be a source of infinite dispute and litigation, if without making Harris pay the whole, the building owner had to go against the different under-tenants. In coming to the conclusion at which I have arrived, I do not in the smallest degree contravene any of the authorities referred to.

BYLES, J.—After the manner in which my Lord has dealt with this case, I will only add a very few words. I cannot conceive, as the case at present stands, that any doubt can now remain upon the question. I think it right to say that, as far as I may venture to pronounce an opinion, all the three cases of *Mourilyan v. Labalmondiere* (1), *Evelyn v. Whichcord* (2) and *Coven v. Phillips* (3) were rightly decided. In the first case it was held that the party who was a tenant for twenty-one years, under a covenant to repair, was the party liable, and further that he was the only party liable. It is quite unnecessary to discuss the reasons why, but on a full examination of the statute, I come to the conclusion that there is no reason whatever for impugning the soundness of that decision. The next case is that of *Evelyn v. Whichcord* (2), where it was held that a receiver of a peppercorn rent was not in the beneficial occupation of the rents and profits, and therefore could not be the owner within the meaning of the statute. The third case was *Coven v. Phillips* (3), and it is to this effect: that though a man in point of law may be a tenant from year to year, yet if he has a contract for a term, he must be taken in a Court of equity to be possessed of the interest contracted for, because equity considers that to be done which is contracted to be done. That case only shews, that if a person paying a rent, and therefore a yearly tenant, has a contract for a beneficial term, he would be the party liable under the statute. Every one of those cases is quite consistent with our decision here. It is plain here that the defendant is the "owner," both within the meaning of the act of parliament and in the popular sense of the word. It seems to me he is more than that, he is the occupying owner. It appears that the ground-floor and the basement are let to one tenant, and the two upper floors are let to another tenant; and on the terms of a letting which we have not ascertained, the

residue of the house, or a portion of it, is let to another. What is there to shew that the demise of these rooms carries any interest whatever in the party-wall? If such a letting were to carry an interest in the party-wall, so might the letting of lodgings carry with it such an interest. We certainly do not find that the defendant demised any portion of the party-wall, and I should be astonished if I took a lease of rooms for a term of years, if I was told that it included a demise of a portion of a party-wall. I quite agree with what my Lord has said, and I entertain no doubt but that this verdict ought to stand.

SMITH, J.—I am of the same opinion. It may be difficult to put a definite construction upon this statute. The best the Court can do is to look narrowly to the facts of each case. I think that in this case the defendant answers the description of "owner" in the statute. He is in the immediate possession of the whole of the rents and profits, and therefore the beneficial owner, and the evidence does not satisfy me that there are other persons who answer that description.

Rule discharged.

1865.
April 25.

{ FOWLER AND ANOTHER v. THE
ENGLISH AND SCOTTISH MAR-
INE INSURANCE COMPANY,
LIMITED.

*Marine Insurance—Insurance against
War Risks—Embargo—Total Loss.*

By a policy of insurance on a vessel against capture and detention the assurers contracted "to pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." The vessel having been detained under an embargo within the meaning of the policy, —Held, that when the thirty days after receipt of official news of such embargo had expired, the assured was entitled to recover for a total loss, although before action, but subsequently to such thirty days, the embargo was taken off and the vessel was restored to the assured.

This was an action on a policy of insurance, which was tried, before Erle, C. J., at

the London Sittings after Michaelmas Term 1864.

The policy was upon a ship called *Ernst Jacob*, valued at 2,500*l.*, at or from Riga to London, and the insurance was "only against such risks as are excluded, free from capture, seizure and detention, or the consequences of any attempts thereof, to pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation."

The first count of the declaration set out the policy, and alleged a loss by the seizure and detention of the ship under an embargo by the King of Denmark, and that, before action brought, thirty days after receipt of official news of the said seizure and detention had elapsed, and that the defendants had not indemnified the plaintiffs against the said loss, or paid the said sum of 2,500*l.*

The defendants pleaded to the first count, so far as relates to the total loss of the ship, first, a denial of the detention of the ship under an embargo by the King of Denmark, until after the lapse of thirty days after receipt of official news of the said seizure; and secondly, a plea to the effect, that within thirty days after the said embargo, and before action, a decree was made by the King of Denmark, by which this embargo was taken off, and that the ship afterwards sailed upon and completed her voyage from Riga to London in safety.

The facts were these: The ship, the *Ernst Jacob*, was a Prussian ship, and on the 4th of December 1863, in the course of her voyage from Riga to London, she was obliged to put into Elsinore for repairs. War being then imminent between Denmark and Prussia, the plaintiffs on the 15th of December effected the policy in question, being an insurance of the vessel against war risks only. On the 3rd of February 1864, war having been declared between Denmark and Prussia, an embargo was laid by the Danish Government on the *Ernst Jacob*, then still at Elsinore. On the 4th of February a telegram was received at Lloyd's, giving information of the embargo on the *Ernst Jacob*, and on the same day an entry of the loss was made in the loss-book at Lloyd's, which the jury found was the

official news contemplated by the policy. The thirty days after the receipt of such news expired on the 6th of March. On the 15th of February a decree was made and promulgated by the King of Denmark, by which enemies' vessels, then lying under embargo in Danish harbours, were permitted to depart until the 1st of April, under proviso of reciprocity on the part of the governments interested. The Prussian Government assented to the terms of this decree on the 13th of March 1864, on which day the embargo was taken off the *Ernst Jacob*, and she shortly afterwards sailed from Elsinore, and arrived in good condition in London on the 29th of April. It was admitted that the vessel would not have been allowed to leave the Danish harbour until the 13th of March, when the Prussian Government assented to the decree. The present action was brought after the embargo had been taken off, and the plaintiffs claimed to recover a total loss.

A verdict was found for the plaintiffs for 2,500*l.*, and interest thereon at 5*l.* per cent., leave being reserved to the defendants to move to set the same aside, and enter a verdict for the defendants. Pursuant to such leave,

Mellish obtained a rule nisi to that effect, on the ground that the loss ceased to be total when the embargo was taken off. Against this rule,

Lush and *Sir G. Honyman* now shewed cause.—The plaintiffs are entitled to recover for a total loss, the right to recover having vested in them absolutely on the expiration of the thirty days. But for this clause in the policy, it is clear from the authorities that immediately on the embargo being put on the ship they could have given notice of abandonment, and brought their action for a total loss; but that if the ship had been restored before the action was brought, they could not have recovered for a total loss—*Arnould on Marine Insurance*, p. 1072, where it is said, "Immediately, therefore, the assured receives intelligence that his ship is captured, he has a right to give notice of abandonment; and he may insist on such notice, and recover as for a total loss, 'provided the capture, and the total loss occasioned thereby, continue to the time of bringing the action,'" quoting the words

of Lord Mansfield in *Hamilton v. Mendes* (1). Now this clause in the present policy binds the assured not to sue before the thirty days have expired; this is to obviate the necessity of bringing an action directly the vessel was seized, which the state of the law rendered necessary in order to secure the assured's right to recover for a total loss. But at the expiration of the thirty days the clause in question is an absolute engagement to pay for a total loss; otherwise it would be wholly for the benefit of the underwriters, which was not the intention of the parties when it was inserted. The English rule, that an abandonment, though rightfully made, is not absolute, and that if the loss has ceased to be total before action the abandonment becomes inoperative, was doubted by Lord Eldon in *Smith v. Robertson* (2); and it does not prevail in America—3 *Kent's Commentaries*, 403, 8th edit.

Mellish and Archibald, in support of the rule.—The contract of insurance is one only of indemnity—*Hamilton v. Mendes* (1), *Brotherston v. Barber* (3); and therefore if the vessel be restored to the assured before action, the loss cannot be total, but must only be partial. According to the construction the plaintiffs put on this clause in the policy, no meaning is given to the words "without waiting for condemnation." Moreover, if the words relied on by the plaintiffs, viz. "to pay a total loss thirty days after receipt of official news of capture or embargo," are to be taken in their literal meaning, the assured would be entitled to be paid for a total loss whether, before the thirty days had expired, the ship was restored or not; and yet it would seem to be admitted by the plaintiffs that they would have no right to sue for a total loss if the vessel were restored before the thirty days expired. It is submitted that the clause meant only to point the time when the policy should be payable; but not to alter the law, by which the assured is only to recover to the extent he has been damnified at the time of bringing his action. Such a clause might be desirable, because, without it, although there might be a right of action immediately the vessel had been captured,

yet in practice the underwriter never paid until some time afterwards, as he required to have evidence of such capture before he paid on the policy. An embargo may or may not be such as to amount to a total loss. In *Arnould on Marine Insurance*, s. 387, p. 1085, it is shewn that embargo may be a ground of abandonment where it is likely to be of long or uncertain duration, for which *Rotch v. Edie* (4) is cited; but the learned author says, "Of course, if the arrest be only momentary, if it creates only a temporary obstruction of the voyage, without giving rise to any permanent loss of control over the ship, it cannot give any right to abandon;" for which he cites *Foster v. Christie* (5). He then proceeds to say, "In France the assured is allowed to give notice of abandonment immediately after capture; but in case of detention by arrest or embargo, he is obliged to wait before doing so for different periods fixed by the 387th article of the *Code de Commerce*." The evidence shews that the embargo here was only temporary. The words in this policy, "without waiting for condemnation," imply that the vessel still continues liable to capture; but they ought to be "without waiting for restoration" to give effect to the construction the plaintiffs seek to put on the policy.

ERLE, C.J.—I am of opinion that the plaintiffs are entitled to recover for a total loss. There is no dispute as to what the law was when the parties made this contract, and the only duty which is cast upon us is to put a construction upon the words of the contract. The insurance is only against such risks as are excluded, free from capture, seizure and detention; and the clause which has given rise to the dispute in this action is, "to pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." If those last words, "without waiting for condemnation," had been left out, it appears to me to be clear that when the thirty days elapsed the assured were entitled to claim for a total loss. Am I, then, to alter the meaning of the rest of the clause because I cannot put a construction on those words,

(1) 2 Burr. 1198.

(2) 2 Dow, 474.

(3) 5 M. & S. 418.

(4) 6 Term Rep. 413.

(5) 11 East, 205.

"waiting for condemnation"? I think not. The contracting parties must be taken to have known the law when they made their contract, and by that they contract that after the thirty days have expired the loss shall be paid as for a total loss. The embargo here was not a temporary one, and it seems to me that the plaintiffs are entitled to recover their claim for a total loss.

BYLES, J.—I am of the same opinion. Had the words "to pay a total loss thirty days after receipt of official news" stood by themselves, it is clear that after the expiration of such thirty days the money insured would have been payable as for a total loss. It is to be remembered that this policy is an insurance against capture as well as embargo; and the word "condemnation" which is afterwards used, and which may refer to the determination of a prize Court, is applicable to the determination of one of the matters insured against, but not to the others; and it still leaves the previous words, and these are incapable of any other meaning than what I have already stated.

SMITH, J.—I am of the same opinion. It seems to me that the true construction of the policy is to give a vested right to the assured to recover for a total loss in the event there stated, and which has happened, namely, after the expiration of thirty days after the receipt of the official news. Then it is said there are the words "without waiting for condemnation," and no effect is given to those words. They might mean that in the case of capture the delay of the recovery for the loss until the expiration of the thirty days was to be equivalent to a condemnation of the vessel. I am at a loss to put any other construction on those words; and if the meaning were given to the policy which has been contended for by the defendants, the consequence would be to tie up the hands of the assured for the thirty days, and then afterwards, if the ship were restored, the assured would have no right at all. That would make the clause entirely restrictive of the rights of the assured, and not such as, I think, were intended.

Rule discharged.

1864.
Nov. 9.

WILSON AND OTHERS, *appellants*,
v. THE CHURCHWARDENS OF THE PARISH OF
SUNDERLAND - NEAR - THE-
SEA, *respondents*.

Church-Rate—Power of Justices under a Local Act to enforce Rate—Quaker disputing Rate—5 & 6 Will. 4. c. 74.—Appeal to the Quarter Sessions—Jurisdiction of Justices to inquire into Validity of Rate—Inhabitant.

By a local act (5 Geo. 1. c. ix.) power was given to choose a certain number of "inhabitants" of a parish to be vestrymen for such parish, and for the rector and majority of the vestrymen to assess persons and property in the parish for defraying the expense of obtaining the act, and for buying of bells for the church, and for doing what should be fit to be done in or about the church and keeping the same in repair, and, in case of default in payment of the sums so assessed, the Justices were empowered to issue their warrant for the levy thereof by distress and sale of the offender's goods. The act also stated that any person aggrieved by any such assessment or distress might appeal to the Quarter Sessions "within three months after such distress".—Held, that the jurisdiction of the Justices under such local act to enforce the rate was not taken away by the 5 & 6 Will. 4. c. 74, though the person on whom the rate was made was a Quaker and disputed its validity.

Held, also, that the local act gave a power of appeal against the assessment before as well as after the distress, and that it was, therefore, not competent to the Justices to inquire as to the validity of the constitution of the vestrymen.

Semble—That it was not necessary for the qualification of a vestryman chosen pursuant to the act that he should sleep as well as reside within the parish, the word "inhabitant" not having in the act such a limited meaning.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 90.]

1865. }
 April 25. } *PIGRIM v. KNATCHBULL, BART.*

Costs—County Court—Concurrent Jurisdiction—9 & 10 Vict. c. 95. s. 128.—Place of Dwelling.

The defendant had two residences, one in London, which was within, and the other in the country, which was more than twenty miles from the plaintiff's residence. At the time the action was brought, the defendant was at his London house, but two days before he had written to the plaintiff's attorney from his house in the country:—Held, that the superior Court had concurrent jurisdiction with the County Court within the meaning of 9 & 10 Vict. c. 95. s. 128.

This was an application for a rule directing the plaintiff to have his costs. The facts, as they appeared from the affidavits, were as follows: The defendant had two residences, one a town house, in Chesham Place, Belgrave Square, which was less than twenty miles from the plaintiff's residence, and the other a country house, near Ashford, in Kent, which was more than twenty miles from the plaintiff's residence. The plaintiff had been the defendant's butler, and had been hired by the defendant in his house in London, and the action, which was brought to recover 15*l.* 3*s.* 3*d.* for wages, was tried before the Under-sheriff, when the plaintiff obtained a verdict. The action was commenced on the 5th of January last; and on that day it appeared the defendant was at his London house, but on the 4th of January the plaintiff's attorney had received a letter from the defendant, dated on the 3rd of January, from his country residence, in reply to a letter he had addressed to him there.

B. T. Williams, in support of his motion.—It is submitted that the plaintiff is entitled to his costs, as this is a case in which the superior Courts had a concurrent jurisdiction given them by section 128. of 9 & 10 Vict. c. 95. In *Butler v. Ablewhite* (1), where the plaintiff had two permanent dwelling-places, and at the time of action brought he was residing with his family at the residence, which was situate more

than twenty miles from the defendant, it was held by this Court, differing from the decision of the Court of Queen's Bench in *Bailey v. Bryant* (2), that it was a case in which the superior Court had concurrent jurisdiction, and that the plaintiff was therefore entitled to his costs. The case of *Kerr v. Haynes* (3) shews that a plaintiff may dwell in the country, though he has also a London house.

Marshall Griffith shewed cause in the first instance.—The facts in *Bailey v. Bryant* (2) cannot be distinguished from those in *Butler v. Ablewhite* (1); therefore there is a difference between the two Courts on this point. There is, however, some distinction between the present case and that of *Butler v. Ablewhite* (1), as here the hiring of the plaintiff was at the defendant's London residence, and also when the writ was issued the defendant was at his London residence. There is this further distinction, that in both the cases which have been cited for the plaintiff, it was the plaintiff, and not the defendant, who had the double residence. In *M'Dougal v. Paterson* (4) Maule, J. says, "Assuming that a man may have a dwelling-house in two places at the same time, he may, as I read the act, have the rights which belong to a man who dwells more than twenty miles off, and also those which belong to a man who dwells less than twenty miles off. There are no negative words in the act." Here the practical effect of making this rule absolute would be to make the words of the acts disabling words in the case of a defendant who has two residences.

[*BYLES, J.*—Suppose a suggestion entered on the roll that the plaintiff dwells more than twenty miles from the dwelling of the defendant, and that were traversed, how would that be? Does not the plaintiff so dwell, although the defendant has two residences? We are dealing, it must be remembered, with a statute which repeals the Statute of Gloucester.]

It is submitted that the plaintiff must shew that the defendant does not dwell

(2) 1 E. & E. 340; s. c. 28 Law J. Rep. (N.S.) Q.B. 86.

(3) 29 Law J. Rep. (N.S.) Q.B. 70.

(4) 11 Com. B. Rep. 755; s. c. 21 Law J. Rep. (N.S.) C.P. 27.

(1) 6 Com. B. Rep. N.S. 740; s. c. 28 Law J. Rep. (N.S.) C.P. 292.

within twenty miles of the plaintiff's residence.

B. T. Williams replied.

ERLE, C.J.—In *Butler v. Ablewhite* (1) the plaintiff had two residences, one within and the other more than twenty miles from the defendant's residence, and this Court founded their judgment, that the plaintiff in that case was entitled to his costs, on the ground that the actual residence of the plaintiff at the time of bringing the action was the more distant residence. I do not dissent from that case as it stands, but it is not exactly in point here, because the question here arises in respect of the defendant's residence, and there may be, though I cannot find it, a distinction between where it depends on the plaintiff's residence and where it depends on the defendant's. I give, however, my judgment in like manner as it was given in *Butler v. Ablewhite* (1), because I think, in fact, the defendant's residence was at the time when the action was brought more than twenty miles from that of the plaintiff, though perhaps, at that time, the defendant was bodily within such twenty miles. This rule must therefore be absolute, but without costs.

BYLES, J.—I am of the same opinion. In *Butler v. Ablewhite* (1) this point of two residences was discussed and fully considered. No doubt the decision in that case proceeded on a literal construction of the statute, and I think rightly so. The plaintiff is entitled to his costs under the Statute of Gloucester, unless he is deprived of them by the statute of 9 & 10 Vict. c. 95, and he says, "I dwell more than twenty miles from where the defendant dwells." If an issue were taken on that, it would be decided for the plaintiff. I see no distinction between the case where the defendant has two residences and the case where the plaintiff has

two residences, and it seems to me that the present case is concluded by one, if not by two authorities, in favour of the plaintiff.

SMITH, J. concurred.

Rule absolute, without costs.

1865. } DAY, appellant, v. SIMPSON,
May 3. } respondent.

Stage Play—6 & 7 Vict. c. 68.—*Music Hall*—*Dramatic Representation, with Actors not bodily visible to the Spectators.*

The appellant was convicted under the 6 & 7 Vict. c. 68. (the act for regulating theatres) for keeping a place for the public performance of stage plays and for causing to be acted there certain parts in a stage play without the licence required by that act. It was proved that the appellant was the occupier of a hall, which, though licensed for public dancing and music, was not licensed as a theatre, and that one end of that hall was fitted up with a stage, where, with lights and scenery and the other accessories of a stage, the appellant caused to be presented for the amusement of the public, for which they paid, a performance sustained by living persons with a dialogue between them and a regular plot, which was distinguished only from an ordinary stage play by all the actors except two (the dialogue between whom was wholly subordinate to the plot of the piece) being not bodily on the stage, but represented merely by a reflexion of their figures on a mirror at the back of the stage, so ingeniously contrived that to the spectators the appearance was that of persons actually upon the stage:—Held, that there had been a violation of the statute, and that the conviction was right.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 149.]

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF COMMON PLEAS.

TRINITY TERM, 28 VICTORIÆ.

1865. { PHELPS v. THE LONDON AND
May 26. { NORTH-WESTERN RAILWAY
COMPANY.

Carriers by Railway—Detention of Passenger's Luggage—"Ordinary Luggage."

An attorney, going by railway to attend a county court, took in his portmanteau documents and bank-notes for use in certain causes in which he was engaged as an attorney. The portmanteau was carried under the private act of the railway company without charge as passenger's "ordinary luggage"; it was missing at the end of the journey, and not recovered for some days:—Held, that these articles were not "ordinary luggage" of the plaintiff as a passenger, and that the railway company were not liable in damages for the consequences of the temporary loss of them.

This was an action brought by the plaintiff against the defendants for the temporary loss of his portmanteau and its contents, forming part of his luggage as a passenger on the defendants' railway.

It appeared at the trial that the plaintiff was an attorney, who was on a journey to attend two cases in a county court, and that, in addition to his clothing and analo-

gous articles, he had placed in his portmanteau certain deeds and documents which were to be used in the said cases, and also a sum of money in bank-notes in anticipation of his having to make payments therein. The portmanteau, which was labelled and carried without charge in the usual way as passenger's luggage, was not forthcoming at the end of his journey, and was not found and delivered to him for some days after. The consequence was, that not only was he put to inconvenience and expense in waiting and searching for his luggage, but the cases had to be postponed, his journey was rendered fruitless, and considerable expense and inconvenience entailed thereby.

By the defendants' private act, 9 & 10 Vict. c. cciv. s. 66, it was enacted that "every passenger travelling on the railway in a first-class carriage may take with him his ordinary luggage not exceeding 112 lb. in weight; and every passenger travelling in a second-class carriage may take with him his ordinary luggage not exceeding 60 lb. in weight; and every passenger travelling in a third-class carriage may take with him his ordinary luggage not exceeding 40 lb. in weight, without any charge being made for carriage."

The learned Judge left to the jury the two following questions: first, what damage did the plaintiff sustain on the assumption that he was entitled to carry the deeds, documents and bank-notes as part of his ordinary luggage? Secondly, what damage did he sustain on the assumption that he was only entitled so to carry his clothing and analogous articles?

The jury found that on the first assumption he was entitled to 4*l.* 1*s.*, and on the second to 20*l.*

A verdict was entered for the plaintiff for the larger sum, with leave reserved to the defendants to move to reduce the damages to 20*l.*, on the grounds that the deeds, documents and bank-notes were not the plaintiff's ordinary luggage which he was entitled to carry without payment, and that the alleged loss of the object of his journey was too remote to be recoverable as damage, and could not fairly and reasonably have been contemplated by the defendants (1).

A rule *nisi* having been obtained, pursuant to such leave,—

Huddleston and *Prûleaux* now shewed cause.—The question turns on the meaning of "ordinary luggage" in section 66. of the private act. There are no cases in point, or which define what is to be considered the ordinary luggage of a passenger. The only cases which seem in any way to bear on the point are *Cubitt v. the London and North-Western Railway Company* (2), and *The Great Northern Railway Company v. Shepherd* (3).

[WILLES, J.—There is also a case which was decided in the House of Lords, in an appeal from Ireland (4).]

In *Cubitt v. the London and North-Western Railway Company* (2), it was held that a box containing only merchandise was not personal luggage. In *The Great*

Northern Railway Company v. Shepherd (3), where it was held that ivory knife-handles were not personal luggage, Parke, B. says, "Luggage, according to the true modern doctrine on the subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience; perhaps even a small present or a book for the journey might be included in the term;" and *Story on Bailments*, section 499, is to a like effect. What is "luggage" must vary, both with the habits and the profession of the traveller. A fishing-rod or a gun would be luggage of a sportsman, a wig and gown of a barrister, his deeds and papers of an attorney. Again, it may be observed, that the word in the statute is "ordinary" and not "personal." As to the remoteness of damage, in *Smeed v. Foord* (5), Crompton, J. gives a convenient rule: "I should tell the jury that they ought to give the plaintiff such damages as were the natural consequences of the breach of contract; but it is doubtful whether anything more than the general rule should be laid down . . . but all this is to be left to the jury." Here the matter has gone to the jury, and they have decided it.

Kemplay and *Wheeler*, in support of the rule.—Although the word "ordinary" is used, yet ordinary luggage of a passenger means his own ordinary personal luggage,—things required for his own personal use,—but not things which are to be used in the business of others. It is not necessary to decide what property, which is for the use of the passenger, falls within the statute; it is sufficient to say the property now in question was to be used for the benefit of others.

ERLE, C.J.—I am of opinion that this rule should be made absolute. The question is confined to the damages in respect of the deeds connected with the plaintiff's professional character as an attorney making a journey to attend a county court, and the money which comes within the same category, and which, it is said, was necessary for him to take in his professional character for use in the litigation. I consider the loss in respect of each of these articles, so reduced into one category, is not a loss con-

(5) 1 E. & E. 602; s.c. 28 Law J. Rep. (N.S.) Q.B. 178.

(1) There was a plea of the Carriers Act, but that was properly given up at the trial, as the action was for delay and not for loss of luggage.—See *Hearn v. the London and South-Western Railway Company*, 10 Exch. Rep. 793; s.c. 24 Law J. Rep. (N.S.) Exch. 180.

(2) 13 Com. B. Rep. N.S. 818; s.c. 31 Law J. Rep. (N.S.) C.P. 271.

(3) 8 Exch. Rep. 30; s.c. 21 Law J. Rep. (N.S.) Exch. 114.

(4) His Lordship perhaps referred to the case of *The Belfast Railway Company v. Keys*, 9 H.L. Cas. 556.

nected with luggage for his personal use in his journey as a traveller. It is impossible to draw a definite line. Luggage which one person might carry for his personal use might be a distress and annoyance to another. But still the habits of mankind must be considered to be within the cognizance of the railway company, so that anything carried according to usage for personal use would be a matter for which the company would be responsible as luggage of a traveller upon a journey. But these articles are entirely out of that category; they were not for the plaintiff's personal use, or usually required, but were taken by him in his capacity of attorney for the service of another person, and I think the defendants are not to be held responsible for them.

WILLES, J.—I am of the same opinion.

BYLES, J.—I am of the same opinion. I should doubt if a man's own title deeds and securities can be called "ordinary luggage," but when they belong to another person the case is still clearer. And as to the money, there is in this particular case no distinction between the money and the deeds.

SMITH, J.—I am of the same opinion.

Rule absolute.

1865.

June 5. }

JEFFRYES v. EVANS.

Game, Reservation of—Quiet Enjoyment—Destruction of Rabbits and Coverts by the Tenant.

A. let a farm to B, reserving the exclusive right of "hunting, shooting, fishing and sporting," and afterwards let to C. the exclusive right of "shooting and sporting over and taking the game, rabbits and wildfowl upon" the farm, and covenanted with C. for his quiet enjoyment of such right without interruption from persons claiming through him. B. shot rabbits and grubbed up a large quantity of gorse, &c., whereupon C. brought an action against A:—Held, first, that B. had no right to shoot rabbits, and that his act therefore was a wrongful one, for which A. was not liable; secondly, that B. was entitled to grub up the gorse, &c. in the reasonable use of the land as a farm, that there was no implied covenant with C. that this should

not be done, and that A. was therefore not liable for such act of B.

The declaration (as far as it is necessary to refer to it) alleged, that the defendant demised to the plaintiff, for seven years, a certain messuage and lands, and also the exclusive right at all times during the said term of shooting and sporting over, and taking the game, rabbits and wildfowl upon the said premises and upon certain other manors and lands, with a certain reservation as to trees, &c. over the lands demised; and that the demise contained the usual covenant for quiet enjoyment without interruption from persons lawfully claiming under the lessor, and a covenant to repair. And it contained four breaches: 1. That one Rees, lawfully claiming under the defendant the right to shoot the rabbits in and upon the said manors and lands, and having good title under him, entered into and upon the said lands, and shot and killed and carried away large quantities of rabbits there, and evicted the plaintiff from the enjoyment of the said exclusive right of shooting and sporting and taking the said rabbits so to him demised and granted. 2. That the said Rees, lawfully claiming under the defendant the right to cut down divers furze coverts, woods and plantations in and upon the said manors and lands over which the plaintiff had the said exclusive right of shooting and sporting, cut down, carried away and destroyed large quantities of such furze coverts and plantations, and thereby evicted the plaintiff from and disturbed him in the enjoyment of his said right of shooting and sporting. 3. That there was an improper exercise of the right as to trees. 4. That there was a breach of the covenant to repair.

The defendant pleaded: to the first breach, first, that Rees did not enter the lands and shoot and kill the rabbits and evict the plaintiff from the enjoyment of his exclusive right of shooting and sporting and taking rabbits; secondly, that Rees did not lawfully claim under him the right to shoot rabbits: to the second breach, thirdly, that Rees did not cut down the furze, &c. and evict the plaintiff or disturb him in his said right; fourthly, that Rees did not lawfully claim under him to cut down the furze, &c.: to the

third breach, fifthly, payment into court: to the fourth breach, sixthly, a denial of the non-repair.

On these pleas issue was taken.

At the trial, it appeared that the lands referred to in the declaration, and called the Upton Estate, were divided into two portions, viz., Upton Castle with a small quantity of land attached, and Upton Castle Farm. That the said Rees was tenant of the farm under the defendant by virtue of a lease of December 1857, which reserved to the lessor, &c. all timber and other trees, mines, minerals and quarries on the said farm, and also the exclusive right of hunting, shooting, fishing and sporting on the said farm. That the plaintiff was the tenant of Upton Castle and the annexed land under the defendant, by virtue of a lease of September 1860, which also gave a right of sporting over the farm in the terms disclosed by the declaration, and contained the covenants therein set forth. Evidence was given as to the destruction of the rabbits, furze, &c., the injuries in cutting trees, and the non-repair. The learned Judge was of opinion that Rees had no right under his lease to destroy the rabbits, and could not therefore be said to claim under the defendant; and that the cutting down the furze, &c. was not an eviction of the plaintiff from his right of shooting; and that therefore the plaintiff was not entitled to succeed on the first two breaches. But he left it to the jury to say whether any and what damage had been done to the plaintiff on each of the breaches, assuming that he had a right to recover for damages accruing under them.

The jury found that the plaintiff had sustained damages from all the four alleged causes of action, and assessed such damages *separatim*. And the learned Judge thereupon directed a verdict to be entered for the plaintiff on the first, fifth and sixth issues; for the defendant on the second issue, with leave to the plaintiff to move to enter a verdict for the damage assessed on that issue, if on the true construction of the lease to Rees he had a right to shoot the rabbits; and for the defendant on the third and fourth issues, with leave to the plaintiff to move to enter a verdict for the damage assessed on those issues, if the Court should think the issues in fact proved;

but the rule to be drawn up so as to allow the defendant to move in arrest of judgment as to the second breach to which such pleas were pleaded, on the ground that the acts complained of did not amount to a breach of the defendant's covenant.

A rule nisi having been obtained, and in substance drawn up pursuant to such leave, (except perhaps the addition of the words, "and that on the construction of the said lease Rees had a right to cut furze and underwood," after the words "issues in fact proved,")—

Gifford, H. Allen and G. B. Hughes now shewed cause.—The first point made on the other side is, that rabbits are not game, and that, therefore, Rees had a right to shoot, and the defendant is consequently liable for his rightful act; and the case of *Spicer v. Barnard* (1) is relied on. The reservation in that case was no doubt the same as it is here; but there the question was as to the meaning of "game" in a particular statute; here it is as to its meaning in a contract between private parties. The legal technical meaning may vary from time to time; but in a contract all animals generally sported after will be included. Again, rabbits have been recognized as game in various statutes from 13 Rich. 2. st. 1. c. 13; and though not game within 1 & 2 Will. 4. c. 32, yet, if a man sports after them he will be surcharged; they are also within 25 & 26 Vict. c. 114, and are not mere objects of diversion, as appears from the judgment of Bayley, J., in *Hannam v. Mockett* (2). The second point made was, that there was an implied covenant not to disturb by cutting the furze, &c.; but the other side is in this dilemma: if there be such a covenant implied in the lease to the plaintiff, it must equally exist in the lease to Rees, and his act, therefore, would be a wrongful one, for which we are not responsible; if there be not, then there is no covenant to break.

J. W. Bowen and C. Coleridge, in support of the rule.—First, rabbits never were game—*Woolrych on the Game Laws, Paterson on the Game Laws, Chitty on the Game Laws, Fitzh. Nat. Brev.*, 86 and 87; they are not game within 4 & 5 W. & M. c. 23

(1) 1 E. & E. 874; s. c. 28 Law J. Rep. (n.s.) M.C. 176.

(2) 2 B. & C. 934.

— *The King v. Yates* (3), or within 5 Ann. c. 14. sect. 4.—Ashurst, J., in *The King v. Thompson* (4); and on a review of the various acts that have been passed, it will be found that rabbits are always expressly mentioned in addition to game whenever they are intended to be included. The cases of *Padwick v. King* (5), *Thomas v. Fredericks* (6), *Graham v. Ewart* (7), and *Spicer v. Barnard* (1), are all in favour of the plaintiff. Secondly, the reservation of trees in the lease to Rees did not include underwood—2 *Platt on Leases*, 42, *Berriman v. Peacock* (8); and there was in the lease to the plaintiff an implied covenant that the farm should be reasonably fit for his shooting—7 *Bac. Abr.* 252; and therefore this is an act of Rees for which the defendant is liable to the plaintiff.

ERLE, C.J.—I am of opinion that the rule should be discharged, and the verdict stand as entered. The action (as far as it relates to the present rule) is brought for breach of a covenant for quiet enjoyment of the exclusive right of shooting and sporting over and taking the game, rabbits, and wildfowl upon certain lands in the occupation of Rees; and the declaration alleges that Rees, lawfully claiming under the defendant the right to shoot the rabbits upon these lands, shot, killed and carried away large quantities of rabbits, and evicted the plaintiff from his exclusive right of shooting; and also that Rees, lawfully claiming under the defendant the right to cut down the furze, &c. upon such lands, cut down and carried away large quantities of it, and thereby also evicted the plaintiff from and disturbed him in the enjoyment of his said right of sporting. The great point is as to whether Rees had a right to shoot the rabbits, and I think he had no right to do so. The demise to Rees was of a farm, with a reservation to the landlord of the "exclusive right of hunting, shooting, fishing and

sporting" over it. And I think that the fair meaning of the words is, that there is a reservation to the landlord of whatever ordinarily known as "hunting, shooting, is fishing and sporting." The word "game" is an indefinite word, and seems at various times to have had various meanings; to have at one time included one thing, at one time another; to have had at one time a wider, and at another time a narrower signification. And if the issue had been as to the meaning of a reservation of game, possibly we might have construed it according to the statutes for the time being in force. But the word "game" is not used. Further, in my opinion, when a tenant takes a farm with a reservation of "hunting, shooting, fishing and sporting," he should, if afraid of destruction that may be done by rabbits, make it a matter of arrangement, and stipulate either for compensation or for some powers for destroying them. Here there is no such stipulation, and, indeed, I see no evidence of any extraordinary increase of the rabbits. The second point is as to the destruction by Rees of the furze coverts, woods and plantations, the evidence not being definite as to its extent. It is said that the covenant for quiet enjoyment of the shooting, sporting, and taking game, rabbits and wildfowl, by the plaintiff, contains an implied covenant not to grub up the furze coverts, woods and plantations, and that the doing so was an eviction from the right of the shooting and sporting. The short answer is, that it was no eviction from the right of shooting and sporting, for the same right of shooting remained when the land became arable, and the covenant is only that the plaintiff shall have the shooting there. If his contention were correct, it might be said that it would be a breach of covenant for the tenant to give up growing turnips or any other crop favourable to partridges; and the same law applies where thirty or forty acres of brushwood are destroyed. If there had been a covenant for the enjoyment of shooting in a wood, it might have been different; in this case it is not so, and I am of opinion that there was no eviction. These are my two answers. There is also the dilemma which has been put by Mr. Giffard; but the foregoing are the reasons on which I decide.

(3) 1 *Ld. Raym.* 151.

(4) 2 *Term Rep.* 18.

(5) 7 *Com. B. Rep.* N.S. 88; s.c. 29 *Law J. Rep.* (N.S.) M.C. 42.

(6) 10 *Q. B. Rep.* 775; s.c. 6 *Law J. Rep.* (N.S.) Q.B. 393.

(7) 11 *Exch. Rep.* 326; s.c. 25 *Law J. Rep.* (N.S.) *Exch.* 42.

(8) 9 *Bing.* 384; s.c. 2 *Law J. Rep.* (N.S.) C.P. 23.

WILLES, J.—I am of the same opinion. The reservation in the lease to Rees is of "hunting, shooting, fishing and sporting," and I can see no reason why all things generally hunted, shot, fished or sported after should not be included. General words should receive a general construction. The consequence of the plaintiff's construction would be, that not merely might the tenant kill rabbits (which are beasts of warren), but also woodcock, snipe, quail, and landrail (which are birds of warren); and this, I think, leads to an absurdity. As to *Graham v. Ewart* (7) I have spoken to my Brother Martin, who delivered the judgment, and I find, as I supposed, that the words "game, commonly so called," were meant to refer to such things as are usually sported after, in contradistinction to small birds, and things of a similar character, as, for instance, rats and sparrows. I am clearly of opinion that Rees had no right to kill the rabbits; and, therefore, on the first point, my judgment is in favour of the defendant. As to the second point, the argument for the plaintiff would have been weighty if there had been a grant of woods or underwood; but that point does not arise here. I think that there is in this case nothing to hinder the landholder from using the land in the ordinary way; he is justified as long as he acts in reasonable use of the land, and does not resort to expedients for driving the game away; and I therefore am of opinion that the destruction of the furze and underwood was no eviction from the right of shooting. I am not aware of any case in which a man has succeeded in an action for breach of such a covenant for quiet enjoyment as this, where the grantor had what he professed to grant. Here whatever was reserved by the defendant was granted to the plaintiff; and any right that there might be to keep down a nuisance was recognized equally in the leases of 1860 and 1857. The grantor in this case had the right to that which he professed to grant; the interruption, therefore, was not one which was stipulated against, and our judgment should be for the defendant.

BYLES, J.—I do not desire to be supposed to dissent from the rest of the Court; but I desire to make two observations. First, I do not think that woodcocks,

snipe, quails, and landrails are on the same footing as rabbits, inasmuch as rabbits may become a nuisance. Secondly, it must not be understood that I decide that when a landlord lets land, reserving to himself the right of sporting, the tenant may not destroy the rabbits if they become a nuisance.

SMITH, J.—I am also of opinion that our judgment should be for the defendant. The first point is, whether the reservation in the lease to Rees included rabbits. I am of opinion that it did, and that the right so reserved was granted to the plaintiff. What Rees did, he therefore did unlawfully and against the reservation of his landlord. The second point is, whether the defendant is entitled to keep the verdict entered for him on the third and fourth issues, and I am of opinion that he is. The cutting of the underwood may have been in the ordinary use of the farm as a farm, and it was no interruption of the grant of the shooting, as the plaintiff might still shoot over the land as before. A man taking such a grant as this must stipulate that the woods must be kept, and that the nature of the cultivation must not be changed. There, further, is this dilemma: if there be no implied covenant against the destruction of the underwood in the lease to the plaintiff, there is no covenant to break; and if there be, then there must equally be one by Rees in the lease to him, and then his act is wrongful, and an act for which the defendant is not liable.

Rule discharged.

1865.) HURST v. THE GREAT WESTERN
June 10. } RAILWAY COMPANY.

Carriers by Railway—Passenger—Delay causing Loss of a Train.

The plaintiff took a ticket from the defendants from C. to N; the plaintiff, after waiting a long time, was told by a porter that the train was late in consequence of an accident, and the train eventually arrived an hour and a half late. The consequence was that the plaintiff was late for the train at G, which would have carried him on to N. The train-bill was not put in, but only some correspondence in which the defendants repudiated their liability on the ground that by the train-

bills they gave notice they would not be liable for the trains not keeping time:—Held, that there was no evidence of a cause of action.

The declaration in this action contained two counts: the first alleged a contract by the defendants to carry the plaintiff within a reasonable time, and without any unreasonable delay, from Cardiff to Newcastle, and a breach thereof, whereby the plaintiff was delayed for a long time at Gloucester; the second alleged a contract by the defendants to carry the plaintiff by a certain train from Cardiff to Gloucester, within a reasonable time, and to use reasonable care to convey him there by a fixed time, and in time to go on to Newcastle by a certain other train, about to start within a reasonable time after such fixed time, and a breach whereby the plaintiff arrived at Gloucester after such fixed time and too late to go on by such other train.

The defendants pleaded not guilty, and denials of their being such carriers, and of the plaintiff being such passenger as in the two counts respectively alleged.

At the trial the defendant and a friend of his were called and deposed to the following facts. One of the defendants' trains starts from Milford, so as in the ordinary course of things to arrive at Cardiff at 4:34 P.M., and at Gloucester at 7:5 P.M., from which last-mentioned place a train of the Midland Railway Company starts at 8:17 P.M. for Birmingham and other places, in communication with other trains of other companies, which run through York and eventually to Newcastle. On the 17th of December 1864, the plaintiff arrived at the Cardiff station before 4:34 P.M., and asked the clerk if he could book him to Newcastle by the train about to start, and was given a ticket on which were the following words: "Great Western Railway, Cardiff to Newcastle, *via* Midland Railway, First Class." The plaintiff waited a considerable time, and was informed by a porter that the train was late and delayed in consequence of an accident. The train did not arrive at Cardiff till 6 P.M., and the plaintiff on his arrival at Gloucester found that the Midland train had already gone in due course, and he was delayed there about twenty-four hours. In addition to the facts so deposed to, a correspondence was put in, which, in substance, amounted to this:

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on the one hand the plaintiff claimed a considerable amount; on the other, the defendants were willing to pay a portion, but at the same time repudiated all liability, on the ground that they gave public notice by their train-bills that they did not guarantee the arrival or departure of the trains at the times specified, and would not be liable for any delay that might occur, and also on the ground that the delay was from circumstances beyond their control.

It was submitted, on behalf of the defendants, that the plaintiff had made out no case; the learned Judge, however, refused to nonsuit the plaintiff, and left the case to the jury, who found for the plaintiff, leave being reserved to the defendants to move to set aside the verdict and enter a nonsuit, on the ground of there being no evidence of a cause of action, subject to the condition that the matter should go no further than the Court above.

A rule *nisi* having been obtained pursuant to such leave, and also for a new trial on the ground of the verdict being against evidence,—

Temple and *Crompton* now shewed cause, and contended that under the above circumstances they were entitled to keep the verdict.

E. James, Manisty and *T. Jones*, on the other side, were not called on to argue.

ERLE, C.J.—I am of opinion that the rule should be made absolute, on the ground that there is no evidence of a breach of any duty or contract by the defendants. The grievance complained of is, that the train was an hour and a half late at Cardiff, and that the plaintiff consequently missed the train at Gloucester, and had to wait for the next train. The whole case rests on the ticket from Cardiff to Newcastle, and I am of opinion that the mere taking of a ticket does not prove a contract that a train will arrive at the time when it is expected. The train, no doubt, was expected to arrive earlier than it did, and if the train-bill had been put in evidence we should have seen what the contract was as to its arrival. No special contract arises from mere talk with officials, casual talk with an official whose duty may merely be to open or shut the doors of the carriages; and indeed all that the porter says is that the train is late. It is quite

consistent with all that appears in this case that the duty of the defendants may have been fulfilled, and it lies with the plaintiff to shew that it has not.

WILLIAMS, J.—I am of the same opinion. The plaintiff has suffered in consequence of the train not leaving Cardiff at the precise hour at which it was expected, or at such an hour as would fit the departure of a particular train from Gloucester which went on direct to Newcastle. And the question is, whether the company entered into such a contract, or undertook such a duty as to oblige them to have the train at Cardiff in time for the plaintiff to go on by the next train from Gloucester to Newcastle. This depends, first, on the wording of the plaintiff's ticket, and, secondly, on the other facts. As to the first, the language of the ticket is simply that the defendants will convey the plaintiff from Cardiff to Newcastle, and there is no statement beyond the fact that the journey will be by the Midland Railway. And the only duty which the law attaches to such a contract (taking the ticket as the contract) is, that the passenger shall be carried in a reasonable time. As to the second, the only other circumstance is, the evidence that the train ought to have arrived at 4.34 P.M. That means that it was due then. And the question arises whether the defendants warranted its arrival, or whether it was merely due then in the ordinary course without any warranty. The plaintiff must shew the duty of the defendants by evidence; and the only evidence would be either the statement by an authorized official of the company that the train would so start, or such obvious proof as the train-bill of the company,—evidence such as was given in the case of *Denton v. the Great Northern Railway Company* (1). It clearly lay on the plaintiff to give that evidence. The saying that the train is due is ambiguous, and open to either of the constructions I have just mentioned, viz., that the defendants warranted its arrival or that it was due in the ordinary course without warranty; and it lay on the plaintiff to clear this up. I am of opinion that both the merits and the law are with the defendants.

(1) 5 E. & B. 860; s. c. 25 Law J. Rep. (N.S.) Q.B. 129.

BYLES, J.—I am of the same opinion. This is an important case as it affects every railway ticket in the kingdom. I find here no evidence of a guarantee that the train will arrive at a particular time, and indeed there is no statement of it even in the declaration. The ticket is the only proof which has been given of the contract, and it affords no evidence in support of such guarantee, for it is silent on the matter, and only proves a contract for the employment of reasonable care for the fulfilment of the contract of carriage. If the plaintiff wanted to prove such a guarantee, he should have put the time-table in evidence, which might perhaps have proved it. Without the conversation at the station there would be no evidence even of when the train was expected to start, and that is no evidence of a warranty by the defendants.

SMITH, J.—I am of opinion that the contract was to carry in a reasonable time with reference to the usual trains of the company as shewn in the train-bills. It is perfectly clear from the correspondence that there were train-bills. The correspondence was either in evidence, and evidence of the contents of the train-bills, or it was not: if it was not, there was no evidence of the contents of the train-bills; if it was, it shews that the plaintiff is out of court, for it shews that they contained an express stipulation that the company did not guarantee the arrival and departure of the trains at the times specified, and would not be responsible for delay.

Rule absolute.

1865. } BUTTERWORTH v. BROWNLOW
June 19. } AND ANOTHER.

Carrier—Arrangement between Bailor and Sub-Carrier.

A, a carrier, was in the habit of carrying goods for B; the ordinary course was to deliver the goods to B. immediately on their arrival at M, where B. carried on business. B. requested A. to employ C. as his agent, and afterwards, without notice to A, arranged with C. not to deliver in due course, but to give him notice of the arrival of the goods, and to keep them till he sent for them. C. on one occasion forgot to give notice per-

suant to this arrangement, and B. brought his action against A. for such neglect:—Held, that A. was not liable.

This was a case stated on appeal from the decision of the Judge of the County Court of Lancashire, and the facts were briefly as follows.—

The plaintiff was a cotton-waste dealer at Manchester. The defendants were carriers, who undertook to carry from Lille, and other places abroad, to Manchester and other places in England, at certain through-rates. The defendants principally carried on their business by means of other carriers, with whom they made their own arrangements; they themselves, however, making the contract with the customers on their own account as principals. The plaintiff, who had been for some time in the habit of dealing with the defendants, on the 20th of October 1862, requested the defendants in future to send his goods through Messrs. Carver & Co., by route of the Lancashire and Yorkshire Railway, instead of through Messrs. Thompson, McKay & Co., who were usually employed by the defendants, and who used the Manchester, Sheffield and Lincolnshire Railway. And from that time the defendants forwarded the plaintiff's goods through Carver & Co. In the ordinary course of business, and in the absence of special instructions to the contrary, Carver & Co., or any other carriers at Manchester, would, immediately on the arrival of the goods there, and without any previous advice of such arrival, deliver them at the warehouse of the consignee. Some time, however, before the transaction out of which the present complaint arose, the plaintiff gave instructions to Carver & Co. that, instead of pursuing the ordinary course of business they were to advise him of the arrival of the goods, and deliver them only on receiving a written or printed order from him to that effect. These instructions were accepted and regularly acted on by Carver & Co.; but the defendants had no notice of their instructions or alteration in the course of business. On the 7th of September 1864, three bags of waste were consigned from Lille to Manchester, in the ordinary way, through the defendants, for the plaintiff, of which

the defendants gave him notice. The bags arrived at Manchester in proper time, on the 14th of September, and Carver & Co., in pursuance of the foregoing instructions, did not deliver them, but through some oversight never gave the plaintiff notice of their arrival. The plaintiff made no inquiries about them; but this might have been accounted for by his large business. The value of cotton-waste fell 50% per cent. between the 7th of September and the 1st of October, on which day the plaintiff, without any previous notice to the defendants of the non-arrival, invoiced those three bags to the defendants at their value in the Manchester market on the 7th of September, and sought to recover the sum in the present plaint. The learned Judge decided that the plaintiff, by his instructions to Carver & Co., had been the cause of the defendants' contract to deliver not having been carried out, and that the defendants, not having had notice of such instructions, were not bound to advise the plaintiff of the arrival of the goods in any other way than by their delivery, and were not liable in this action.

Holkar, for the appellant.—Carver & Co. are agents, for whose acts the defendants are liable—*Muschamp v. the Lancaster and Preston Junction Railway Company* (1); and though the act was beyond the ordinary course of business, they are still liable—*Richards v. the London, Brighton and South Coast Railway* (2). Carver & Co. were servants within the principle of *Sadler v. Henlock* (3), and the analogous cases.

Kemplay, for the respondents, was not called on to argue.

WILLES, J.—I am of opinion that the Judge was right, and that his decision should be affirmed. The action is for not giving notice of the arrival of the goods at Manchester. The plaintiff must have known the ordinary course of business; he gets the defendants to send through Carver & Co., and then gives instructions to Carver & Co. not to deliver in the

(1) 8 Mee. & W. 421; s. c. 10 Law J. Rep. (N.S.) Exch. 460.

(2) 7 Com. B. Rep. N S. 839.

(3) 4 E. & B. 570; s. c. 24 Law J. Rep. (N.S.) Q.B. 138.

ordinary course of business, but only on the receipt of his order. The result of what the Judge finds is this, that the defendants were carriers to deliver to the plaintiff, and employed Carver & Co. to carry this out; and that the plaintiff entered into an arrangement with Carver & Co., which was, in fact, an arrangement for warehousing. It is impossible to say the Judge was wrong in this conclusion of fact, whatever the law may be, though as to that I have little doubt.

BYLES, J.—I am of the same opinion. The plaintiff says to Carver & Co., "Don't fulfil the contract in ordinary course, but give me notice of the arrival of the goods, and keep them till I send;" the defendant knows nothing at all about this, and thinks that the goods will be delivered in due course; the plaintiff therefore complains of an injury brought about by his own act.

Judgment for the respondents.

1865. }
June 23, 24. } TAMVACO v. SIMPSON.

Charter-Party—Freight payable in Advance—Lien—Recovery of Money paid in an Action on an enforced Guarantee.

A, of Alexandria, bought coals of B, of London, which were to be delivered at Alexandria, prior to be paid on delivery of bill of lading, less balance of freight payable at Alexandria. B. chartered C.'s ship to carry the coal, "coal to be delivered on freight being paid, . . . freight to be paid on unloading and right delivery of cargo, less advances, in cash, at current rate of exchange, . . . half the freight to be advanced by freighter's acceptance at three months on signing bills of lading; owner to insure amount and deposit with charterer the policy and to guarantee the same." The bill of lading was signed, B. gave his acceptance for the half freight, the receipt of the half freight was indorsed on the bill of lading, and the bill of lading was indorsed in blank by B. and given to A. The average length of the voyage was two months; before the ship arrived B. became insolvent, and on arrival of the ship and before the acceptance was due, the master refused to deliver the cargo to A. unless the whole of the freight was paid or payment guaranteed. A guarantee was given

by D. for A. under protest, and the cargo was delivered; D. then by A.'s direction refused to pay. An action was brought in the Consular Court against D, who then, by A.'s direction, paid under protest. A. repaid D. C. knew nothing of the arrangement between A. and B.:—Held, that A. was entitled to recover the half freight from C.

This was an action brought by the plaintiff to recover 301*l.* 17*s.* 6*d.* under the circumstances hereinafter mentioned. By consent of the parties and the order of Willes, J., the following case was stated for the opinion of this Court.

CASE.

The plaintiff is a merchant residing at Alexandria, in Egypt, and the defendant a shipowner residing at Sunderland, and owning the ship called the *Parthenon*.

On the 1st of September 1863 Messrs. Tizinia & Co., of London, as agents for the plaintiff, entered into a contract with Mr. De Mattos, of London, for the purchase of 2,000 tons of steam coal. The contract (which was set out in the case) provided that De Mattos should supply 2,000 tons of certain specified coal, the bills of lading for the entire quantity to be delivered at the end of September in two or more shipments; that Tizinia & Co. should pay on receipt of bill of lading and policy of insurance a certain price, deducting the balance of freight payable at Alexandria, together with a certain commission, the said balance of freight to be paid in cash at Alexandria at the current rate of exchange for three months' bills on London; that the coals should be taken alongside at buyer's risk and expense at a certain rate, and that in case of neglect by De Mattos, Tizinia & Co. might charter vessels for seller's account. In pursuance of this contract, on the 1st of October 1863, De Mattos entered into (amongst others) a charter-party of the *Parthenon* with the defendant. The charter-party (which was set out at length in the case) provided that the said ship, being tight, &c., should proceed to Sunderland, there load a complete cargo, and therewith proceed to Alexandria, and there deliver the same on being paid freight at the rate of 30*l.*, 5 guineas gratuity, per keel of 21 tons 4 cwt., taken on board and delivered in full of all port charges, &c., the act of God,

&c. excepted, the cargo to be delivered and be discharged in a specified way; *the freight to be paid on unloading and right delivery of the cargo, less advances, in cash, at current rate of exchange; (1) one-half of the freight to be advanced by freighter's acceptance at three months on signing bills of lading; owner to insure the amount and deposit with charterer the club policy and to guarantee same; certain working days and demurrage to be paid; ship to be addressed to freighter's agent at port of discharge, paying usual commission; brokerage to be due lost or not lost; ship and freight bound to the venture, and all claim for average to be settled in London by Lloyd's Rules, and a penalty of 700*l.* for non-performance. In accordance with the charter-party, De Mattos shipped 20½ keels (weighing 426 tons 13 cwt.) of coal. The captain signed a bill of lading (set out in the case), which stated that such quantity had been shipped in good order, to be delivered in like good order in a specified way at Alexandria, as the agent for the charterer might direct (the act of God, &c. excepted), unto order or to his assigns; the ship to be discharged in a specified manner, with demurrage as in charter-party, and average accustomed. The freight of this coal at the date in charter-party was 603*l.* 15*s.* On the bill of lading being signed, De Mattos gave his acceptance at three months for 301*l.* 17*s.* 6*d.* in favour of the defendant. The acceptance was dated the 31st of October 1863, and became due the 3rd of February 1864. On the acceptance being given, the defendant's agents indorsed the following receipt on the bill of lading: "Received on account of within freight 301*l.* 17*s.* 6*d.* as per charter-party." De Mattos then gave the plaintiff's agent an invoice shewing what was due for the coals. In this invoice from the price of the coal was deducted the freight at 30*l.* per keel and the gratuity, "less advance on sailing, 301*l.* 17*s.* 6*d.*"; 3*l.* per cent. on the price was added, and a receipt for the balance per cheque acknowledged. On the 28th of October 1863 De Mattos indorsed the bill of lading in blank to Tizinia & Co.,*

(1) This paragraph was punctuated as above, and the words "for ship's use" in the form struck through, as appeared by a document handed up to the Court during the argument.

who paid the said balance due on invoice by cheque, as above stated, and forwarded the bill of lading to the plaintiff at Alexandria. The defendant had not before action any knowledge of the contract of the 1st of September 1863 between the plaintiff's agent and De Mattos, of the invoice, of the above payment, or of any of the transactions between the plaintiff or his agents and De Mattos. The ship sailed on the 4th of November 1863, and shortly after De Mattos became insolvent, and on the 4th of January 1864 executed a deed under the 192nd section of the Bankruptcy Act, 1861, without the assent of the plaintiff or the defendant, and on the 1st of February 1864 everything had been done to make such deed effectual. The ship arrived at Alexandria on the 5th of January 1864, and the captain reported her arrival to the plaintiff, and stated he should be ready next day to discharge the cargo. The plaintiff being holder of the bill of lading as such indorsee as above, thereupon took all necessary steps for receiving the cargo, and intimated to the captain that he was prepared to pay the balance of the freight remaining unpaid after deducting the 301*l.* 17*s.* 6*d.* referred to in the receipt in the bill of lading. On the 6th of January 1864 the captain, who on his arrival had learned by letter that De Mattos had suspended payment, refused to deliver the cargo to the plaintiff unless he was paid the full amount of the freight without any deduction, or had a guarantee the payment of the same. The master thereupon claimed a lien on the cargo for the full chartered freight, and detained the cargo till the 20th of January 1864, the plaintiff refusing to make such payment or to give or procure such guarantee. De Mattos's acceptance was at this time in the hands of third parties; it was not paid at maturity, and, before action, was taken up by the defendant. On the 20th of January 1864 Messrs. Barker & Co., at the request of the plaintiff, and to procure delivery of the cargo, gave the following guarantee, as the master still refused to deliver without the payment of the whole freight, or a guarantee of the same: "In consideration of your agreeing at our request to deliver to Mr. Tamvaco the cargo of coals at present on board your

ship, we hereby undertake and guarantee that when and so soon as you shall have delivered the said cargo unto the said Mr. Tamvaco, or his order, that we will on demand pay, or cause to be paid, to you in cash the full amount of freight due and payable to you in respect of said cargo without any deduction whatsoever, except commissions due." The master then began to deliver the cargo, and completed such delivery on the 13th of February 1864. On the completion of the delivery (the acceptance had now been dishonoured at maturity) the master applied to the plaintiff for payment of the full freight, and on his refusal applied to Barker & Co.; they, however, by plaintiff's directions, refused, and the master then took proceedings on the guarantee against Barker & Co. in Her Majesty's consular court at Alexandria, which had jurisdiction. The cause proceeded, and a day was fixed for trial; but on the day before such fixed day, viz. on the 7th of March 1864, Barker & Co., by order of the plaintiff, paid the master the whole freight, the plaintiff at the same time protesting against the payment, and serving a copy thereof on the master. The master gave a receipt (set out in the case), which is not material. The plaintiff afterwards, and before action, repaid Barker & Co. The average length of the voyage from Sunderland to Alexandria is two months.

The questions for the opinion of the Court were—

First, whether under the above circumstances the plaintiff was, when the captain refused to deliver the cargo, entitled to have it delivered to him on payment of the balance of freight after deducting 30*l.* 17*s.* 6*d.*

Secondly, whether, assuming the plaintiff to be entitled to recover in respect of the said refusal to deliver, he is entitled to recover anything, as damages, beyond the damages sustained by him by his being deprived of the possession of the cargo from the time of the said refusal to the time of the cargo being delivered to him.

If the Court shall be of opinion on both points in the affirmative, then the plaintiff to be allowed to sign judgment for 30*l.* 17*s.* 6*d.* with costs.

If the Court shall be of opinion on the

first point in the affirmative, and on the second point in the negative, then the plaintiff to be allowed to sign judgment for 10*l.* and costs.

If the Court shall be of opinion on the first point in the negative, then the defendant to be at liberty to sign judgment as in case of a nonsuit, with costs.

Mellish (*Bidder* with him), for the plaintiff.—The first question is, whether the master had a lien beyond the amount of freight payable at Alexandria. If the bill had run out and been unpaid, the question would, no doubt, have been whether the Court would follow *Kerchner v. Venus* (1), where the Privy Council decided that the contract for carriage was such as to prevent any lien, acting on *Howe v. Kerchner* (2), and against *Gilks v. Middleton* (3).

[WILLIAMS, J.—They thought they were acting contrary to that case, but in truth they were not.]

But here the bills were still running. The case with which *Kerchner v. Venus* (1) really conflicts is *Neish v. Graham* (4). Secondly, what are the damages? If the payment had been in money, it could have been recovered back, and the taking a guarantee makes no difference.

Manisty (*Lewens* with him), for the defendant.—The defendant knew nothing of what took place between De Mattos and the plaintiff, and therefore that is out of the case. The question is, whether the ordinary lien for freight was waived? The words of the charter-party are "deliver the same on being paid freight, . . . the freight to be paid on unloading and right delivery of the cargo, less advances in cash" (the words "for ship's use," which generally follow, being struck out), "at the current rate of exchange"; and therefore, putting the provision as to insurance out of the question, there was an advance, to be returned if the ship be lost; and the defendant therefore is entitled to succeed. Further, that the shipowner was to have an interest in this freight is shewn by his having to insure, which he could not have otherwise

(1) 12 Moo. P.C.C. 361.

(2) 11 Moo. P.C.C. 21.

(3) 2 Com. B. Rep. N.S. 134; s.c. 36 Law J. Rep. (N.S.) C.P. 209.

(4) 1 E. & B. 505.

done. The cases reported in *Moore's Privy Council Cases* support the defendant's view. Secondly, when the ship arrived the bill was virtually dishonoured, and therefore the right of lien, even if suspended before, had revived. There is no authority on this point, but it is correct on principle.

[*Mellish* referred to *Aleager v. the St. Katherine's Dock Company* (5).]

Thirdly, after the proceedings at law and the payment made therein, the money is not recoverable; and there was no protest on the 20th of January, when alone it could have been available. Assuming that this point does not go to the root of the case, but only to the amount of the damages, still only the damage arising from the detention, excluding the guarantee, is recoverable; the money paid on that cannot be recovered, for that would be getting indirectly what cannot be got directly; and it could not have been got directly when on action brought the claim was not disputed, but paid—see the notes to *Marriott v. Hampton* (6).

WILLES, J.—I am of opinion that our judgment should be for the plaintiff. The first question is, whether the shipowner under the circumstances, particularly the insolvency of De Mattos, had a lien, not only as to the half of the freight payable at Alexandria, but also as to the half which had been paid by a bill of exchange in pursuance of the charter-party, which provides "one-half of the freight to be advanced by freighter's acceptance at three months on signing bills of lading, owner to insure the amount and deposit with the charterer the club-policy, and to guarantee the same"? This bill became due on the 3rd of February; the ship arrived in January, and in the mean time, and before her arrival, De Mattos had become bankrupt, and the bill was sure to be dishonoured, and it was certain that only a portion of its amount would be realized. Before the bill became due, the consignee of the bill of lading, on which was a receipt stating that half the freight had been paid as per charter-party, demanded the goods and offered the remaining half of the freight. The master, knowing of the

insolvency of De Mattos, refused to deliver up the cargo, unless the whole freight were paid in cash or guaranteed. The plaintiff, in order to get the cargo, yielded, and procured from Barker & Co. the undertaking set out in the case, and which, looking to the circumstances of the case, was clearly intended to apply, not to the half, but the whole of the freight. The cargo was then delivered, and the delivery was completed on the 13th of February; and no new right accrued because of the previous demand and refusal to deliver. Subsequently, the master insisted on payment of the full freight. A suit was brought on the guarantee in the consular court against Barker & Co., who, on consideration, did not raise the present defence, but paid under protest the amount in dispute, viz. 301*l.* 17*s.* 6*d.* The question is, whether the plaintiff, who has repaid Barker & Co., is entitled to recover this sum from the defendant the shipowner? and I conceive that he is. It is necessary to see what the rights of the shipowner were under the charter-party, and whether the master was right in detaining the goods. Assuming that there was no such right, there will arise another question, whether the subsequent transactions took away the right of the consignee? I entertain no doubt as to the effect of the clause in the charter-party; the words "in cash" were not intended to qualify "advances," but are to be taken in connexion with "at current rate of exchange." We have no assistance here from mercantile usage, none is stated in the case. The clause is "the freight to be paid on unloading and right delivery of the cargo, less advances, in cash, at current rate of exchange." If this be read "less advances in cash," there is no provision in the charter-party to which this can apply; to hold that it referred to advances for ship's use would be nonsense, for not only is there no provision for them, but the words "for ship's use," which stood in the form, are actually struck out. As I have already said, we have no assistance here from mercantile usage or practice, nor have we any from the form which has been handed up to us. But we find the charter does deal with advances not in cash, "one half of the freight to be advanced by the freighter's acceptance at three months on signing bills of lading," and therefore we

(5) 14 Mee. & W. 794; s. c. 15 Law J. Rep. (N.S.) Exch. 34.

(6) 2 Smith's Lead. Cas. 237.

are bound, in order to give effect to the charter-party, to read "advances" as applying to this advance of the half freight, and not to advances in cash. The words then read "freight to be paid on unloading and right delivery of cargo (less advances) in cash at current rate of exchange," and this makes the whole sensible, and gives effect to all the words. And this is not inconsistent with a mercantile transaction where credit is wanted, and a bill therefore is given, the shipowner saying to the charterer, "You shall pay half the freight three months hence, but must give me a negotiable instrument." Mr. Manisty's argument on the other words prevents me from giving any opinion as to whether the half freight is properly a loan to be restored, or whether, in case of loss of the ship, the loss is to fall on the charterer. I incline to the latter construction, but give no opinion, as it is not necessary. The refusal, then, to deliver having been whilst the bill was running, the plaintiff is therefore entitled to sue in trover, unless the transactions at Alexandria affect this right. The plaintiff is, *prima facie*, entitled to recover the value of the goods; and also where they are detained on an unfounded claim of lien he may pay the money and take the goods, and then recover the money he has so paid. The distinction between a payment, or a transaction in the nature thereof, and a contract entered into on duress of goods, is well put in *Byles on Bills*, 109; and, here, if the whole freight had been paid in money by the plaintiff, he might recover it. But, instead of this, a guarantie is given by Barker & Co., who, as strangers to the transaction, engage to pay the whole freight in consideration of the delivery of goods to which they are not entitled themselves, but under circumstances which entitle them to be recouped by the plaintiff. Barker & Co. are obliged thereby to pay the whole; and therefore the settlement of the action against them was wise. Assume they had engaged to deliver a specific chattel, performance could not be resisted by shewing part only of the freight was due; so, here, the matter depended on whether, on the construction of the contract, they did not guarantee payment of the whole freight; they did, and it was wise to settle. But, then, it is insisted that, looking to the con-

tract, the action on it, and the payment in the action, the money paid is not recoverable. The master refused to deliver unless the money was paid or a guarantie given. What was the character of this transaction? Was it to settle the dispute? It was certainly binding and final in one sense, that the master was to receive the whole freight. But was it final so as to allow the retention of the sum extorted? I apprehend that what the master suggested was not a final agreement to settle the dispute, but a suggestion to get the money, or a guarantie, he not to be in a better position by a guarantie being given instead of the money. By law the plaintiff in trover is, *prima facie*, entitled to recover the whole value of the goods; but if the defendant gives up the goods, this is to be taken into account. Here we have a middle case; here the goods are given up, but so that the plaintiff is 301*l.* 17*s.* 6*d.* out of pocket; a jury might find a verdict for this sum, and, therefore, our judgment is for the plaintiff for that amount.

BYLES, J.—I am of the same opinion. If the bill of exchange for the half freight was to fall due after the voyage, it is clear no lien was contemplated for that amount—*Horncastle v. Farran* (7) and *Alsager v. the St. Katherine's Dock Company* (5). Here, there was no advance in the nature of prepayment of freight when the bill fell due; the debt would, no doubt, revive, but it is another thing to say that the lien does. This bill was not due till after the time for delivery; if that be so, there was no right to detain the goods *quoad* the amount of the bill. The plaintiff enters into an agreement, as to which it is not necessary to decide, whether there was good consideration. By this agreement, he says to the master, "If you will deliver the goods, I will pay the whole freight; you shall be depositary of that sum, and the dispute shall hereafter relate to that money and not to the goods. I will give the cash subject to future adjudication, and I give this agreement under protest." The parties, therefore, were, in my opinion, just where they were before, and I think it a very plain case.

Judgment for the plaintiff for
301*l.* 17*s.* 6*d.*, and costs.

1865. }
May 31. } MOAKES v. NICHOLSON.

Bargain and Sale—Delivery on Board Ship—Passing of Property.

A. bought coal of B, to be shipped in a ship chartered by A, payment in cash against bill of lading in the hands of B's agent. Before shipment A. sold to the plaintiff, and at the time of both sales the coal was unascertained. The coal was shipped and three bills of lading signed for delivery to A. or order; one only was stamped and retained by B, another was sent to A. Not being paid, B. sent the stamped bill of lading to the defendant and the captain delivered the coal to him:—Held, that the plaintiff had no right of action against the defendant.

In this case the plaintiff sought to recover damages for the conversion of a cargo of coal; and the following facts were proved at trial.

On the 9th of December 1864, at Hull, a person named Pope bought of a person named Josse a quantity of coal, and a great deal of evidence, oral and written, was given at the trial in order to shew the terms of the sale, the defendant contending that by the terms of this sale there was to be "payment in cash against bill of lading in the hands of Josse's agent in London," and that it was not the intention of the parties that the property in the goods should pass till payment. The coal at the time of the contract was lying undistinguished in a heap at Josse's yard, containing a much larger quantity than that contracted for, and it was to be shipped on board a vessel, which was chartered by Pope in his own name and on his own behalf, to carry it to London. On the 13th of December, whilst the whole or all but a very small portion of the coal was still undistinguished, Pope sold the coal he had contracted for to the plaintiff on the Coal Exchange in London. The plaintiff resold on the same day at a higher price, and before action had paid Pope. By the 19th of December the coal was shipped and the captain signed three bills of lading, stating the coal was to be delivered to "Pope or order" on being paid freight and demurrage as by charter-party. One only of

these bills was stamped, and this Josse retained; the second, together with an invoice and a letter announcing the loading, was sent on the 19th of December to Pope, who received them next day. Josse not being able to get his money from Pope, sent the stamped bill of lading to the defendant, his agent, with directions to stop the delivery of the coal, and the captain, under the defendant's directions, refused to deliver to those claiming through Pope, and the defendant himself took the cargo.

The jury found that the sale was for cash, and the learned Judge directed a verdict for the plaintiff, and gave the defendant leave to move to set this verdict aside and enter one for himself, on the grounds that on the facts admitted and proved the defendant was entitled to the verdict, that the defendant had a right to stop the coals *in transitu*, and that neither Pope nor the plaintiff had any right to the property and possession of the coals.

A rule *nisi* having been obtained pursuant to such leave,

D. D. Keane and Barnard now shewed cause.—The bill of lading is "to Pope or order," and not in blank; there is also the invoice and letter. All these documents are sent to Pope. It cannot be said, therefore, that the property did not pass by the delivery on board Pope's ship; at all events as respects a third person, who has bought for value in the public market, it would be a fraud to hold that the property did not pass. In the case of *Turner v. the Trustees of the Liverpool Dock Company* (1) the circumstances were very different. And *Joyce v. Swan* (2) is in our favour.

Russell and Thesiger, in support of the rule.—When the plaintiff bought the goods they were unascertained and the documents not in Pope's possession. The contract was, that the property should not pass till the money had been paid; this has been found by the jury; and the effect of the delivery depends on the intention of the parties—*Blackburn on Sales*, 135, *Brandt v. Bowlby* (3).

[WILLES, J.—It is a question for the

(1) 6 Exch. Rep. 543; s. c. 20 Law J. Rep. (N.S.) Exch. 393.

(2) 17 Com. B. Rep. N.S. 84.

(3) 2 B. & Ad. 932.

jury—Smith's Mercantile Law, 300, Van Casteel v. Booker (4).]

Yes, that is clear from *Brown v. Hare* (5).

ERLE, C.J.—I am of opinion that this rule should be made absolute. The action is brought on the ground that the cargo had vested in Pope. The coals were sold by Josse to Pope, by Pope to Moakes (the plaintiff), and he again passes them on. One material point is, whether Moakes has a better title than his vendor Pope, and I think he has no better title. The rule that a man shall not have a better title than his vendor is not universal, because, for instance, there are cases where, if the goods be in possession of a man as ostensible owner, together with the documents of title, he may be able to confer on a purchaser a better title than he has himself. No such point, however, arises here, because at the time of the treaty between Josse and Pope the goods were unascertained; the treaty was that the property should not pass till the cash was paid, and, whilst the goods are so unascertained, Pope makes the contract with Moakes, who therefore is only in Pope's shoes. Then what, as between Josse and Pope, was the intention of the parties? The property in Josse cannot pass out of him unless there be a sale which passes it. Now Josse intended to retain the property till the cash was paid, and if so, the property did not pass; that was clearly the contract. The delivery on board ship had no effect. Even if the delivery had been to Pope, yet it might be only as a warehouseman. As to the difficulty which has been raised about the bills of lading, and as to their allowing Pope to pass as owner, under certain circumstances, such a question might have arisen; but it does not arise here, because when the plaintiff bought the goods they were neither ascertained nor loaded, and therefore there could have been no such bills; and besides, the only stamped bill of lading was retained by Josse, and the effect of an unstamped bill of lading is well known.

BYLES, J.—I am of the same opinion. I had doubts at one time, because I thought

(4) 2 Exch. Rep. 691; s. c. 18 Law J. Rep. (N.S.) Exch. 9.

(5) 4 Hurl. & N. 822; s. c. 29 Law J. Rep. (N.S.) Exch. 6.

that the goods were sold after they were on shipboard, and after the bills of lading were in Pope's hands; but it appears that at the time of the sale not only were the goods not on board, but they had not been distinguished; therefore no property passed then, and it is now clear from the decided cases that none passed at the time of shipment, because the shipment was not intended to be a delivery. The captain was a sort of supercargo, and (as the jury find) the property was not to pass till all the conditions were satisfied. As to any representations by means of the documents, the plaintiff could not have been misled, for he bought before Pope had them.

KRATING, J.—I am of the same opinion. No doubt the means used by Josse to retain his property in and control over the goods were very slovenly, but it clearly was the intention that the property should not pass without the cash. The jury have found this, and their finding seems in accordance with the evidence. The means adopted were slovenly, for circumstances might have arisen which might have placed Josse in a precarious position. Because there was a stamp only on one of the bills of lading, he thought himself amply secured. Yet, if unstamped bills of lading had been produced to a subsequent purchaser in the market, the effect might have been to raise questions which might have jeopardized Josse's rights. It turns out, however, that the plaintiff contracted with Pope on the 13th of December, and it was not until the 19th of December that the goods were ascertained and shipped.

Rule absolute.

1865. } TRAYES AND ANOTHER v.
June 8. } WORMS.

Ship and Shipping—Charter-Party—Insurance—Advanced Freight—General Average.

*The defendant chartered a vessel, freight to be paid in bills at six months' date from date of sailing or in cash (less discount equal thereto), less, in either case, the cost of insurance, to be effected by charterers at ship's expense, and also 800*l.* to be paid on delivery of cargo:—Held, that such advanced*

freight was not to be returned, and that the defendant was liable to contribute to general average in respect thereof.

This was an action brought by the plaintiffs against the defendant to recover (as appeared by the declaration) money payable for certain general average alleged to have become payable in respect of goods on a voyage of a ship called the *Hibernia*, and in respect of certain loss, damages and expenses incurred by the plaintiffs, in and about the preservation of the ship and cargo and the said goods from damage and loss, and for general average for and in respect of money paid by the defendant to the plaintiffs, before completion of the voyage, by way of advance of freight, and for losses, damages and expenses incurred by the plaintiffs in and about the preservation of ship and cargo and freight from damage and loss. There were also counts for money paid and money claimed to be due on accounts stated.

The defendant pleaded never indebted, payment, the Statute of Limitations, and a special plea setting up the American judgment afterwards mentioned.

The plaintiffs joined issue and demurred to the last plea.

The amount claimed by the plaintiffs on the writ was 1,007*l.* 13*s.* 11*d.*, together with interest at 4*l.* per cent. per annum, from the 29th of June 1854.

After issue joined by consent of the parties and by order of Byles, J., dated the 11th of January 1864, the following case was stated for the opinion of the Court, pursuant to the provisions of the statute in such case made and provided.

CASE.

On the 21st of April 1853 E. Oliver, the then owner of the ship *Hibernia*, through his agents, Parry, Brown & Co., effected a charter of the said ship to the defendant, whereby it was agreed that the said ship, being tight, &c., should, with all possible despatch, proceed to Bute Dock, Cardiff, or so near thereunto as she might safely get, and there load from the factors of the said affreighters a full and complete cargo of steam coal; captain taking sufficient coal for ship's use independent of the cargo, same to be indorsed on the bills of

lading; cargo to be brought and taken from alongside at merchant's risk and expense, and not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions and furniture; and being so loaded should therewith proceed to San Francisco or any of the landing-places within the waters of San Francisco, or Sacramento, within one day's sail of the former, or so near thereunto as she might safely get, and deliver the same on being paid freight at and after the rate of 4*l.* 10*s.* British sterling per ton of 20 cwt. delivered, ship to be addressed to charterers' agent at port of discharge on usual terms for doing the ship's business. (The act of God, &c., excepted.) The freight to be paid by good and approved bills on London at six months' date from date of sailing, less cost of insurance to be effected by the charterers at ship's expense, or in cash, under discount equal thereto, at charterers' option, less, in either case, 800*l.*, which was to be paid on delivery of cargo in cash at the current rate of exchange, and ten days on demurrage over and above the said laying days at 10*l.* per day. Penalty for non-performance of the agreement 5,000*l.* The vessel to be loaded at the quickest turn obtainable with Powell & Wayne or Thomas & Joseph, and discharged at rate of not less than 20 tons per working day on being ready to deliver.

The defendant, under the said charter-party, loaded the ship with a cargo of coals, consisting of 1,246 tons, and a bill of lading was duly signed for the same by the master of the said ship, which stated that they were shipped in good order and condition for H. Worms, and were to be delivered in the like good order and well conditioned at the port of San Francisco (all and every the dangers and accidents of the seas and navigation of whatever nature and kind excepted), unto H. Worms or order, on being paid freight for said coals as per charter-party, with primage and average accustomed.

Agreeably to the terms of the said charter-party, the defendant, in payment of the freight payable under the said charter-party less the sum of 800*l.* mentioned therein, payable on delivery of the cargo, gave two bills of exchange, amounting together to the sum of 4,518*l.* 6*s.*, being the balance of

the freight, less the insurance thereon, which amounted to the sum of 288*l.* 14*s.*, and thereupon the master indorsed on the said bill of lading the following receipt—

“Received of Mr. H. Worms the sum of four thousand eight hundred and seven pounds sterling, on account of the within freight, viz:

	£.	s.	d.
By two bills on London, each			
of 2,259 <i>l.</i> 3 <i>s.</i> , together . . .	4,518	6	0
Insurance, 5% on each 144 <i>l.</i>			
7 <i>s.</i> , together . . .	288	14	0
	<hr/>		
	£4,807	0	0

Said amount of 4,807*l.* to be deducted from the freight at San Francisco.

(Signed) John Cleverley.”

Both the said bills of exchange were paid at maturity. On the 14th of July, 1853, the said E. Oliver transferred the said ship and the benefit of the said charter to the plaintiff Traves; and he, on the 26th of October, 1853, transferred eight sixty-fourths of the said ship to the plaintiff Williams. The ship, shortly after the shipment of her cargo, sailed on the voyage mentioned in the said charter-party, and during such voyage sustained considerable damage, and was for the safety of the general adventure compelled to and did put into Valparaiso, where she arrived on the 7th of January, 1854, and remained until March, 1854. Expenses were necessarily incurred at Valparaiso in the repair of the ship, the particulars of which appeared in the average statement hereinafter mentioned, and it was agreed between the parties that the portion put down to general average in such statement were general average charges. The master of the said ship not having funds at his command to defray the expenses, on the 10th of March, 1854, properly borrowed the requisite amount at Valparaiso, and duly executed a bottomry bond, on behalf of himself and the said E. Oliver, the owner, and for whomsoever might be owner or owners of the said ship, to Robertson Brothers, of Valparaiso, merchants, in the penal sum of twenty-six thousand dollars of lawful money of the United States of America, to be paid to Edward D. Heatley & Co., of San Francisco, in California, in London, merchants, as agents for the said

Robertson Brothers, their certain attorney or agent, executors, administrators or assigns, or order, for which payment well and truly to be made he bound himself, the said ship or vessel, her tackle, apparel, furniture and appurtenances, the cargo of coals on board and the freight to be earned on the voyage, and hypothecated the said ship, together with all her tackle, apparel, furniture and appurtenances, the said cargo and freight.

After the completion of the repairs, the ship proceeded on her voyage to San Francisco, where she arrived in June, 1854, and duly delivered the cargo. The plaintiffs, after hearing of the injury sustained by the *Hibernia*, transmitted to San Francisco the sum of 1,000*l.* towards defraying the bottomry bond executed at Valparaiso. On the 16th of May, 1854, the plaintiffs entered into the following contract with one William James :

“Messrs. Valentine Traves and Bethuel Williams sell, and William James, of Liverpool, buys the ship *Hibernia*, now supposed to be on her passage from Valparaiso to San Francisco, on the following conditions, viz., that the ship is to be transferred to the purchaser at once by bill of sale, and in case she is net sold at San Francisco, or no heavy expenses incurred there upon her previous to the arrival of the person sent out by him, he is to take possession of her in the purchaser's name, and he, W. James, is to become the sole registered owner; but it is understood that one-eighth of the said ship is still to belong to the original owners, viz., say one-eighth of the net value of the ship and freight, after she is discharged in Cadiz and all expenses upon her are paid, is to belong to them; but in case the ship does not become the property of the said William James, any expense which he may be put to in sending a person out to San Francisco, interest of money, or otherwise, is to be refunded him by the present owners. In taking possession of the said ship, the 1,000*l.* already remitted to San Francisco by the present owners, with any balance of freight which may be due there (supposed to be about 800*l.*) is to become the purchaser's, and also any insurance which is now due, or may hereafter become due either in this country or New York, on

said ship or freight, and all freight on the return voyage, subject to the above reservation, or any other thing connected with the said ship, is to become his also; and on payment for the said ship, the purchaser is to discharge the bottomry bond now upon her for 3,700*l.*, say about three thousand seven hundred pounds liabilities, in Cardiff, to Messrs. Parry, Brown & Co., Batehlor Brothers and the bank there, together about 1,500*l.*, all wages and expenses on the voyage and 500*l.* to the present owners, by his acceptance at six months from receiving advices of the said ship having left the port of San Francisco, and all right in the existing charter is transferred with the said ship also.

"Mem. Everything paid to be debited the ship and everything received to be credited her (with interest for and against), and one-eighth of the balance to belong to the original owners, the other seven-eighths to me; but nothing except what is named now. I to be liable for and only what wages may be due to the crew on the termination of the voyage."

And the said ship was, on the said 16th of May, 1854, transferred to the said William James by bill of sale, (a copy of which was appended to the case).

Disputes subsequently arose with reference to the said contract between the plaintiffs and the said William James, which gave rise to proceedings at law and in equity; and on the 2nd of August, 1855, the following agreement was entered into by the plaintiffs and the said William James:

"An agreement, made this 2nd of August, 1855, between Bethuel Williams, of Aberdare, in the county of Glamorgan, merchant, and Valentine Traves, of Cardiff, in the same county, broker, of the one part, and William James, of Liverpool, merchant of the other part. Whereas certain differences have arisen between the parties hereto as to the performance of an agreement between them, dated the 16th of May, 1854, and proceedings at law and in equity are now pending between them in reference thereto, and they have this day agreed upon certain terms hereinafter set forth, whereby all proceedings are to be stayed, and all questions whatever under the said agreement and otherwise between the par-

ties settled. Now, the said Bethuel Williams and Valentine Traves on the one part, and the said William James on the other part, agree with each other as follows:

1. That all proceedings at law and in equity between them be stayed.

2. That each side pays his own costs of such proceedings.

3. That the said Bethuel Williams and Valentine Traves discharge the said William James from any claim in respect of the one-eighth of the ship *Hibernia*, say the one-eighth of the net value of the said ship and freight, reserved to them by the said agreement, and that the said William James is to be sole and absolute owner of the said vessel.

4. The said Bethuel Williams and Valentine Traves release the said William James from the liability to pay them or give them a bill of exchange for 500*l.*, as mentioned in the aforesaid agreement.

5. That the said William James has this day given to the said Bethuel Williams and Valentine Traves a bill of exchange at six months date for 750*l.* as the remaining full consideration under the aforesaid and this present agreement.

6. That the said William James hereby releases the said Valentine Traves from all claims under certain bills of exchange, making together 6,000*l.*"

After the ship's arrival at San Francisco an average statement was duly made out in accordance with the law, but this statement is not to preclude either party from raising the question,—who is to contribute in respect of freight? (A copy of the said average statement formed part of the case.) In the month of July, 1854, James paid the amount of the said bottomry bond given at Valparaiso, and this action is brought by and prosecuted for the benefit of the said James. The defendant, by himself or his agents, duly paid the 800*l.*, the balance of the freight, and also the sum of \$912 charged on the cargo in the said average statement. The said James took proceedings in the District Court of the United States for the Northern District of California. (A copy of the proceedings in that Court and of the judgment pronounced therein formed part of the case.) The money directed by such judgment to be paid was forthwith paid. The

defendant on the 21st and 25th of July 1853 effected two policies of insurance in France for 130,000 francs on advances made on freight of the cargo by the said ship for the said voyage from Cardiff to San Francisco, with faculty to call at any or all ports in the southern seas. The policy is stated to provide for reimbursement of the advances in all cases of fortune of the seas which might have for consequence the deprival of the said advances from the person assured. (Copies of the original policies formed part of the case.) The above were the only policies effected in respect of the advances. (The pleadings formed part of the case; and a demurrer to the fourth plea was argued on the 26th of April, 1861, when the Court held the fourth plea bad and the second count of the declaration good. The judgment of the Court will be found reported in the 10 *Com. B. Rep.* N.S. p. 149.)

The Court is to have power to draw any inferences of fact from the facts hereinbefore stated which a jury might draw.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover all or any part of the money claimed by them? If the Court shall be of opinion in the affirmative, then judgment is to be entered for the plaintiffs as the Court may direct for such sum as the Court may think fit, together with costs of suit; but if the Court shall be of opinion in the negative, then judgment of *nolle prosequi* shall be entered for the defendant, with costs of defence.

During the argument it was arranged that the amount should be settled by a Judge at chambers, if the parties could not agree.

Sir G. Honyman (*M'Leod* with him), for the plaintiffs.—First, if the money advanced was to be returned, there would be no insurable interest; but the charter-party provides that freight (except 800*l.*) is to be payable, "less cost of insurance to be effected by charterer at ship's expense," and therefore this money was not to be returned, and on the loss of the ship the money is gone, and not recoverable. Secondly, the principle of general average adjustment is, that all the parties interested in the adventure for the benefit of which the loss was incurred should be

sufferers by the loss in exact proportion to the extent of their respective interests, but no further—*Arnould on Insurance*, s. 343; here the expense was incurred for the benefit of all, whether interested in ship, cargo or freight, and the defendant being interested in this unreturnable freight must contribute in respect of it. Either the charterer insures (under this policy) so as to be reimbursed by the insurers on the occurrence of a loss, or he does not; if he does, it would be unjust that he should not contribute; if he does not, it is his own fault. Such an interest must contribute—*Stevens and Benecke on Average*, p. 215. The shipowner having paid is entitled to be recouped—*Arnould on Insurance*, s. 344, and the law of San Francisco does not apply, as the contribution is due at the moment of the outlay—*Arnould on Insurance*, s. 349.

Mellish and Milward, for the defendant.—First, this freight was returnable; the charter-party says that freight is to be paid at so much per ton "delivered." It is true that the provision as to payment by bills, "less 800*l.*, which is to be paid on delivery of cargo," is rather contradictory to the former provisions; but they are to be, and can only be, reconciled by saying that the freight depends on the delivery.

[*WILLES, J.*—Has it not been repeatedly held that a charterer's insuring is a conclusive test as to the return of the money!]

[*Sir G. Honyman.*—Yes, *Hicks v. Shield* (1).]

Secondly, whether this be so or not, yet the defendant is not liable to contribute—*Phillips on Insurance*, s. 1404.

ERLE, C.J.—The rule of contribution is undisputed. As to the advanced freight, it was not to be returned; the charterer is the person interested in it, either as an interest in the freight, or as an interest in the increased value of the goods, and he must therefore contribute in respect of it.

WILLES, J.—The first question is concluded by the charter-party; this advanced freight was insured, and therefore it is not to be returned, but the charterer must proceed against the underwriters. The second

(1) 7 El. & B. 633; s. c. 26 Law J. Rep. (N.S.) Q.B. 205.

question is, whether a person who has thus advanced money on account of freight is liable to contribute to general average. I am of opinion that he is. This is not a question between underwriters, in which case it might then be a question whether this is to be considered an interest in the cargo or in the freight; but here, however that may be, the charterer is interested in having the goods carried. The general law of general average is, that the sacrifice shall be contributed to by those who are interested. The charterer here was interested in the cargo and the freight, just as if these goods had been partly his own goods and partly the goods of others for whom he was carrying for hire, in which case the sum payable to him, though not strictly freight, might be insured as such and would contribute. I am therefore clearly of opinion that our judgment should be for the plaintiffs.

BYLES, J.—I am of the same opinion. The charterer is as it were a purchaser of a part of the freight, and is liable to lose it by the loss of the ship, and he should therefore contribute. He may also be said to have an interest in the increased value of his goods, and be called on to contribute on this ground.

SMITH, J.—I am of the same opinion. This advance was not to be returned; the charterer therefore had an interest in the arrival of the vessel, and is liable to contribute.

Judgment for the plaintiffs.

1865. } HUGHES v. PALMER AND
June 19. } OTHERS.

Debtor and Creditor—Composition-Deed—Covenant by Sureties, void or voidable.

By a composition-deed made between an insolvent, the defendants as sureties, the plaintiff as trustee, and the body of creditors, the defendants covenanted to pay to the plaintiff certain instalments; and it was provided that, as between them and the creditors, the defendants should be deemed principal debtors, also that on non-payment of the instalments, adjudication of bankruptcy against the insolvent, or any different arrangement by him with his creditors, the release, the deed, and all its clauses and provisions should be at

an end and void. After payment of the first instalment the insolvent was adjudicated bankrupt on his own petition. In an action by the plaintiff against the defendants for the second instalment,—Held, that “void” meant “voidable” at election, and that the defendants were liable.

This was an action for breach of covenant; and without pleadings, there was stated for the opinion of the Court the following

CASE.

One T. H. Palmer being in difficulties, an indenture was made between him of the first, the defendants of the second, the plaintiffs of the third, and the said T. H. Palmer's creditors of the fourth part; and was executed by T. H. Palmer, the defendants, the plaintiff, and the requisite number of creditors. This indenture, after reciting that T. H. Palmer was unable to pay in full, and had proposed a composition of 7s. 6d. in the pound, to be paid to the plaintiff as trustee in three equal instalments, at four, eight, and twelve months after registration of the indenture under section 192. of the Bankruptcy Act, 1861, the defendants to be securities for the payment, witnessed that the parties of the first and second parts jointly and severally covenanted with the plaintiff that they would pay him 2s. 6d. in the pound on T. H. Palmer's debts, at or before the expiration of four months from the said registration, a like sum at or before eight months, and a like sum at or before twelve months after the same; that such money was to be applied in payment of the said debts; that the creditors released and discharged the said T. H. Palmer from their debts, &c.; provided always, that though as between the said T. H. Palmer and the parties of the second part the latter were sureties only for repayment of the composition, nevertheless, as between them and the creditors, they, the parties of the second part, should be deemed and taken to be principal debtors, so that they should not be discharged from liability by reason of time being given to, or any arrangement being made with T. H. Palmer, without their consent, or by reason of any other circumstance which might have the effect of discharging them, if only sureties;

provided always that the indenture should not prejudice the rights of the creditors against sureties, or on any securities, but, nevertheless, so that on any security being realized by a creditor, the composition was to be paid only in respect of the remainder of his debt; provided always, "that in case default should be made in payment of any or either of the said instalments of the said composition, or any part thereof, or in case before the said composition should be fully paid to the said W. Hughes (the plaintiff) as aforesaid, the said T. H. Palmer should be adjudicated bankrupt, or make or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangements with his creditors different to this present arrangement, then and in any of such cases these presents and the release and every other clause and provision therein contained should be thenceforth at an end and void" (without prejudice to any act which might have been done by the trustee), and the creditors should be at liberty to sue or prove for the amount of their debts still unpaid; and that the deed was intended to be within the 192nd section of the Bankruptcy Act, 1861.

The said indenture was duly registered, and the first instalment duly paid. Afterwards and before the second instalment became due, the said T. H. Palmer was adjudicated bankrupt on his own petition. This action was brought to recover the second instalment. None of the creditors had elected to treat the deed as void, nor had any of them proved under the bankruptcy, and after the adjudication they met and resolved that they would not treat the deed as void against the sureties, but would hold them jointly and severally liable to pay the balance of the composition. The question for the opinion of the Court was, whether the defendants were discharged from liability on their covenant.

Anstie, for the plaintiff, contended that the deed was not void, but voidable only at the election of the plaintiff and the creditors, and cited *Hyde v. Watts* (1), *Doe d.*

Bryant v. Banks (2), *Roberts v. Dawy* (3), *Arnsby v. Woodward* (4), and *Pennington v. Cardale* (5).

J. Brown, for the defendants, contended that the bankruptcy made the deed void, inasmuch as bankruptcy was not a wrongful act, was generally under pressure, only substituted another mode of distribution, and (by taking the property) prevented the defendants from recouping themselves, and also destroyed equality if the deed was to be still in force.

Anstie, in reply.

WILLES, J.—I am of opinion that our judgment should be for the plaintiff. The action is brought to recover the second instalment payable under a deed made between an insolvent, the defendants, the plaintiff, and the creditors, whereby the defendants covenant jointly and severally with the plaintiff to pay him three instalments, and by which it is provided, that though as between the insolvent and themselves they are to be sureties, yet as between them and the creditors they are to be deemed principal debtors. In consideration of this undertaking the creditors release their debts, subject, however, to this condition, on which the present question turns, "That in case default shall be made in payment of any or either of the said instalments, or in case before the said composition shall be fully paid to the said W. Hughes (the plaintiff), the said T. H. Palmer (the insolvent) shall be adjudicated bankrupt, or make or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangements with his creditors different to this present arrangement, then these presents and release and every other clause and provision herein contained shall be henceforth at an end and void." It appears that one instalment was paid, that the said T. H. Palmer was adjudicated bankrupt on his own petition, that the subsequent instalment became due, and that the defendants were called on to pay it, but that they refuse to do so, and say that by the bankruptcy the said condition came into operation, and they were discharged from their covenant. And the

(1) 12 Mees. & W. 254; s. c. 13 Law J. Rep. (N. S.) Exch. 41.

(2) 4 B. & Ald. 401.

(3) 4 B. & Ad. 664.

(4) 6 B. & C. 519.

(5) 3 Hurl. & N. 656; s. c. 27 Law J. Rep. (N. S.) Exch. 438.

question is whether the bankruptcy had such an effect. To determine this, we must take the whole of the provisions, and see whether the intention was that the deed should be void as respects all parties on the acts being done which are contained in this condition, or whether the condition means that the deed is to be voidable as against such parties as are guilty of default, the remedies of the others being still preserved, as in the case of leases containing clauses of re-entry, &c., conditions which, however strong in words, are now held must be construed to operate only on the election of the landlord. The question is whether the present condition falls within that class. We must on principle give effect to the language in accordance with the scope of the deed and the real intention of the parties, and I am of opinion that in the present case "void" must be taken to mean "voidable" at the election of the parties not in default. Examples may be given to shew the justice of this. A condition may be that a deed shall be void on the performance of an act which is an indifferent one, such as the condition in a lease for twenty-one years that it shall expire on notice; there the notice is an indifferent act, and the lease may be ended by the act of either party. Now take the case of a condition that a lease shall be void in default of the payment of the rent or of repairing; in such a case to say that the lease thereon is absolutely void would involve a twofold absurdity, viz., that the lease might be ended by the default of one of the parties, and that not only the tenant might end the lease by such default, but also deprive the landlord of his remedies for breach of covenants before the default. The Courts therefore treat "void" to mean void for the benefit of the person not in default, void at his election. As to the election in the present case, it may be a question whether it must be joint or not, all agreeing to be represented by the trustee, yet each having a separate interest; on this I express no opinion, but content myself with referring to *Co. Litt.*, 145, a. I see no difficulty in saying that the doctrine which has been applied to leases should apply here, and it is not necessary to decide whether the election is to be by all the creditors, by the majority, or by one. Having compared the present case with the

case of a lease with a similar condition, I should have thought that enough to decide the question. However, there is a further argument. For not only is the case of bankruptcy provided for, but also of the non-payment of the instalments. Now it would be impossible to hold that the deed became absolutely void on such a default; and then, applying the ordinary rule of construction that you recognize words and persons by the company in which they are, you have in the proviso a condition which in leases is held to mean only void on election, and another which clearly depends on election; and I am of opinion that the true construction of the proviso is, that on the happening of the events therein mentioned, the deed is voidable at the election of the creditors.

BYLES, J.—I am of the same opinion. The cases which have been cited shew "void" may mean "voidable" or "voidable at election." The words here are strong; but they are not so strong as those in *Roberts v. Davey* (3), "shall cease, determine, and be utterly void and of no effect;" and yet there it was held that "void" only meant "voidable" at the election of the grantor. In this case it is past controversy, and indeed admitted, that "void" means "voidable" as far as the non-payment of instalments. The bankrupt and the sureties engage to pay these instalments, with the proviso "that in case default shall be made in payment of any or either of the said instalments, or in case before the said composition shall be fully paid to the said W. Hughes (the plaintiff), the said T. H. Palmer shall be adjudicated bankrupt or make or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangements with his creditors different from this present arrangement, then these presents and release and every other clause and provision herein contained shall be henceforth at an end and void." Therefore, in the first case "void" clearly means "voidable at election," and all the other cases are cases where the default either is or may be the act of the bankrupt; the condition as to his being adjudicated bankrupt may mean on his own petition, and then even if it can be split it would mean voidable; and as to the condition as to an arrangement, that must be his own act, and "void" there means "voidable."

In every case therefore is comprehended a disabling voluntary act of the bankrupt. The plain object of the deed is, that, in the event of the creditors losing an instalment they shall not be prejudiced by the release.

KEATING, J.—I am of the same opinion. After the full exposition given by my learned Brothers, it is only necessary to say that I agree with the reasons they have given.

Judgment for the plaintiff.

[IN THE HOUSE OF LORDS.]

1865. }
Feb. 24 ; } JELlicoe v. GARDINER.
March 14. }

Will—Construction—Shifting Clause.

By his will a testator devised the C. estate to the use of his eldest son J. for life, with remainder to his first and other sons in tail male, with remainder to his (testator's) second and third sons R. and J. and their issue male, with remainder to every other son of the testator in tail male, with remainder to the first and other sons of his eldest son J. in tail general, with similar limitations in favour of the sons of testator's second and third and other sons, with remainder to the use of the first and other daughters of his eldest son J. in tail male, with similar limitations in favour of the daughters of testator's second and third sons, with remainder to the use of the first and other daughters of his eldest son J. in tail general, with similar limitations in favour of the daughters of testator's second and third sons, with remainder to the use of all and every testator's sons to be thereafter born successively in tail general, with remainder to the use of his eldest daughter E. for life, with remainders over. The will further directed that so often as the G. estates should come to any of the testator's sons or daughters or their issue being in possession of the C. estate, then that the persons next in remainder, according to the limitations in the will, should be entitled to and come into possession of the C. estate for the estate and interest thereby limited to him or her respectively, and so from time to time as often as the event might happen, in such manner and as if the person so becoming possessed of the G. estates had died or was

then dead without issue. The testator's eldest son J. came into possession of the G. estates; and by a decree of the Court of Chancery it was declared that the testator's second son R. became entitled to the C. estate for life with remainder to his first and other sons in tail male, with such remainders over as in the will mentioned. R. dying without issue, was succeeded in the C. estate by the testator's third son, who also died without issue. There being no other sons, the testator's eldest daughter E. then claimed the C. estate in preference to the eldest son of J, and contended that the will was to be construed as if J. had died without issue:—Held, affirming the judgment of the Court of Exchequer Chamber, that the shifting clause did not operate to prevent the eldest son of J. from taking the C. estate under the limitation in remainder to his first and other sons in tail general in priority to the testator's daughter E.

Quære—as to the correctness of the decree in Chancery.

This was an appeal against the judgment of the Court of Exchequer Chamber, reported 15 Com. B. Rep. N.S. 170; s. c. 33 Law J. Rep. (N.S.) C.P. 128, affirming the judgment of the Court of Common Pleas, reported 12 Com. B. Rep. N.S. 568; s. c. 32 Law J. Rep. (N.S.) C.P. 17.

The facts of the case have been very fully set out in the report in the 32 Law J. Rep., and for the present purpose sufficiently appear in the head-note and in the judgment of the Lord Chancellor.

Cairns (Sir Hugh), Manisty, and Udall, for the appellant, the defendant below, argued that the intention of the testator with regard to the shifting clause was, that whenever the G. estates came to any person taking under the will who should be the head of the stirps, the head and issue of that person was to be struck out of the will, and the will to be read as if there was no limitation to that person or any of his issue, until the ultimate limitation to the testator's right heirs might come into effect. That that was the principle upon which Sir William Grant dealt with the case before him; and that by shifting away the estate as if the head of the stirps was without issue, the intention of the testator was carried into effect as a reunion of the two

estates was prevented. That the respondent's claim if operative at all was only operative as an executory trust or claim which could not be enforced in law, and that he was barred by the Statute of Limitations.

They referred to *Carr v. Lord Erroll* (1), and *Doe d. Heneage v. Heneage* (2).

The Attorney General, Mellish and Quain, for the respondent, were not called upon.

THE LORD CHANCELLOR.—My Lords, at the date of the will of Sir James Gardiner, the testator, the Gardiner estates stood limited under the will of Sir William Gardiner to Sir John Whalley Smythe Gardiner for life, remainder to his first and other sons in tail male, remainder to the use of Sir James the testator for life, remainder to his first and other sons in tail male, remainder to the first and other daughters of Sir John in tail male, remainder to the use of the first and other daughters of Sir James in tail male, with remainders over. Under these limitations no female issue of any son of Sir James could take or inherit it.

By the will of Sir James Gardiner, the testator, the Clerk Hill estates were devised to trustees in fee upon trust to convey the same to the use of the testator's eldest son James for life, remainder to trustees to preserve the contingent remainder, remainder to the first and other sons of James in tail male, remainder to the testator's son Robert for life, remainder to trustees to preserve the contingent remainders, remainder to the first and other sons of Robert in tail male, remainder to the testator's third son, John Master Whalley, for life, remainder to trustees to preserve, remainder to his first and other sons in tail male, remainder to every other son of the testator successively in tail male, remainder to the first and other sons of the testator's eldest son James in tail general, with similar remainders in tail general to the first and other sons of the second, third, and every other son of the testator in tail general, with remainder to the first and other daughters of the testator's first and every other son in tail male, with remainder to the use of Elizabeth Jane, the testator's eldest daughter, for life, with

divers remainders over. This Elizabeth Jane is the present appellant.

Pausing for a moment, and contrasting the limitations of these two wills, it is apparent that if James, the eldest son of Sir James the testator, had daughters and no son, such daughters would not take under the limitations of the Gardiner estate, but would take the Clerk Hill estate severally and successively in tail male in remainder, anterior to the limitation to the appellant for life. Secondly, it is apparent that if the eldest son of the testator's first son James did not bar the entail, and died leaving daughters only, such daughters would take nothing under the limitations of the Gardiner estates, but would inherit under the limitation in remainder of the Clerk Hill estates to their father in tail general.

We now come to the shifting clause contained in the will of Sir James. By that clause the testator Sir James declares his will and mind to be that his devised estates should not be held or enjoyed by any one of his sons or daughters, or his, her or their issue after such son or daughter, or such his, her or their issue should have come into possession of the estates devised by the will of Sir William Gardiner, but that as often as the estates devised by the will of Sir William should come to the possession of any of his (Sir James's) sons or daughters, or any of their issue, that then the person next in remainder under the limitations of his (Sir James's) will should be entitled to his devised estates, for the estate thereby limited to him or her, and so from time to time, as often as the event might happen, in such manner and as if the person so becoming possessed of the Gardiner estates had died, or was then dead without issue.

It is plain from the first part of this clause that the word "issue" denotes and is limited to such issue as might take or inherit under the limitations of the Gardiner estates, which would not include the daughters of Sir James's first son, or the female issue of a grandson. It is reasonable to put the same meaning upon the word "issue" in the subsequent phrase, "had died or was then dead without issue"; for the testator plainly contemplates that the Gardiner estates would be the supervenient estate, and that the shifting clause

(1) 6 East, 58.

(2) 4 Term Rep. 13.

would be called into operation by the Gardiner estate accruing under the will of Sir William Gardiner to some person taking the Clerk Hill estate under his own will; and as the guiding intent and object are to prevent unity of possession, the word "issue" ought not to be extended, so as to include issue not capable of taking or inheriting under the limitations of Sir William Gardiner's will. But, further, it is the object of the clause to propel the Clerk Hill estates from the devisee, who shall succeed to the Gardiner estates, to the person next in remainder under the limitations of the Clerk Hill estates; and the words, "as if such devisee 'had died or was then dead without issue,'" are used for this purpose, and denote the assumption or hypothesis necessary for effecting it; but it would be unreasonable to give the words a meaning beyond what is necessary for the intent and object with which they are used. So limited, they denote such issue as would take under the limitations anterior to the devise to "the person next in remainder," and exclude them only from taking under those limitations.

I agree with one of the learned Judges in the Court below that but for Sir William Grant's decree, the words, "had died or was then dead without issue," ought to be read as applicable distributively to the case of tenant for life and tenant in tail. But that construction is negatived by the decree, inasmuch as the son of Sir James No. 2. was made a party to the suit for the purpose of contending that, by reason of his father having succeeded to the Gardiner estates, the Clerk Hill estates were propelled to himself as next in remainder; but it seems to have been decided, and apparently on the words, "was then dead without issue," that the case must be treated as if Sir James the younger had died without leaving any issue inheritable under the limitation to his first and other sons in tail male; and therefore the words "was then dead without issue" were held to apply to the case of a tenant for life of the Clerk Hill estates becoming entitled to the Gardiner estates. Accordingly the decree declares Robert (being the second son of the testator Sir James) to be entitled to have the Clerk Hill estates settled on himself for life with-

out impeachment of waste, save as in the will mentioned, with remainder to Robert's first and other sons in tail male, with such remainders over as are contained in the will of the testator Sir James with respect to the said estates: a declaration which expressly treats all the estates limited by the will of Sir James the testator in remainder expectant on the estate of Robert, as valid and capable of taking effect; and therefore the estates in remainder limited by the will to the first and other sons of James the younger, in tail general, and also the estates limited in remainder to the first and other daughters of Sir James the younger in tail male are treated by the decree as still subsisting and capable of taking effect, which would not be the case if under the shifting clause Sir James the younger, must be considered as having died without issue male or female.

The deed of release and settlement follows the decree, and converts the equitable life estate of Robert Whalley, and all other the estates limited by the will of Sir James, the testator, in remainder thereon, into legal estates. The point, therefore, now raised by the present appellant is inconsistent with this decree, and with the deed of release which was settled in the Master's office under the direction of the Court. The consequences of holding that the words "was then dead without issue," have a larger signification than what is required to pass on the Clerk Hill estate to the said devisee in remainder, would be very unreasonable. Thus, according to such construction, if Sir James the younger had daughters only, such daughters, although not inheritable to the Gardiner estate, would be deprived of the power of taking the Clerk Hill estate under the express gift to the first and other daughters of Sir James the younger in tail male; and so also the first son of Sir James the younger would be deprived of the estate given to him in remainder in tail general, by which his female issue would lose the right to inherit the Clerk Hill estate, although they could never take the Gardiner estates under the limitations in the will of Sir William. The express estates given by the will of Sir James the testator would be taken away and defeated by a construction put on the elastic word "issue" in the

shifting clause not required for the object and proper operation of the clause, which ought not to be extended beyond its declared intent and purpose. I have examined, with great care, the learned and able judgment of Mr. Justice Williams, but I think the reasons for putting a limited meaning on the words "without issue," in the shifting clause, predominate.

Two other objections were faintly urged by the appellant, one founded on the Statute of Limitations and the other on an allegation that the respondent had not the legal estate. With respect to the Statute of Limitations, the argument is at variance with the decree of Sir William Grant; for it must be founded on the construction that when the Clerk Hill estate passed from Sir James the younger as tenant for life, it vested in his eldest son James Whalley Smythe Gardiner, who died unmarried on the 11th of October 1837, when the respondent's title accrued, being twenty years before the action of ejectment. But this is not in accordance with the true construction, for the respondent claims under the limitation in remainder to the first and other sons of Sir James the younger in tail general; and with respect to the other suggested difficulty, it seems clear that the whole of the legal estate was conveyed by the trustees of Sir James the testator to uses correspondent with the trust estates declared by his will of the Clerk Hill estate in remainder expectant on the estate for life given to his second son Robert.

I therefore humbly move your Lordships to affirm the judgment and to dismiss the appeal with costs.

LORD CRANWORTH. — My Lords, the direction contained in the shifting clause is that as often as the Gardiner estates should by virtue of the will of Sir William come to the possession of any of the testator's sons or daughters, or any of their issue, then the person next in remainder under the limitations of his will should take the Clerk Hill estate, as if the person so succeeding to the Gardiner estates had died without issue. The testator speaks of the Gardiner estates devolving on any of his sons or daughters. This could not have happened, for those estates were devised only to sons in tail male. But the clause may be read as if sons and their issue had

alone been mentioned. The question is, what issue is contemplated by the testator under the words "had died without issue"? I think certainly, that issue which stood under the limitations of the will in order before the next remainderman, and so would but for the shifting clause have prevented him from succeeding. There is no intention, express or implied, to alter the limitations, except so far as was necessary for preventing the two estates from coalescing under the limitations of the two wills; and when, therefore, the respondent became entitled to an estate tail under the limitations of the will, subsequent to that under which the remainderman had taken by virtue of the shifting clause, there was nothing in the language of the will preventing him from taking the Clerk Hill estate, for he was not in possession of the Gardiner estates; at all events, was not in possession of them under the will of Sir William, the possession of which was obviously the sole motive influencing the testator to direct that his own estates should go to younger branches of his family.

With respect to the question of the legal estates, I entertain no doubt whatever. The whole of the will, with all its limitations, is set out *in extenso*, by way of recital, in the conveyance executed under the authority of the Court of Chancery; and though no other uses are in express terms declared, except those to Robert, the son, for life, and to his first and other sons in tail male, this was probably done merely to avoid unnecessary prolixity, the other uses being sufficiently indicated by the general expressions referring to them as previously set out.

I therefore concur with the Lord Chancellor in thinking that the judgment below ought to be affirmed.

LORD CHELMSFORD. — My Lords, I agree with my two noble and learned friends, and think it unnecessary to add anything to what they have said.

Judgment affirmed; and appeal dismissed, with costs.

[IN THE HOUSE OF LORDS.]

1865. }
 May 16, 18; } BLADES v. HIGGS AND
 June 13. } ANOTHER.

Game — Property in Animals Feræ Naturæ—Game killed by Trespasser.

Game started and killed wrongfully by one person on the land of another becomes the absolute property of the owner of the land, and not of the captor, though it be killed and carried away in one continuous act.

Quære—Whether there would be any difference if the game were started on the land of one person and killed on that of another.

This was an appeal from the decision of the Court of Exchequer Chamber, reported 13 *Com. B. Rep.* N.S. 844; s. c. 32 *Law J. Rep.* (N.S.) C.P. 182, affirming the judgment of the Court of Common Pleas, reported 12 *Com. B. Rep.* N.S. 501; s. c. 31 *Law J. Rep.* (N.S.) C.P. 151.

In October 1860 an action was brought, in the Court of Common Pleas, by the appellant, the plaintiff in the Court below, against the respondents, the defendants in the Court below, for the conversion of the appellant's rabbits, and also for assaulting him and taking them from him by force.

The defendants pleaded that they were not guilty, and that the rabbits were not the plaintiff's; and they pleaded, further, a justification of the assault to get the rabbits from the plaintiff, as being rabbits belonging to their master, the Marquis of Exeter; and issues were joined upon those pleas, which came on to be tried at Nisi Prius, at the Summer Assizes for Leicester of 1861, and a verdict was found for the plaintiff, with 6*l.* 10*s.* damages.

In the following Michaelmas Term the defendants obtained a rule calling upon the plaintiff to shew cause why the verdict found for him should not be set aside, and a new trial be had, on the ground that the Judge presiding at the trial misdirected the jury in telling them that the facts relied upon by the defendants, if taken as proved, did not constitute evidence that the right to the possession of the rabbits was in the Marquis of Exeter; and the same, after argument, was made absolute.

Against this judgment the plaintiff, William Blades, appealed to the Exchequer,

Chamber, and a special case was agreed upon between the plaintiff and the defendants, which special case was also used and referred to for the purposes of the present appeal, and, so far as is material, was as follows.—

“William Blades, the above-named plaintiff, is a fishmonger and licensed dealer in game at Stamford, in the county of Lincoln, and the defendants, William Higgs and Thomas Percival, are, the former the steward, and the latter a servant in the employ of the Marquis of Exeter. Between seven and eight o'clock in the morning of the 16th of October 1860, the plaintiff bought of a man, named Yates, two bags, containing about ninety rabbits, and ordered them to be consigned to him at the Midland station at Stamford. The plaintiff, upon the purchase, paid 4*l.* 15*s.* for the rabbits. A few minutes before nine the same morning, the plaintiff went to the Midland station with a barrow, for the purpose of bringing the rabbits away to his shop. The bags arrived, directed to the plaintiff, with one of his own printed labels, and the plaintiff paid 4*s.* for the carriage of them to Stamford, and they were delivered to him. As he was proceeding to put the two bags in the barrow, and before he had got them on, the defendant Higgs came up to the plaintiff, and said he wanted to see what was in the bags, to which the plaintiff said he should not allow him, and, with the assistance of a porter, the plaintiff lifted the bags on the barrow. The defendant Higgs remained there until two policemen came, and then he directed them to see what the bags contained. The plaintiff said he might. One of the policemen looked into them, and seeing that they contained dead rabbits, he allowed the plaintiff to take them, and assisted him in putting them back on the barrow. The other defendant, Percival, then came up and said, “I shall take these rabbits; they are mine,” and the defendant Higgs said also, “They are the Marquis of Exeter's.” The defendants then attempted to get possession of the bags, and the plaintiff resisted for some time, until at length, one of the policemen saying to him, it was no use his struggling any longer, he discontinued his resistance, and the defendants took possession of the bags and their con-

tents. Another game-dealer in the town, called Pollard, was fetched to the spot to buy the rabbits, and they were sold to him by the defendants, the plaintiff protesting against the sale of his property. The two bags were directed to the plaintiff, and had been sent from the Ketton station on the Midland Railway.

"The counsel for the defendants proposed to prove, on their behalf, that the persons who transmitted the rabbits to the plaintiff went upon the Marquis of Exeter's land and took the rabbits, and killed them, and put them into the bags there, and then carried them to the railway station at Ketton, and contended that the property in the rabbits was in Lord Exeter, and that the defendants, acting under his authority, were justified in the course they adopted."

The Judge who presided at the trial, thereupon ruled that the plaintiff was entitled to the rabbits, and that the defendants were not entitled to take them from him, and accordingly the jury found a verdict for the plaintiff as above mentioned.

The question on this appeal was, whether the Court of Common Pleas ought to have made such rule as above mentioned.

Hayes, Serj. (*Beasley* with him), for the appellant.—The judgments in the Courts below were founded on the ground that the case was governed by *Lonsdale v. Rigg* (1); but in that case the question of the property in the game was treated as immaterial, and it was so. The whole question tried in that case was as to the ownership of the soil, and the only authority referred to on the question of property in game was the opinion of Lord Holt in *Sutton v. Moody* (2). The weight of authority shews that there is no property in game in the owners of the land—*Bract.* lib. 2, cap. 1, *Just. Inst.* II. tit. 1. s. 12, *Case of Swans* (3), *Fitz. N. B.* 87, *Com. Dig.* tit. 'Biens,' F., *Year Book* 43 Edw. 3. p. 23, pl. 2, *Mallocke v. Eastly* (4), *Fines v. Spencer* (5), *Bowlston v. Hardy* (6). The opinion of Lord Holt in *Sutton v. Moody* (2) was not warranted by the previous decisions, and it is the only case

in which an opinion will be found opposed to the appellants' contention as to there being no property in game. The opinion of Lord Holt is not to be found in the cases on which he is said to have come to his decision. The only other case opposed to the appellants' view is *Churchward v. Studdy* (7), which merely follows *Sutton v. Moody* (2). *Pollexfen v. Crispin* (8), referred to in *Sutton v. Moody* (2), turned on judgment after verdict; *Hannam v. Mockett* (9) is another authority that there is no property in game. There is no property in wild animals so as to make it larceny to take them—1 *Hale's Pleas of the Crown*, 511. The game laws also shew that game is not considered property—1 & 2 *Will.* 4. c. 32; by that act the taking of game was made a misdemeanor, and there was no need for this if the property in it was in the owner of the land.—They also referred to the 25 & 26 *Vict. c.* 114. s. 2, 2 *Russ. on Crimes*, 84, and 2 *East's Pleas of the Crown*, 607, in support of the same view.

Macaulay and Field, for the respondents.

—The larger class of wild animals must be divided into two classes, viz. first, vermin; and secondly, game. There is no property in the first class of unprofitable animals—*Gundry v. Feltham* (9), as to foxes—*Hannam v. Mockett* (10), as to rooks, and *Year Book* 12 Hen. 8. p. 9. By the law of England there has always been a property in available or profitable game; not an absolute property to exist in all places, but a limited property. The Civil Law has no application, because it is not the law of England in this respect. *Sutton v. Moody* (2) shews that there was always some property in game, either *ratione privilegii*, by reason of a warren or chase, or *ratione soli*, by reason of the ownership of the soil, and that both are local, and this position is fortified by *Bowlston v. Hardy* (6); but when the game is once killed it becomes the absolute property of the owner of the soil or warren—*Christian on Game Laws*, 49 (ed. 1817). The statute 11 Hen. 7. c. 17. speaks of property in game, and see *Year Books* 12 Hen. 8. 9, 14 Hen. 8. 1. That the property in animals *feræ naturæ* follows the ownership of

(1) 1 Hurl. & N. 923; s. c. 26 Law J. Rep. (N.S.) Exch. 196.

(2) 1 Lord Raym. 250; s. c. 12 Mod. 146.

(3) 7 Rep. 15 b.

(4) 3 Lev. 227.

(5) 3 Dyer. 306, b.

(6) Cro. Eliz. 547; s. c. 5 Rep. 104.

(7) 14 East, 249.

(8) 1 Vent. 122.

(9) 1 Term Rep. 334.

(10) 2 B. & C. 934.

the soil is also laid down in the *Case of Coneys* (11), *Keble v. Hickringill* (12), *Hadesden v. Gryssel* (13), and *Graham v. Ewart* (14). There may be property in things of which larceny cannot be committed—1 *Hale's Pleas of the Crown*, 512, *Newton and Richard's case* (15), and *Manwood's Forest Laws*, 198 (ed. 1741). No man can acquire a right of the kind contended for by the appellant by his own wrongful act. Lord Holt's view of the law in *Sutton v. Moody* (2) has been universally acted upon for 150 years.

Hayes, in reply, referred to 2 *Russ. on Crimes*, 136 (2nd ed.) 'Larceny'; and 7 & 8 *Geo. 4. c. 29. s. 30* : and contended that the act committed was merely a trespass.

The LORD CHANCELLOR. — My Lords, when it is said by writers on the common law of England, that there is a qualified or special right of property in game, that is in animals *feræ naturæ*, which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word "property" can mean no more than the exclusive right to catch, kill, and appropriate such animals, which is sometimes called by the law a reduction of them into possession. This right is said in law to exist *ratione soli* or *ratione privilegii*, for I omit the two other heads of property in game which are stated by Lord Coke, namely, *propter industriam*, and *ratione impotentia*, for these grounds apply to animals which are not in the proper sense *feræ naturæ*. Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil. Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the Crown, by virtue of its prerogative, one man may have of killing and taking animals *feræ naturæ* on the land of another, and in like manner the game

when killed or taken by virtue of the privilege, becomes the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil.

The question in the present case is, whether game found, killed, and taken upon my land by a trespasser becomes my property as much as if it had been killed and taken by myself, or my servant by my authority. Upon principle there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is of a wrongdoer, should divest the owner of the soil of his qualified property in the game, and give the wrongdoer an absolute right of property, to the exclusion of the rightful owner. But in game when killed and taken, there is absolute property in some one, and therefore the property in game found and taken by a trespasser on the land of A, must vest either in A. or the trespasser; and if it be unreasonable to hold that the property vests in the wrongdoer, it must of necessity be vested in A, the owner of the soil.

This view of the case is supported by a series of decisions. In the case of *Sutton v. Moody* (2) Lord Chief Justice Holt deduced several conclusions from the Year Books on the subject of property in game. Among these are the following propositions: "If A. starts a hare in the ground of B, and hunts it and kills it there, the property continues all the while in B." In the case thus put, it must, of course, be taken that A. has hunted and killed the hare without the leave or licence of B, and therefore that it is a wrongful act by A. which enures for the benefit of the true owner, viz. the owner of the soil. Another proposition is, that if A. starts game in the forest or warren of B, and hunts it into the ground of C, and there kills it, the property remains all the while in B, the proprietor of the chase or warren, because the privilege continues; and consequently B. is entitled to the absolute property in the dead game so chased and killed by A, who from the statement of the case must be taken to have acted without the licence of B, and therefore to have been a tres-

(11) Godb. 122.

(12) 11 Mod. 74.

(13) Cro. Jac. 195.

(14) 11 Exch. 326; s. c. 25 Law J. Rep. (N.S.) Exch. 42.

(15) Godb. 174.

passer. A third proposition is, that if A. starts a hare in the ground of B. (who is entitled *ratione soli* only, for that is plainly implied), and hunts it into the ground of C, and there kills it, the property is in the hunter; for it cannot be in B, (who is entitled *ratione soli* only, and not *ratione privilegii*,) for the hare is not killed upon his land; and it cannot be in C, for the game was not originally found in his possession; but was driven upon his ground by the chase and pursuit of the hunter.

These propositions appear to me to prove clearly that game, found and killed by a trespasser under such circumstances as that it would be the absolute property of the owner of the soil, or of the owner of right of free warren, if it had been found and killed by such owner instead of by the trespasser, does in law become the absolute property of the proprietor of the soil or privilege immediately on its being so caught and killed by the trespasser. The law so laid down in *Sutton v. Moody* (2) is consistent with several earlier cases decided subsequently to the Year Books, of which I will mention one, *The Coney's case* (11), which has been recognized and acted upon in several subsequent decisions. Of these I may mention *Churchward v. Studdy* (7), *Graham v. Ewart* (14) and, lastly, *The Earl of Lonsdale v. Rigg*, in the Court of Exchequer (16), and Exchequer Chamber (1), on which so much reliance was placed by the Courts of Common Pleas and Exchequer Chamber in their decision of the present case. With respect to this case of *Lonsdale v. Rigg* (1), I entirely concur in the observations of Mr. Justice Blackburn, and consider the case as a conclusive authority upon the point before us, which it is not desirable to question or disturb. The case when condensed amounts to this, that grouse were shot and taken away by a trespasser upon and from the land of the plaintiff, who brought trover for the dead grouse. And it was clearly held by the Judges of the Court of Exchequer, and afterwards by all the Judges in the Court of Error, that the grouse, as soon as they were killed and fell upon the land of the plaintiff, became and were his absolute property, in respect of his ownership of the

soil. This conclusion would not be affected, even though it be true that an indictment at common law will not lie against the trespasser for killing and carrying away of game, if it be one continuous act, inasmuch as the ownership of the game is considered as incident to the property in the land. But this consequence is the result of a peculiarity in the law of larceny, which holds that the act of severing and taking away things attached to the freehold is not a felonious taking,—a result which does not affect the existence of the rights of property.

I am therefore of opinion that the learned counsel for the defendants on the trial at Nisi Prius were right in requiring the evidence to be admitted, which they proposed to give, in order to prove that the property in the rabbits was in Lord Exeter; and that the learned Judge was wrong in his direction to the jury that such evidence was immaterial, and ought not therefore to be admitted. I am therefore of opinion that the order making the rule *nisi* for a new trial absolute was right, and that the present appeal ought to be dismissed with costs.

LORD CRANWORTH.—My Lords, I think it is safe and just to adhere to the law as laid down by Lord Holt (2). He had evidently considered the subject carefully, and according to his view of the law, the rabbits killed by a trespasser on the lands of Lord Exeter certainly belonged to his Lordship. Lord Holt's opinion was followed in *Churchward v. Studdy* (7). There the hunter (who was a poacher) was eventually held to be entitled to the hare, but that was because he started in on the land of a third person, and followed it on to the ground of the defendant, and there caught and killed it. It was in strict conformity with Lord Holt's view of the law to hold that in these circumstances the hare belonged to the poacher. The rule *nisi* was granted by the Court of King's Bench, on the supposition that the hare had been caught on the land of the defendant by his servant acting as his agent, in which case the Court clearly thought it would have been the property of the defendant, whereas in fact the defendant's servant was assisting the hunter and his dogs.

This case was followed by that of *Lord Lonsdale v. Rigg* (16), afterwards affirmed in the Exchequer Chamber (1), where the subject was carefully considered. It was there

(16) 11 Exch. Rep. 669 : s. c. 25 Law J. Rep. (N.S.) Exch. 73.

decided that grouse killed by a poacher belong to the owner of the soil on which they are killed,—strictly following Lord Holt's doctrine. There was not a formal plea in that case traversing the property in the birds; but it was agreed to waive that objection in point of form, and to dispose of the case as if such an issue had been expressly raised.

It was argued before this House that if game killed by a poacher is the property of the owner of the soil, then every poacher is guilty of larceny. But that is a fallacy. Wild animals, whilst living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, like growing fruit, considered as part of the realty. If a man enters my orchard and fills a wheelbarrow with apples which he gathers from my trees, he is not guilty of larceny, though he has certainly possessed himself of my property;—and the same principle is applicable to wild animals.

It was further said, that the late Game Act, which authorizes the stopping of a poacher having game in his possession, and the selling of the game for the benefit of the parish, shews that the legislature could not have understood the game to be the property of the person on whose land it was killed; for in that case, it was said, it would have been an unjust appropriation of the property of another. But this arrangement was probably made because it might often be impossible to know on whose land every particular head of game had been killed, and was considered to be on the whole an arrangement beneficial to the landowner. On the whole, I see no reason for disturbing the decision of the Court below, and think that there ought to be a new trial.

LORD CHELMSFORD. — My Lords, the question to be determined on this appeal is, whether animals *feræ naturæ* killed or reduced into possession by a trespasser on the land of another become the property of the owner of the land. The case was very learnedly argued on both sides, and all the authorities with respect to property in wild animals, either in a state of nature or reclaimed, were fully examined, and both

the civil and the common law were referred to for doctrine on the subject. By the civil law the person who took or reduced into possession any animal *feræ naturæ*, although he might be a trespasser in so doing, acquired the property in it. This appears clearly from the following passage in the *Institutes* (lib. II. tit. 1. s. 12) cited in the argument: "*Feræ igitur bestiæ et volucres et pisces, et omnia animalia quæ mari cælo et terrâ nascuntur, simulatque ab aliquo capta fuerint, jure gentium, statim illius esse incipiunt; quod enim ante nullius est id naturali ratione occupanti conceditur; nec interest feræ bestias et volucres utrum in suo fundo quisque capiat an in alieno.*"

If the same rule prevails in our law, then the rabbits in question were not the property of Lord Exeter, but of the poacher who took and killed them upon his land. This doctrine, however, as to the right of property in wild animals captured seems never to have prevailed in our law to its full extent. With respect to animals in a wild and unreclaimed state there seems to be no difference between the Roman and the common law. A distinction was suggested in argument between wild animals which are unprofitable and regarded as vermin, and those which are fit for food, and therefore profitable; and it was said of the latter, that by the law of England there is always a property in game, whether alive or dead, in somebody. But this is not reconcileable with the authorities. In the *Case of Swans* (3) Lord Coke says, "A man hath not absolute property in anything which is *feræ naturæ*. Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain in two ways, by industry, or *ratione impotentia et loci*." . . . "But when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, &c., he hath not any property in the deer, or conies, or pheasants, or partridges, and, therefore, in an action *quare parcum warrennum, &c. fregit et intravit et tres damas lepores cuniculos phasianos perdices cepit et asportavit*, he shall not say *suos*, for he hath no property in them, but they do belong to him *ratione privilegii* for his game and pleasure so long as they remain on the privileged place;" *à fortiori*, therefore, where

a person is merely the owner of land without any other privilege attached to it than that which the ownership confers, he can have no property in the wild animals upon the land so long as they are in a state of nature and unreclaimed. Indeed, this notion of the existence of property in wild animals is inconsistent with the whole current of the authorities from the Year Books downwards, which almost invariably shew that no action lies merely for taking away hares, conies, pheasants, and partridges; and that where the taking animals of this description is stated in addition to the trespass upon the land, the plaintiff shall not say "*lepores, &c. suos.*"

With respect to wild and unreclaimed animals, therefore, there can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property absolutely when they are killed, and in a qualified manner when they are reclaimed. So far every thing is clear, and the only difficulty which arises upon the subject of property in wild animals is that which the present case presents. As animals *feræ naturæ*, when killed or reduced into possession by the owner of the land where they are found, or by his authority, become instantly his property, does the unauthorized act of a trespasser by the very act of killing them convert them at once to the use of the owner of the land? To this question Lord Holt, according to the case which he puts in *Sutton v. Moody* (2), would have given a distinct answer, that provided the game was both started and killed on the ground of the same owner, the property would be in him. I think Lord Holt must have been of opinion that as long as the game continued upon the land there was a species of property, or rather, perhaps, a right to take it, existing in the owner of the land which was sufficient to make it his, the instant, by being killed or taken, it became the subject of property. But I cannot so easily discover the principle upon which he proceeded when he said that, "If A. starts a hare in the ground of B, and hunts it into the ground of C, and kills it there, the property is in A, the hunter; but A. is

liable to an action of trespass for hunting in the grounds as well of B. as of C." I have some difficulty in understanding why the wrongdoer is to acquire a property in the game under the circumstances here supposed. If the animal had left the land of B. and passed into the land of C. of its own will, and had been, immediately it crossed the boundary, killed by C., it would unquestionably have been his property. Why then should not the act of a trespasser, to which C. was no party, have the same effect as to his right to the animal as if it had voluntarily quitted the neighbouring land? And why not only should B. lose his right to the game, and C. acquire none, but the property by this accident of the place where it happened to be killed be transferred to the trespasser? It would appear to me to be more in accordance with principle to hold, that if the trespasser deprived the owner of the land where the game was started of his right to claim the property, unlawfully killing it on the land of another to which he had driven it, he converted it into a subject of property for that owner and not for himself. But the first proposition stated by Lord Holt with respect to game started and killed on the land of the same owner is free from all difficulty, and is sufficient to dispose of the present question. The case of *Sutton v. Moody* (2) has always been regarded as an authority upon this point, and as far as I can ascertain has never been questioned. It was recognized in *Churchward v. Studdy* (7), in *Graham v. Ewart* (14), by Baron Martin in *Lord Lonsdale v. Rigg* (16). And in this last case, when before the Court of Error (1), Mr. Justice Coleridge said, "The grouse shot on the land of the plaintiff" (i. e. shot by the defendant, a wrongdoer), "belonged to him according to all the authorities." It certainly would not be right to disturb a principle of law so long established unless it could be clearly shewn to be erroneous. And it appears to me not only that it is well founded, but that very strange consequences would follow from adopting the view contended for by the appellant. If he is right in saying that the owner of the land has no property in game, unless it is killed by him or by his authority, it will necessarily follow that a poacher reducing the game into possession, and

thereby as possessor, though a wrongdoer, having a right to it against all the world but the true owner, there being no owner to challenge his possession, might maintain an action against the owner of the land for taking the game from him, even upon the land itself where it was killed. It is much more reasonable to hold that the trespasser having no right at all to kill the game, can give himself no property in it by his wrongful act; and that as game killed or reduced into possession, is the subject of property, and must belong to somebody, there can be no other owner of it, under these circumstances, but the person on whose ground it is taken or killed.

This view of the case will render the distinction suggested in the course of the argument, between killing and carrying away the rabbits, as parts of one and the same continuous act, and killing them and leaving them upon the land, and coming back for them, wholly immaterial. For the act of killing being at once that which made the rabbits the subject of property, and reduced them into possession, whether they were for an instant, or for hours upon the land, they equally belonged to the owner of the land. For these reasons I think that the judgment of the Court of Exchequer Chamber, affirming the judgment of the Court of Common Pleas, was right and ought to be affirmed.

Judgment affirmed, and appeal dismissed with costs.

1865. { ALTON AND ANOTHER v. THE
May 30; { MIDLAND RAILWAY COM-
June 1. { PANY.

Master and Servant—Railway Company—Neglect of Duty as Carriers—Tort arising out of Contract—Action by Stranger to the Contract.

A master cannot maintain an action per quod servitium amisit against a railway company, for an injury to his servant whilst a passenger on the company's railway, caused by neglect of their duty to safely carry the servant according to their contract with him as such passenger, unless the master was a party to the contract.

Declaration — For that one Charles Thomas Baxter, before and at the time of

the committing of the grievances herein-after mentioned, was and from thence hitherto has continued and still is the servant and traveller of the plaintiffs in their business of brewers and otherwise, and the defendants were carriers of passengers upon a certain railway, to wit, the Midland Railway, from a certain station of the defendants at Trent to a certain other station of the defendants at Nottingham for hire and reward to the defendants; and the said C. T. Baxter, so being the servant and traveller of the plaintiffs as aforesaid, became and was received by the defendants as a passenger to be by them safely and securely carried upon the said railway on a journey from the said station of the defendants at Trent to the said station of the defendants at Nottingham for hire and reward to the defendants in that behalf, and thereupon it became and was the duty of the defendants to use due and proper care and diligence in and about the carriage and conveyance of the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid upon the said railway on the said journey, yet the defendants did not safely and securely carry the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid, upon the said railway on the said journey, and did not use due and proper care and diligence in and about the carriage and conveyance of the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid, and by their servants so negligently, unskilfully, carelessly and improperly behaved and conducted themselves in that behalf that the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid, was thereby and by reason of the negligence, carelessness, unskilfulness and improper conduct of the defendants and their servants, wounded and injured, and became and was sick, disabled, and unable to attend to the necessary business of the plaintiffs about which he was employed at the time of the injuries complained of, and so remained from thence for a long time, to wit, for nineteen weeks, whereby the plaintiffs during all such time lost the services of the said C. T. Baxter in their said business, and all benefits and advantages which would otherwise have accrued to them from such services; and the said business of the

plaintiffs, so carried on by the said C. T. Baxter, suffered great loss and injury; and the plaintiffs were, by reason of the premises, and of the wrongful and improper conduct of the defendants, otherwise injured and damaged.

The defendants demurred to the declaration, and also pleaded—That the defendants contracted with the said C. T. Baxter to carry him as such passenger, as in the declaration mentioned, on the said journey, and they received him, as in the declaration mentioned, under and by virtue of that contract, and they did not contract with the plaintiffs to carry the said C. T. Baxter, and that the matter complained of in the declaration was not a breach of any contract between the defendants and the plaintiffs, but was a breach of the said contract between the defendants and the said C. T. Baxter.

The plaintiffs demurred to the plea.

Keane (*Graham* with him), for the plaintiffs.—The question raised by these pleadings is, whether a railway company who have been guilty of negligence are liable to the master for the loss he has sustained by an injury to his servant through such negligence of the company. That a railway company are common carriers, and are subject to the same liability which an ordinary carrier is subject to at common law, is well established—*Hodges on Railways*, 2nd edit. 596, *Carpue v. the London and Brighton Railway Company* (1), *Crouch v. the London and North-Western Railway Company* (2), and *Tattan v. the Great Western Railway Company* (3); and the 8 & 9 Vict. c. 20. ss. 86, 89. shews that the legislature intended that a railway company should carry passengers, and that as such carriers they were not to escape from their duty of common carriers. Then the master has such an interest in the services of his servant as to entitle him to bring an action against any one who has deprived him of the benefit of such services—*Hall v. Hollander* (4); and it matters not whether the person who

was to render him services stood in the relation to him of an ordinary servant or of a higher character, such as that of a public singer—*Lumley v. Gye* (5). Several instances of the action by the master for the loss of the services of his servant are stated in *Manley Smith's Master and Servant*, 2nd edit. 96; and in *Martinez v. Gerber* (6) the form of a writ for a master is given by Serjeant Manning.

[WILLES, J.—Has not Baxter a right of action on the contract with the defendants in this case?]

Yes.

[WILLES, J.—Is there any authority to be found in favour of a master suing for damages consequential on a breach of a duty which arose out of a contract with the servant?]

It is submitted that the duty which is the foundation of this action is not to perform a contract. It is a duty which does not arise out of the contract to carry for remuneration made by Baxter with the company, but out of what is anterior to such contract; for apart from and collateral to such contract, there is the duty which the law imposes on a common carrier to carry with due care any person who offers himself for that purpose. The case of *The Great Northern Railway Company v. Harrison* (7) shews that it is not necessary that there should be any contract to support an action against the carrier for negligently carrying a passenger, but that it is sufficient if the passenger be lawfully there for the purpose of being carried; and in *Ansell v. Waterhouse* (8), which was an action against a coach-proprietor for injury sustained by a passenger by reason of the coach being overturned through the negligence of the defendant's servants, Holroyd, J. says, "This action is founded on that which is collateral to contract; for the terms of contract with a common carrier, provided they do not vary his general responsibility, are quite immaterial." So in *Bretherton v. Wood* (9), Dallas, C.J., in delivering the judgment of

(1) 5 Q.B. Rep. 747; s. c. 13 Law J. Rep. (N.S.) Q.B. 133.

(2) 14 Com. B. Rep. 255; s. c. 23 Law J. Rep. (N.S.) C.P. 73.

(3) 29 Law J. Rep. (N.S.) Q.B. 184; s. c. 2 El. & El. 844.

(4) 4 B. & C. 660.

(5) 2 E. & B. 216; s. c. 22 Law J. Rep. (N.S.) Q.B. 463.

(6) 3 M. & G. 92, note (a.)

(7) 10 Exch. Rep. 376; s. c. 23 Law J. Rep. (N.S.) Exch. 308.

(8) 6 M. & S. 385.

(9) 3 B. & B. at p. 62.

the Court of Error, says, "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it." The cases of *Marshall v. the York and Newcastle, &c. Railway Company* (10), *Pozzi v. Shipton* (11), *Pippin v. Sheppard* (12), *Colletti v. the London and North-Western Railway Company* (13), *Gladwell v. Steggall* (14), *Dixon v. Bell* (15), *Mytton v. the Midland Railway Company* (16), *Coxon v. the Great Western Railway Company* (17), and *Blake v. the Great Western Railway Company* (18) support the proposition contended for, that the action will lie against the carrier for a breach of his duty as carrier, and that such duty is collateral to and independent of the contract. The case of *Everard v. Hopkins* (19) was an action by a master against a surgeon for giving unwholesome medicine to the plaintiff's servant, whom the defendant had undertaken to cure, *per quod servitium amisit*. The Court gave no judgment; but in the course of the argument the case was put of a servant being sent by his master to pay money on a bond for him, and of the servant's horse being carelessly pricked by a smith when shoeing the horse, so as to prevent the servant from being in time to pay the money, and it was said by Coke, C.J., "This being the servant's horse, he shall have an action on the case for pricking

of his horse, and the master also shall have his action on the case for the special wrong which he hath sustained by the non-payment of the money occasioned by this." It appears that the whole Court were agreed as to this, as well as that in the case where a man sends his servant upon a message of some importance, and the servant falls into a hole which has been digged in the highway, and hurts himself so that he cannot go upon his master's message; both the servant and the master shall have their several actions on the case for their several wrongs against the person who dug the hole. In *Com. Dig.* tit. 'Action on the Case for Negligence,' (B) 1, it is said, "The master may have an action for goods lost at an inn where his servant was a guest." Moreover, a father can maintain an action for the seduction of his daughter, though there has been a breach of promise to marry, and the father is a stranger to such contract. In *Grinnell v. Wells* (20) the law as to the right of the master to sue for the invasion of his right to the service of his servant is fully stated and explained. The result of the authorities is this, that when a railway company allow any one to be a passenger for hire on their railway, they become common carriers, and subject to the duty which such a carrier is subject to, and which is analogous to that of an innkeeper or surgeon, &c., and is something which is independent of and collateral to the contract for remuneration. This duty the defendants here have failed to perform, and they have thereby also invaded the plaintiffs' right by depriving them of services to which they were entitled, and for this the plaintiffs have a right of action, notwithstanding there may happen to be a contract between the defendants and the plaintiffs' servant.

Bovill (O'Malley and Douglas Brown with him), for the defendants.—The only case which has been cited which has any bearing on the point here is that of *Everard v. Hopkins* (19), and there there was not only no judgment, but the case itself is distinguishable, as it appears there the agreement to cure the plaintiff's servant was made by the defendant with the plaintiff; and with regard to the observations

(10) 11 Com. B. Rep. 655; s. c. 21 Law J. Rep. (N.S.) C.P. 34.

(11) 8 Ad. & E. 963; s. c. 8 Law J. Rep. (N.S.) Q.B. 1.

(12) 11 Price, 400.

(13) 16 Q.B. Rep. 984; s. c. 20 Law J. Rep. (N.S.) Q.B. 411.

(14) 5 Bing. N.C. 733; s. c. 8 Law J. Rep. (N.S.) C.P. 361.

(15) 5 M. & S. 198.

(16) 4 Hurl. & N. 616; s. c. 23 Law J. Rep. (N.S.) Exch. 385.

(17) 5 Id. 274; s. c. 29 Law J. Rep. (N.S.) Exch. 165.

(18) 7 Id. 987; s. c. 31 Law J. Rep. (N.S.) Exch. 346.

(19) 2 Bulst. 332.

(20) 8 Sc. N.R. 741; s. c. 7 M. & Gr. 1033; 14 Law J. Rep. (N.S.) C.P. 19.

made by the Judges in the course of the argument, they are merely dicta. There being, therefore, no decided authority in favour of this action, the right to maintain it must be determined by a resort to first principles. It is said that there is a duty imposed on the defendants as common carriers; but whether such duty be imposed by the custom of the realm, or be created by statute, it applies only to them as the carriers of goods, and has no application to them as the carriers of passengers. They are bound to carry goods, but not passengers; and when they do carry passengers they are responsible, no doubt, for carrying them with a certain degree of care; but such responsibility does not arise from any custom, but from the contract, and it is only such a responsibility as any one would incur who should undertake to carry another. Without any privity of contract, to whom, and how, can any duty on the part of the railway company arise? In *Langridge v. Levy* (21) the action was maintainable because there was fraud, and the defendant had notice of the person by whom the gun was to be used. That case was so explained by the Court of Exchequer in *Winterbottom v. Wright* (22). In the latter case the defendant had contracted with the Postmaster General to provide a mail-coach to convey mail-bags along a certain line of road, and some other persons who had contracted to horse the coach along the same line hired the plaintiff to drive the coach, and it was held that the plaintiff could not maintain an action against the defendant for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction. There, Lord Abinger says, "There is no privity of contract between these parties, and if the plaintiff can sue, every passenger, or even any person passing along the road who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would

ensue." And Alderson, B. observes, "If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract." And in *Tollit v. Sherstone* (23) Maule, J. says, "It is clear that an action of contract cannot be maintained by a person who is not a party to the contract, and the same principle extends to an action of tort arising out of a contract." Moreover, where, as in this case, no notice of any other party was disclosed at the time the contract was made, how can any duty to such person be implied?—(He was then stopped by the Court.)

Keane, in reply.—The fallacy is in supposing that the duty is one which arises only out of a contract. It is submitted that the duty is imposed on the defendants as carriers by the custom of the realm—*Addison on Torts*, 2nd edit. p. 395, citing the American case of *Cole v. Goodwin* (24), where Cowen, J. says, that the traveller is under a sort of moral duress or necessity of employing the common carrier, and the latter shall not be at liberty to throw off his legal liability. He is a public servant, with certain duties defined by law, and, as Ashurst, J. said of the duties of innkeepers, they are indelible.

[WILLES, J.—Is this one of those personal actions which would die with the party injured, or could his executors after his death sue for the injury?]

It is submitted that the executors could not sue, and that the cause of action would die with the party.

ERLE, C.J.—This is an action brought by the plaintiffs against the Midland Railway Company, and they allege in their declaration that the defendants, by their negligence in carrying Baxter, a servant of the plaintiffs, injured him, and that by reason thereof the plaintiffs lost the services of Baxter in their business. On the face of the declaration it appears that the relation between the defendants and Baxter arose out of a contract, for it alleges that Baxter was received by the defendants as a passenger to be carried by them upon

(21) 2 Mee. & W. 519; s. c. 6 Law J. Rep. (N.S.) Exch. 137; and in error, 4 Mee. & W. 337; s. c. 7 Law J. Rep. (N.S.) Exch. 387.

(22) 10 Mee. & W. 109; s. c. 11 Law J. Rep. (N.S.) Exch. 415.

(23) 5 Mee. & W. 283; s. c. 8 Law J. Rep. (N.S.) Exch. 244.

(24) 19 Wend. 281.

their railway for hire and reward. There is a demurrer to the declaration, but the point on which my judgment turns is made more clear by reference to the plea that the defendants contracted with Baxter to carry him as in the declaration, and that they did not contract with the plaintiffs. Therefore it is admitted, on the demurrer to that plea, that the relation between the defendants and Baxter was created by a contract with him. The damage done to Baxter is in substance a breach of that contract, and the plaintiffs complain that they have thereby lost the services of Baxter. It is clear law that where a servant is damaged by a wrong *ex delicto*, and by reason of that injury the master loses his services, the master may have an action for the consequential damage. The distinction which I rely on is, that in all the instances in which the action by the master has been sustained, the damage to the servant was by a wrong *ex delicto*, and there is no instance of the master sustaining such an action where the damage was by breach of contract. I do not go into the origin of these actions by the master; whether they arose or not at the time when the master had some sort of property in the servant; but I must take the law as I find it decided by the cases, and I do not find one case in which the master has sustained an action for consequential damage resulting from an injury to the servant where the damage has arisen from a breach of contract. *Martinez v. Gerber* (6) and *Hall v. Hollander* (4) were cases in which there had been injuries arising from a wrong done to a person using a public way; and in *Gilbert v. Schwenck* (25), where the defendant had taken away the children from the custody of the plaintiff, there was in that, as in all other cases, a wrong done, on which the action was founded; whereas here the action is founded on a contract between the railway company and Baxter. I am aware that there may be causes of action for which a party may seek redress either in the form *ex contractu* or *ex delicto*; and there are instances in which advantages can be obtained in the procedure by suing in the

form *ex delicto* instead of *ex contractu*; but it appears to me that whenever it is necessary to resort to the substance of the cause of action, it is important then to find whether it is tort or contract, as the distinction between them is then maintained. This distinction is adverted to in 1 *Wms. Saund.* 291 d.—291 e, in the notes to *Cabell v. Vaughan*. It is there said, "The same rule applies where the action is founded on matter *ex quasi contractu*; and therefore if an action be brought against one only of several persons upon a matter founded in contract, though the form of the action be case for nonfeasance or malfeasance, and the plea not guilty, yet the defendant must plead it in abatement;" and then several cases, amongst which is *Powell v. Layton* (26), are cited; and again, at p. 291 f, note (g), it is said, "But where the action is not maintainable without referring to a contract between the parties and laying a previous ground for it by shewing such contract, although the plaintiff shapes his case in tort, he shall yet be liable to a plea in abatement if he omit any defendant, or to a nonsuit if he join too many; for he shall not, by adopting a particular form of action, alter the situation of the defendant." It seems to me, therefore, in these cases, the substance was adverted to; and I do not find an instance of making the defendant liable in tort out of a contract with another person than the plaintiff. I think this distinction is further recognized in *Green v. Greenbank* (27). That was an action for a deceitful warranty of a horse, and a plea of infancy was upheld, because the substantial ground of action was contract, and the plaintiff could not, by declaring in tort, render a person liable who would not have been liable on his promise. So in *Roll. Abr.*, tit. 'Action sur Case,' (D,) pl. 3, there is a case in which it was held that an infant is not liable on the custom of the realm for the loss of goods committed to his care as an innkeeper; yet there is as much duty on him as there is on a carrier to take care of the goods he has received. That being the general line of authority, I think there is immense weight in the observations of the Judges in *Langridge v. Levy* (21) and *Winterbottom v.*

(25) 14 Mee. & W. 488; s. c. 14 Law J. Rep. (N.S.) Exch. 317.

(26) 2 Bos. & P., N.R. 365.

(27) 2 Marsh. 485.

Wright (22) in guarding the public against an undefined liability. It seems, therefore, to come back to that on which my opinion is founded, namely, that this is an action for the consequential damage on a breach of contract between Baxter and the railway company, and is therefore not maintainable by the plaintiffs, who were not parties to the contract. As to the cases of costs which have been cited, they do not apply, as, in my opinion, they stand on the law of procedure. For the reasons I have already given, I am of opinion that this action is not maintainable.

WILLES, J.—I am of the same opinion. It is admitted by the defendants that the authorities establish this, viz. that a master may sue for the loss of the services of his servant which has been caused by a wrong or injury done to the servant in the course of his master's business. On the other hand, it is indisputable that no such action has ever been sustained (if it has ever been brought), where the injury done to the servant was not one which was actionable as for a simple wrong, but was for a breach of duty arising out of a contract made with the servant. The question for us to determine is, whether the present action is of the latter kind, or whether it falls within the principle of the decisions in which the action has been maintained. I apprehend that this action is a novelty, and that it does not fall within any principle in which the action has been held to lie, because the right to be carried safely, for the violation of which the present action is brought, is a right which was acquired by the servant by a contract between him and the railway company. To sustain, therefore, such an action as this, we must hold that a person can sue in respect of a contract to which he was no party either by himself or his agent. It has been argued for the plaintiffs that the cause of action is founded on a wrong; but this is not so; the law does not treat this cause of action as founded simply on a wrong, but it gives the person injured the election of proceeding by a form of action either in contract or in tort. Here, however, a third person, who seeks to sue in respect of an injury to his servant, takes upon himself to exercise the election which the law gives to the servant and which it does not give to a stranger.

I will add this by way of illustration,—The servant may bring an action against the railway company on the contract, and therein recover damages for the injury he has sustained, and so determine the election which the law has given him; and the master may elect to treat the injury as a wrong, and so determine the election otherwise than the person who entered into the contract with the company thought proper to determine it; that, to my mind, would reduce the contention on the part of the plaintiffs to an absurdity. If the matter with respect to electing the form of action in these kind of cases was traced to its origin, it would be found to be a process by which the law, by means of what may be called fictions, gives a more compendious remedy to the person injured. I will first start with the doctrine of implied promise. The law imposes a duty which the contracting parties did not stipulate for. Thus a man enters into an elaborate contract under seal, and afterwards there are various modifications and allowances to be made in the subject-matter of the contract, as in the case of a large building agreement, where what was anticipated by the parties at the time of the contract has not come to pass, but work has been done in respect of which money ought to be paid by one party to the other. The party who has so done the work may elect to declare either on the special contract or on an implied promise to pay for the work done. That was the state of things in *Bretherton v. Wood* (9) and the other cases to which reference has been made; but no one would say that the rights of the parties were affected by declaring in one form instead of in the other. Take another case, that of a man selling the goods of another without authority, and receiving the proceeds of such sale. The law says that the person whose goods they were may declare *ex delicto* as for a wrongful conversion, or he may declare for the money received from such sale, alleging that the person who had so received it had promised to pay it to him on request. These are cases in which the law has invented certain modes of proceedings with allegations that cannot be traversed in order that justice may be done between the parties; and, subject to the incidents of infancy and set-off, a party may take his

election as to the form of action whether it shall be in contract or in tort. The case now before the Court is one in which there has been no duty but what arises from the contract. The duty is superadded by law to the contract to carry, and the passenger, as it were, purchases of the railway company the duty which the law says arises out of the contract. I asked Mr. Keane if the executor could sue for this injury, and he replied that he thought he could not. I did not dissent from that answer, as I thought it might be like the action for breach of promise to marry, and that it could not be maintained after the death of the party. But suppose the passenger took luggage with him, and the luggage was lost, it is clear that in that case the executor could sue—*Knights v. Quarles* (28), cited in 1 *Wms. Executors*, 5th edit. 712, where it was held that such an action was maintainable. It is there observed, that “if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, though it was clear he in his lifetime might at his election sue the coach proprietor in contract or in tort, it could not be doubted his executor might sue in assumpsit for the consequences of the coach proprietor’s breach of contract.” There is this further remark I would wish to make. The contract with the defendants in this case was for the reasonably safe conveyance of a passenger; and there is a wide distinction between the liability of a carrier of passengers and that of a carrier of goods, though I do not found my judgment on that distinction. No authority, however, has been found to support such an action as this, and I am not for now introducing one.

BYLES, J.—I am of the same opinion. This case must be decided according to first principles, and I agree with the observations which have been made by my Lord and my Brother Willes. It is clear that there was no contract, either express or implied, with the plaintiffs; but that the contract to carry was wholly between the traveller and the railway company. There is no doubt that in most cases of this nature a plaintiff may elect to sue in either form of action, tort or

contract; but he must not thereby expand the right of action, that is, he must not by changing the form of action allow other persons to sue who could not otherwise have done so. No one can sue for a breach of duty except for a breach of duty to himself. I remember that in *Winterbottom v. Wright* (22) a precedent, which has always been known to be a bad one, was cited from *Wentworth’s Pleadings*, where an attorney having been instructed to make a will failed to do so in proper time, and the intended testator, therefore, died intestate, and the precedent is a form of declaration by the legatees against the attorney for negligence in not getting the will prepared in time; but the attorney’s duty was to the testator, and not to the legatees; and if such an action as that could have been maintained, the heirs of the legatees or devisees might also have sued, and there would have been no end to the attorney’s liability. So, in the case of an improperly made anchor, the maker of it would be liable, not only to the person to whom he sold it, but to the shipmaster and to every passenger in the ship who was injured by the anchor breaking. Take the case of a surgeon who is employed to attend a servant, and suppose the surgeon to be supplied with an improper instrument by the surgical-instrument maker, by which the servant is injured, the master of such servant might, according to the plaintiffs’ argument in this case, bring an action against the maker of the instrument. The moment we depart from the rule that the action for a breach of duty cannot be brought except for a breach of duty against the party suing, the door is opened to most extensive and unknown liabilities. The Court has asked for an authority for such an action as this, and the only one is said to be that of *Everard v. Hopkins* (19); but on examination of that case, it turned out that the contract there was with the master, and the case therefore is no authority for this action; whereas the case of *Winterbottom v. Wright* (22) is a distinct authority the other way, and so is the law in *Langridge v. Levy* (21). I do not think that a more important case than the present one has come before this Court for many years, and it is one on which we ought to express a very decided opinion.

SMITH, J.—I have not heard all the arguments; but, as far as I have heard them, I concur with the rest of the Court. I think the foundation of the argument for the plaintiffs is unsound, for the contract is the groundwork of the whole duty imposed on the defendants; and, consequently, the only parties to sue on such contract are the parties to it.

Judgment for the defendants.

1865. } EVERETT AND ANOTHER v. THE
June 1. } LONDON ASSURANCE.

Insurance—Fire-Policy—Damage by Gunpowder not on the Premises.

A damage sustained from the atmospheric concussion caused by an explosion of gunpowder at a distance, is not a damage insured against by a policy for the payment of such loss or damage as should be occasioned by fire to the property insured.

This was an action brought by the plaintiffs against the defendants for the recovery of 20*l.*, being the amount of damage occasioned to the plaintiffs' house, under the circumstances hereinafter stated; and by the consent of the parties, and by the order of Erle, C.J., according to the Common Law Procedure Act, 1852, the following CASE was stated for the opinion of the Court, without any pleadings.

By a policy of insurance, bearing date the 17th of April 1862, numbered 211,525, and sealed with the common seal of the defendants, for the considerations therein expressed, the defendants covenanted and agreed that, subject to the terms therein mentioned, which have been duly complied with on the part of the plaintiffs, the capital stock, estate and securities of the defendants should be subject and liable to pay, make good and satisfy unto the plaintiffs, their heirs, executors or administrators, such loss or damage as should or might be occasioned by fire to the property of the plaintiffs therein mentioned and thereby insured, according to the conditions and stipulations thereon indorsed, not exceeding in each case respectively the sum of 600*l.* The premium was stated in the policy to be paid for the

insurance of the property mentioned in the policy from loss or damage by fire, according to the exact tenor of the conditions and stipulations indorsed on the policy (a copy of the said policy and the conditions indorsed accompanied and was to be taken as a part of the case). The 5th condition indorsed on the policy was as follows: "That losses by lightning will be made good where property assured by the corporation has been actually set on fire thereby and burnt in consequence thereof." The 8th condition indorsed on the said policy was as follows: "That books of account, manuscripts, written securities, money, bank-notes, bills, stamps and gunpowder will not be insured or comprehended in any insurance effected by or with this corporation, nor will any loss or damage in any case or of any description be made good when more than twenty-five pounds weight of gunpowder shall be deposited or kept on the premises."

On the 1st of October 1864 a large quantity of gunpowder in the gunpowder-magazine of Messrs. Hall, at Erith, ignited and exploded, but from what cause is unknown, and the before-mentioned premises of the plaintiffs were thereby injured to the extent of 20*l.* The plaintiffs' premises, which are rather more than half-a-mile distant from the spot at which the explosion took place, were not set on fire by the explosion of the gunpowder, nor was any part thereof burnt, heated or scorched by the explosion. The injury they sustained consisted in the shattering of the windows and window-frames, and the damaging of the structure generally by the atmospheric concussion caused by the explosion. The question for the opinion of the Court was, whether the damage, so caused to the plaintiffs' premises was a loss or damage insured against under the before-mentioned policy.

Hannen, for the plaintiffs.—The question is whether this injury which the plaintiffs have sustained was an injury within the meaning of the policy. It is submitted that it was. The policy is not limited to a loss occasioned by fire on the premises. It contemplates also an injury from the explosion of gunpowder, for there is a stipulation in the 8th condition that not more than 25 lb. weight of gunpowder shall be kept on the premises. Then, again, take the case of

injury from lightning. The company supposed they would be liable for such, although there should be no actual fire, for there is an express condition in the policy that losses by lightning are to be made good where it has actually set fire to the property and burnt it. Where property is injured by water used to put a fire out, it is always considered an injury from fire within the meaning of a fire-policy, although the water and not the fire is the proximate cause of the injury. Suppose the injury were from an explosion of gas or gunpowder in an adjoining house, would not that be an injury resulting from fire within the meaning of the policy? What difference is there between such a case and the present one, except that of distance? The injury to the plaintiffs' premises from the explosion in question was an injury which was as much the direct consequence of fire as scorching. The only case which seems to have any bearing on the present is that of *Taunton v. the Royal Insurance Company* (1), where directors of an insurance company having decided to pay for a loss occasioned by the concussion of the air resulting from an explosion of gunpowder upon a fire-policy, which provided that the company would not be responsible for any loss by explosion except explosion by gas, a shareholder filed a bill for an injunction to restrain the directors from so applying the funds of the company, but Wood, V.C. dismissed the bill with costs, as such payment was in accordance with the usual custom of fire insurance companies.

Maude, for the defendants.—The policy in this case contemplates only an injury by fire to the property insured, that is to say, there must be the action of fire on the property so as either to heat or burn it in order to bring the case within this policy. Here the damage was not caused by fire, but it was only the effect of atmospheric disturbance. If such a damage as this is to be considered as a damage by fire, where is the line to be drawn? Suppose the injury was from the explosion of the fire-lamp or of a boiler of a steam-engine, by which a railway carriage came against the building; or suppose the windows of a house were broken by the concussion of the air from the firing of ordnance at a review;—all these cases only shew the diffi-

culty which would arise if the Court were to depart here from the words of the contract. The decisions on marine policies are somewhat analogous with reference to what is considered the proximate cause of the loss. In *Green v. Elmalie* (2), where a ship had been driven by stress of weather on an enemy's coast and there captured, it was held to be a loss by capture, and not by perils of the sea. The case of *Ionides v. the Universal Marine Insurance Company* (3) furnishes another instance of what is or not the proximate cause of a loss. In 2 *Marshall on Insurance*, 3rd edit., p. 790, there is a chapter on fire insurance, which is not inserted in the subsequent editions, and there it is said, "In order to bring the loss within the risk insured against, it must appear to have been occasioned by actual ignition, and no damage occasioned by mere heat, however intense, will be within the policy." In support of this reference is made to *Austin v. Drewe* (4), where a policy was effected against loss by fire on the stock of a sugar-house, and in an action on the policy it appeared that the sugar-house consisted of eight stories, in each of which there was sugar in a certain state of preparation, and that heat was communicated to each of the stories by means of a chimney, at the top of which was a register which was usually shut at night, after the fire was out, for the purpose of retaining the heat, and that on the present occasion the fire was lighted in the morning, but the register was negligently kept shut, whereby the building was filled with smoke and sparks and the sugar damaged, not by the smoke, but by the excessive heat, but *nothing took fire*. The Court held that the loss arose from the mismanagement of the machinery, and not from any of those accidents from which the policy was intended to protect the insured, and that therefore the plaintiffs were not entitled to recover. With respect to the case of *Taunton v. the Royal Insurance Company* (1), it was there admitted that the loss was not one for which the company were liable at law.

Hannen, in reply.

(2) 1 Peake, 278. (3rd edit.)

(3) 14 Com. B. Rep. N.S. 259; a. c. 32 Law J. Rep. (N.S.) C.P. 170.

(4) 6 Taunt. 436.

(1) 33 Law J. Rep. (N.S.) Chanc. 406.

ERLE, C.J.—I am of opinion that our judgment ought to be for the defendants. The question is, what is the meaning of this contract? The contract by the defendants is to pay the amount of such loss or damage as should be occasioned by fire to the property of the plaintiffs thereby insured. The damage occasioned by an explosion of gunpowder at a distance does not, I think, come within those words; I therefore think such words do not apply to the damage sought to be recovered in this action. There is a stipulation as to lightning and gunpowder; but this, which is a damage from the explosion of gunpowder off the premises, is not expressed in the policy. The whole matter lies in a small compass, and according to the best of my judgment the words of this policy do not apply to the damage in question.

WILLES, J.—I am of the same opinion. In insurance cases we are bound to look to the immediate and not the remote cause of the loss. No one would say that the damage sustained by the plaintiffs in this case was occasioned by fire, but by a concussion of air, which was caused by an explosion of gunpowder, which was caused by fire. That is going to the *causa causans*, which cannot properly be done.

BYLES, J.—I am of the same opinion. The contract is to pay for loss occasioned by fire, which means either ignition of the article itself, or of part of the premises where it is; in the one case the article might be lost and in the other damaged by fire. Otherwise it would offend the rule of law given by Lord Bacon: "*In jure non remota causa sed proxima spectatur.*"—*Bac. Max. Reg.* 1. An eruption of Vesuvius might injure a ship sailing near it, and that might be said to be a damage by fire. Indeed, if the rule were broken into there is no absurdity at which to stop; the heat of the sun might be too great, and a damage resulting from that might even be said to be a damage by fire. What the Court has to do, however, is to give only the ordinary construction to the words of the contract, and according to such a construction the policy does not cover this loss.

Judgment for the defendants.

1865. { In the matter of THE ARBITRATION OF PETTIWARD v. THE METROPOLITAN BOARD OF WORKS.
June 26.

Sewers—11 & 12 Vict. c. 112. s. 38.—*Compensation*—*Metropolis Local Management Act*, 18 & 19 Vict. c. 120. ss. 148, 181.—*Transfer of Liabilities.*

By 11 & 12 Vict. c. 112. s. 38. power was given to the Metropolitan Commissioners of Sewers to construct sewers under any lands whatsoever, "making compensation for any damage done thereby," and by other clauses of that act the Commissioners were empowered to levy rates retrospectively, as well as prospectively, for the payment of such compensation. By the *Metropolis Local Management Act* (18 & 19 Vict. c. 120.) the powers of such Commissioners are put an end to, and the Metropolitan Board of Works is to stand in their place; and by section 148. the property vested in such Commissioners is transferred to the Board of Works, and all persons who owe money to the Commissioners are to pay the same to such Board, and all monies recoverable from the Commissioners are to be recoverable from the Board; and by section 181. "all mortgages, annuities, securities, and other debts and liabilities," which before the determination of the 11 & 12 Vict. c. 112. might be charged on or payable out of any rates authorized to be levied thereunder, are to continue in full force and be a charge on the districts in which such rates would have been authorized to be levied:—Held, that a liability of such Commissioners to make compensation for land taken by them for a construction of a sewer under the powers of the 11 & 12 Vict. c. 112, was transferred by the 18 & 19 Vict. c. 120. to the Metropolitan Board of Works, and was, therefore, recoverable from such Board, although at the time of the determination of the powers of the Commissioners the existence of such liability was not known, and no claim was made for compensation until several years afterwards.

The following CASE was stated by an arbitrator, with the consent of the parties, for the opinion of the Court.

Roger Petteward, deceased, was in the year 1832, and thence until his death, seised in fee of certain land, used as an orchard

and market-garden, situate in the parish of St. Mary Abbott, Kensington, in the county of Middlesex.

By his will, dated the 13th of May 1833, he devised (*inter alia*) the land in question to trustees to settle the same in manner by the said will directed. The said Roger Pettiward died shortly after making his said will. In 1835 the trustees of the will of Roger Pettiward executed a settlement in pursuance of the said will, and Lady Hotham, under and by virtue of the said settlement, became and was tenant for life of the land in question, with power of leasing the same for not more than twenty-one years.

On the 6th of August 1841 Lady Hotham, in pursuance of the said power, granted a lease of the land in question to John Poupart for twenty-one years from June 1841.

On the 14th of December 1854 the Metropolitan Commissioners of Sewers served upon Mr. Poupart, then in the occupation of the land, the following notice :

"Metropolitan Commissioners of Sewers to Mr. John Poupart, occupier of the piece or parcel of ground hereinafter mentioned, and whom else it may concern.—The Metropolitan Commissioners of Sewers hereby give you notice, that it has been duly ordered by the said Commissioners, that certain works necessary for the drainage of a portion of the area within the limits of the Metropolitan Commissioners of Sewers should be executed and constructed, that is to say, the building of a certain sewer and works in connexion therewith, to commence at a point near the River Thames and near to Cremorne Gardens, in the county of Middlesex, and within the limits of the said Commissioners, in the course and direction shewn upon the plan produced to the said Commissioners, and that for the purpose aforesaid it is necessary to lay down, construct, and carry the said sewer into, through, along and under a certain piece or parcel of ground, used as an orchard and market-garden, in your occupation, in the county and within the limits aforesaid, and that for the construction of such sewer and works as aforesaid it is requisite and necessary that Thomas Lovick, one of the engineers of the said Commissioners, Robert Tomlinson Carlisle, contractor, of and with the said Commissioners, and their assistants,

servants and workmen, some or one of them, should enter into and upon, lay open and otherwise lawfully interfere with the said orchard and market-garden, with or without horses, carts, barrows, planks and other vehicles, implements and things for the purpose and object aforesaid; and whereas the said Thomas Lovick and Robert Tomlinson Carlisle have been duly authorized by the said Commissioners to enter, with assistants, servants and workmen, in and upon the said orchard and market-garden for the purpose of executing the said works at some reasonable hour in the daytime, notice being first given to the occupier of the said orchard and market-garden of the said intended entry in and upon the said orchard and market-garden, and of the purpose and object thereof, twenty-four hours at the least before such entry,—notice is therefore hereby given, that the said Thomas Lovick, Robert Tomlinson Carlisle and their assistants, servants and workmen, some or one of them, will on the 16th day of December instant, at some reasonable hour in the daytime, enter into and upon the said orchard and market-garden for the purpose of executing the said works as aforesaid. Dated this 14th day of December, A.D. 1854. By the Court.

"John Pollard."

In pursuance of this notice the said Commissioners of Sewers, acting in execution of the powers vested in them by the 11 & 12 Vict. c. 112, by their servants and agents entered upon the land in question and constructed under it a sewer, which was completed in the course of the year 1855, and having done so restored the surface of the land to its former condition. Lady Hotham never had notice from any one or knowledge of the intention to construct this sewer, or that it had been constructed. Lady Hotham died on the 30th of November 1855, and upon her death the claimant Robert John Pettiward became, under the settlement hereinbefore mentioned, tenant for life of the land in question, and at the expiration of the lease to Poupart in 1862 he entered into possession of the said land. Mr. Pettiward therefore determined to apply the said land to building purposes, and he accordingly caused to be prepared a plan for the erection of several houses on the property.

After this plan was completed, namely, in October 1862, it became for the first time known to Mr. Petteward that the sewer had been constructed under the surface of the land. The existence of this sewer rendered it necessary to alter the contemplated scheme for building, and, in fact, diminished the value of the land to the extent of 1,500*l*.

Mr. Petteward now claims from the Metropolitan Board of Works the sum of 1,500*l*. as compensation for the damage occasioned to the said land by the construction of the sewer.

By the 11 & 12 Vict. c. 112. s. 38. power was given to the Metropolitan Commissioners of Sewers to construct sewers under any lands whatsoever, making compensation for any damage done thereby, as therein after provided.

By the 69th section of the same act it is enacted that full compensation shall be made out of such rates to be levied under the said act as the Commissioners shall by their decree direct to all persons sustaining any damage by reason of the exercise of any of the powers of the said act; and in case of dispute as to the amount, the same shall be settled by arbitration in the manner provided by the said act.

By the Metropolis Local Management Act (18 & 19 Vict. c. 120), section 145, it is enacted that from and after the commencement of the said act all duties, powers and authorities vested in the Metropolitan Commissioners of Sewers shall cease to be so vested.

By section 146. it is enacted as follows: "No action, suit, prosecution or other proceeding whatsoever, commenced or carried on by or against the said Commissioners, shall abate or be discontinued or prejudicially affected by the determination of the powers of such Commissioners, but shall continue and take effect in favour of or against the Metropolitan Board of Works in the same manner in all respects as the same would have continued and taken effect in relation to the said Commissioners if this act had not been passed, and the powers of the said Commissioners had continued in full force; and all decrees and orders made, and all fines, amerciaments and penalties imposed and incurred, respectively, previously to the com-

mencement of this act, shall and may be enforced, levied, recovered and proceeded for, and all administrative proceedings commenced previously to the commencement of this act shall and may be continued, proceeded with and completed, the Metropolitan Board of Works being, in reference to the matters aforesaid, in all respects substituted in the place of the said Commissioners."

By section 148. it is enacted as follows: "All property, matters and things whatsoever vested in the Metropolitan Commissioners of Sewers, except such sewers as are hereby vested in any vestry or district board, and except such sewers as are not within the limits of the parishes and places mentioned in the Schedules to this act, shall be vested in the Metropolitan Board of Works; and all persons who then owe any money to the said Commissioners of Sewers, or to any person on behalf of such Commissioners, shall pay the same to the Metropolitan Board of Works, or as they may direct; and all monies then due and owing by or recoverable from the said Commissioners shall be paid by or recoverable from the Metropolitan Board of Works; and all contracts, agreements, bonds, covenants and securities theretofore made or entered into with or in favour of or by the said Commissioners, and all contracts, agreements, bonds, covenants and securities made or entered into with or in favour of or by any former or other Commissioners, which under the said act, 11 & 12 Vict. c. 112, were to take effect in favour of, against and with reference to the said Metropolitan Commissioners of Sewers, and are now in force, shall take effect and may be proceeded on and enforced, as near as circumstances admit, in favour of, by, against and with reference to the Metropolitan Board of Works, as the same would have taken effect and might have been proceeded on and enforced in favour of, by, against and with reference to the said Metropolitan Commissioners of Sewers if this act had not been passed, and the powers of such Commissioners had continued in full force; and any retiring pension or allowance granted under section 27. of the said act, 11 & 12 Vict. c. 112, shall continue payable on the like terms by the said Metropolitan Board of Works."

By section 225. it is enacted, that the amount of any compensation to be made under the said act by the said Metropolitan Board shall, unless therein otherwise provided, be settled, in case of dispute, by, and shall be recovered before, two Justices, unless the amount of compensation claimed exceed 50*l.*, in which case the amount thereof shall be settled by arbitration, according to the provisions of the Lands Clauses Consolidation Act, 1845, which are applicable where questions of disputed compensation are authorized or required to be settled by arbitration.

By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102. s. 106), it is enacted, that no writ or process shall be sued out against or served upon, and no proceeding shall be instituted against, the Metropolitan Board of Works for anything done or intended to be done under the powers of such board, under the acts therein mentioned or the said act, until the expiration of one calendar month next after notice in writing shall have been served on such board, and every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards.

Mr. Petteward, in February 1863, gave notice to the Metropolitan Board of Works that he desired to have his claim settled by arbitration, and as the parties did not concur in the appointment of a single arbitrator, he appointed Mr. Charles Lee as the arbitrator to whom the said dispute should be referred, and requested the said board also to appoint an arbitrator to whom the said dispute should be referred.

The said board, by an instrument under their seal, appointed, under protest, Mr. John Oakley to act as arbitrator in the matter of the said claim. The said arbitrators, before they entered upon the matters referred to them, duly nominated and appointed an umpire to decide on such matters on which they should differ, or which should be referred to him, under the provisions of the Lands Clauses Consolidation Act, 1845. It was agreed between the parties that the umpire should state his award in the form of a special case; and it was also agreed between the parties that if

the Court should be of opinion that the said Robert John Petteward was entitled to have any sum of money awarded to him as compensation for the damage occasioned to the land in question by the construction of the said sewer, the amount of such compensation should be 1,500*l.*, together with the costs of and incident to this arbitration.

Watkin Williams, for the claimant, cited *Harrison v. Stickney* (1) to show that a retrospective rate might be made to pay off the liability of the old Commissioners of Sewers.

Mellish (*Raymond* with him), contra, admitted that the only point in dispute was, whether the liability of the Commissioners of Sewers, which had been incurred as stated in the case, was transferred to the defendants, the Metropolitan Board of Works; and he contended that it was not so transferred, as no claim in respect of it had been made in the time of the existence of the old Commissioners of Sewers.

WILLES, J.—I am of opinion that the judgment of the Court ought to be for the claimant. The only difficulty arises out of the fact of the powers of the Commissioners of Sewers, under the 11 & 12 Vict. c. 112, having been transferred to the Metropolitan Board of Works by the 18 & 19 Vict. c. 120. From the earliest time, it has been an object of interest to the Government of this country, and it has from time to time attracted the attention of the legislature, that the country should be preserved by an effectual drainage from floods and inundations, and commissions have from very early times been issued for the purpose of effecting those beneficial objects, in the interest of the public and at the expense of those of the public who have derived benefit from the works of the sewers. That was the object of the legislature in passing the 11 & 12 Vict. c. 112. and the 18 & 19 Vict. c. 120; but it was an object which the legislature did not think fit to accomplish at the expense of private individuals, and any damage which was done to a private individual in the course of making the sewers effectual was, according to section 38. of 11 & 12 Vict. c. 112, to be made good to him by the Commissioners of Sewers. By

that section they were to make improvements, and in the course of doing so to carry their sewers through, across, or under any turnpike-roads, or any street or place laid out as or intended for a street, or through or under any cellar or vault which may be under the pavement or carriage-way of any street, and (if upon the report of the surveyor it should appear to be necessary) into, through or under any land whatsoever; with this qualification, "making compensation for any damage done thereby as hereinafter provided." Now, I think it is perfectly well established, that the meaning of this is, that the making of the compensation should not be a condition precedent, but that the making of the compensation should be an obligation. Now that obligation is thus dealt with by the 69th section: "Full compensation shall be made out of such rates to be levied under this act as the Commissioners shall by their decree direct to all persons sustaining any damage by reason of the exercise of the powers of this act; and in case of dispute as to amount the same shall be settled by arbitration in the manner provided by this act." If there be no dispute the damage is to be ascertained, and if the damage can be ascertained, whether by a surveyor or the opinions of skilled persons, the obligation would be as much to pay an ascertained sum as a sum on a bill of exchange. The obligation is a liability by the Commissioners to pay money, though not an obligation for which they are personally liable. And by the 76th and 77th sections conjointly it would seem, that if the Commissioners of Sewers, under the 11 & 12 Vict. c. 112, were now in existence and capable of exercising their powers, they might make a rate in discharge of the obligation which they have incurred. The fact that a considerable time has gone by is merely an argument of convenience. It is inconvenient for the debtor who is called upon at a time when he might suppose that claim forgotten. It is also inconvenient to the creditor, because it is more difficult for him to establish the existence and the extent of the claim which he makes; but in the absence of any Statute of Limitations, we can attach no importance to it. The only value of it is that which Mr. Mellish, in his argument, attributed to it, that it was probable that debts, the exist-

ence of which might be known, should be kept alive, and that the Commissioners of Sewers, or the new board substituted for the Commissioners of Sewers, should be liable for those, but not for unknown liabilities. But that argument, with deference, is not *ad rem*, because the liability might have arisen the very day before the Metropolitan Board stepped into the place of the Commissioners of Sewers. It was merely for administrative convenience that the powers and property of the Commissioners of Sewers were transferred to the Metropolitan Board. There was no reason, therefore, why the public, whom they represent, should be absolved from any liability to which they were exposed while the direction was in the hands of the Commissioners of Sewers. There is nothing, therefore, in the nature of the case, is there anything in the language of the act, to shew that it was intended that the obligation should not continue? Now, the first section which appears to be material is section 145, by which the Metropolitan Commissioners of Sewers are put an end to. Then, by section 146, the new board is to stand in the place of the Commissioners. Under section 147. they may recover all rates made by the Commissioners. By section 148. all property vested in the Commissioners of Sewers, except minor sewers vested in the vestries and district boards, is transferred to the new Board of Works; and all persons who owe any money to the Commissioners of Sewers, or to any person on behalf of such Commissioners, are to pay the same to the Metropolitan Board of Works, or as they may direct; and all monies then due and owing by or recoverable from the said Commissioners are to be paid by or recoverable from the Metropolitan Board of Works. Stopping at section 148, and reading it with its kindred sections, it would seem to be clear that it was the intention of the legislature that the new board should, with the exception of the minor sewers transferred to minor bodies, stand in the same position as the Commissioners of Sewers. Then comes the 181st section, which expresses this more largely. By that section all mortgages, securities, annuities, and other debts and liabilities, which, at or immediately before the determination or expiration of the

11 & 12 Vict. c. 112, may be charged on or payable out of all or any of the rates authorized to be levied thereunder, shall continue in full force and be a charge on the same districts on which they were charged before. Here we have words apt and express in favour of the conclusion which, I think, the justice and good sense of the case would incline one to arrive at. We have the large word "liabilities," and we have that word coupled with a provision which, as I have shewn, is strictly applicable to the obligation of the Commissioners of Sewers to make compensation for the private property which they had taken away or injuriously affected. Two arguments have been advanced for the purpose of shewing that such might not be the construction of the statute. One of them I have already adverted to; the other is founded upon the doctrine or rule of construction, which may be shortly expressed, *noscitur à sociis*. It is said you find this accompanied by provisions applicable to debts for fixed sums of money, and with machinery that can only be applied to the gradual discharge of such debts; therefore it is said that the word "liabilities" ought to be read liabilities *eiusdem generis*. I am rather disposed to accede to that argument, but to deny that the liability must be in respect of monies numbered. Suppose a contract for the construction of a large sewer, and there were extras, for the payment of which the contract provided, but the exact price of which was not determined, you would say the claim for such extras was not a claim in monies numbered; the contractor might claim 40,000*l.* for that in respect of which he might not get 20,000*l.*, and so the board might well be in doubt as to what sum they should lay by for a sinking fund, as is mentioned in the latter part of the section; still the claim would not the less be a debt within the act. I think that the section deals distinctly with debts and liabilities, because it provides in respect of mortgages, annuities or debts, leaving out liabilities, that they should have priority as before; that they should be marshalled against one another as before, and the section resumes the word "liabilities" when it comes to give power to the Metropolitan Board to raise from time to time the sums becoming payable under or re-

quired for the payment of the said mortgages, annuities, securities, debts, and liabilities, which it gives power to raise and pay in like manner as the expenses of the board in the execution of the act. There seems to be, therefore, no reason why this obligation of the Commissioners should be extinguished, and there is a reason why it should be kept alive, and the language of the act is large enough for that purpose; and, therefore, I think the right of Mr. Petteward is not lost, and that he is in a position to claim compensation against the Metropolitan Board of Works.

BYLES, J.—I am of the same opinion. I start with the admission that has been made that this was an unliquidated liability of the old Commissioners, and the only question is, whether this liability has been transferred to the Metropolitan Board of Works. The Commissioners took part of Mr. Petteward's estate, so that the district got the benefit of it, and one, therefore, feeling the justice of the claim, would look anxiously in the act of parliament to see whether the liability has not been transferred to the body who has succeeded the Commissioners. Now, section 148. strips the Commissioners of all property, and transfers it to the Metropolitan Board of Works, the present defendants. Are, then, the liabilities also transferred? I agree with what my Brother Willes has said about the construction of this section; but whatever that may be, there are general words in section 181. in which the word "liabilities" is used twice, applicable to this case, and I, therefore, agree that the claimant is entitled to the judgment of the Court.

Judgment for the claimant.

1865.
June 20. }

RAY v. JONES.

Debtor and Creditor—Bankrupt Act, 1861, 24 & 25 Vict. c. 134. s. 192.—Composition Deed—Covenant not to sue—Release.

By a deed of composition registered under the Bankrupt Act, 1861, the creditors agreed to accept payment of their debts by certain instalments, and they covenanted, "while the said instalments were duly and regularly

paid by the debtor, not to sue the said debtor or enforce any judgment or other proceeding against him or his estate."—Held, *that the deed could not, in the absence of any express stipulation to that effect, be pleaded as a bar to an action.*

Declaration for goods sold and delivered.

Plea.—That after the accruing of the cause of action in the declaration mentioned, and after action, to wit, on the 10th of April 1865, the defendant, then being indebted to divers persons, made and executed a deed, which, without the schedule or signature and attestation thereto, is in the words and figures and to the effect following, that is to say, "This indenture, made the 10th day of April 1865, between Stephen Thomas Jones, of Cubit Court, Golden Lane, St. Luke's, Middlesex, box-maker (hereinafter called 'the said debtor'), of the first part, and the several persons, companies and firms, whose names are subscribed and seals affixed in the schedule hereunder written, being creditors of the said debtor, on behalf of themselves and all and every other the creditors of the said debtor who may assent to or become bound by these presents of the second part. Whereas the said debtor is indebted to the parties hereto of the second part, and other persons, in sums which he is unable to pay at the present time, and it has been agreed by and between the parties hereto to give the said debtor the time hereinafter mentioned for payment of his debts in full. Now this indenture witnesseth, that he the said debtor hereby, for himself, his executors and administrators, covenants and agrees to and with the said parties hereto of the second part, that he will duly pay all and every the debts and claims of the parties hereto of the second, and all other his creditors, whether executing these presents or not, the full amount of their respective debts and claims that are now due and owing by the said debtor, by nine equal monthly instalments, the first payment of an equal ninth part thereof to commence and be made on the 20th day of May next, and a similar payment to be made on the 20th day of each following month, until the whole of his said debts are satisfied and discharged. And this indenture further witnesseth, that in pursuance of the said

agreement and in consideration of the debtor's covenant as hereinbefore contained, they the parties hereto of the second part, hereby covenant and agree to accept payment of their respective debts by the nine instalments hereinbefore mentioned, and while the said instalments are duly and regularly paid by the said debtor, not to sue the said debtor or enforce any judgment or other proceedings against him or his estate. And it is lastly agreed that this indenture shall operate (so far as it lawfully may) as a deed of arrangement between the said debtor and his creditors under the Bankruptcy Act, 1861. In witness whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written." Averment.—That a majority in number representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10*l.* and upwards, did in writing assent to and approve of the said deed, and the execution of the said deed was attested by an attorney and solicitor, and within twenty-eight days from the day of the execution of the said deed by the defendant the same was produced and left, having been first duly stamped at the office of the Chief Registrar of the Court of Bankruptcy for the purpose of being registered, and together with such deed there was delivered to the said Chief Registrar such affidavits by the defendant as by the Bankruptcy Act, 1861, in that behalf is provided, and the said deed did before the registration thereof bear such ordinary and *ad valorem* stamp duties as were provided by the Bankruptcy Act, 1861, in that behalf; and at the time of the execution of the said deed the plaintiff was a creditor of the defendant in respect of the amount claimed herein pleaded to, within the meaning of the Bankruptcy Act, 1861, and all conditions prescribed by the said act having been observed and performed, and all things having happened necessary in that behalf, the plaintiff became and was, and is, bound by the said deed as if he had been a party thereto and had executed the same.

Demurrer thereto and joinder in demurrer.

Prentice, in support of the demurrer.—The plea is pleaded after action brought and the composition-deed which it sets out

contains no release, enabling it to be set up as a defence or bar to the action. The covenant by the creditors is not a covenant not to sue at all, which in effect would amount to a release; but it is a covenant only not to sue for a limited time, namely, until there has been default in payment of the instalments.

[WILLES, J.—The Court of Queen's Bench, in *Keys v. Elkins* (1), seem to think it might afford an equitable defence.]

It is here pleaded as a legal defence, and it is not a case for allowing an amendment at law: a covenant not to sue for a limited time is clearly not pleadable in bar to an action—*Thimbleby v. Barron* (2). The case of *Walker v. Nevill* (3), which may be cited by the other side, is very distinguishable, as there there was a particular clause in the deed by which it was agreed that a deed with such a covenant should be pleaded in bar. Another objection to the present plea is, that the covenant not to sue is by the creditors only who have signed the deed and who alone are the parties to the deed of the second part; it is true they are there described as being creditors on behalf of themselves and the other creditors of the said debtor; but it is submitted that non-assenting creditors are not parties to the covenant and are not therefore bound by it.

Piffard (Wilson with him), contra.—If the covenant is not made on behalf of all other the creditors of the debtor, it is not made at all. But it is so made, as indeed it professes to be a covenant on behalf of the other creditors, and then by force of the Bankrupt Act it binds the non-assenting as well as the assenting creditors, and as if they had executed the deed. The more important objection is, that the covenant is only a covenant not to sue for a limited period, and cannot therefore, according to a technical rule of law, be made the subject of a plea in bar, but can only form the ground of a cross-action. It is submitted, however, that that is not the true effect of this covenant, but that it is a covenant not to sue at all, with this defeasance, namely, that if the debtor should omit to pay the

instalments agreed to be paid by him, then it should be as if there had never existed any covenant not to sue. Such a deed is pleadable in bar according to the cases of *Gibbons v. Vouillon* (4) and *Hidson v. Barclay* (5), which last case the present one very much resembles.

Prentice, in reply.—In the deed in *Hidson v. Barclay* (5) there was a clause similar to that in *Walker v. Nevill* (3), expressly making the deed pleadable in bar. (He was then stopped by the Court.)

WILLES, J.—Mr. Piffard has urged all that can be urged in favour of this plea, and has particularly referred us to *Hidson v. Barclay* (5); but notwithstanding this I am of opinion that he is not borne out by the authorities, and that this plea cannot be supported. The plea sets up a deed by which the statutory number of creditors have agreed to take the amount of their debts by certain instalments, and have covenanted not to sue, by a covenant which for the present purpose I will assume to be binding on all the creditors, though in terms it is only binding on the creditors who are parties to the deed of the second part. Viewing the covenant in that way, it is a covenant by the creditors that they will accept payment of their debts by nine instalments, and while such instalments are regularly and duly paid by the debtor, that they will not sue him or enforce any judgment or other proceeding against him. The terms in which the covenant is framed are obviously, not to sue only while the instalments are paid, and they do not extend to a release or defeasance which, if intended, would have been expressed, as in the case of *Gibbons v. Vouillon* (4) and *Hidson v. Barclay* (5). No authority has been cited to shew that a defeasance can be implied merely from a covenant not to sue. Such a covenant does not amount to a release unless it be an absolute covenant not to sue. By a violent construction of this instrument possibly the covenant here might amount to an absolute covenant not to sue when all the instalments have been paid, but there is no release until then, when all the conditions on the part of the

(1) *Ante*, Q.B. 25, 29.

(2) 3 Mee. & W. 210; s.c. 7 Law J. Rep. (N.S.) Exch. 128.

(3) 3 H. & C. 403; s.c. *post*, Exch. 78.

(4) 8 Com. B. Rep. 483; s.c. 19 Law J. Rep. (N.S.) C.P. 74.

(5) 3 H. & C. 361.

debtor have been performed. The case of *Ford v. Beach* (6) is conclusive that a covenant not to sue cannot be pleaded as a bar to an action unless it be an absolute covenant; and all the Courts have concurred in holding that deeds under the Bankrupt Act are not pleadable as a defence without they contain a release or satisfaction of the debt, or something to that effect.

BYLES, J.—I am of the same opinion. A covenant not to sue, it is clear, since the case of *Thimbleby v. Barron* (2), effects nothing but a suspension of the remedy. If, however, there be an agreement that it may be pleaded as a bar to an action, as was the case in *Walker v. Nevill* (3), it may be otherwise.

KEATING, J.—I also think that our judgment should be for the plaintiff. It is impossible to extend the covenant in the present case beyond a covenant not to sue for a limited time, and there is nothing in it like a release of the debt.

Judgment for the plaintiff.

1865.
June 8, 12; } SHUTTLEWORTH v. LE FLEM-
July 10. } ING AND OTHERS.

Prescription Act, 2 & 3 Will. 4. c. 71.
—*Fishery.*

Rights in gross are not within the Prescription Act, 2 & 3 Will. 4. c. 71.

The declaration stated, that the defendants broke and entered a certain close of the plaintiff, being part of certain lands called the Low Bank Ground Estate, and landed and brought into and upon the said close certain fishing-nets, and thereby and therewith damaged the grass of the plaintiff there then growing.

The fifth and sixth pleas were as follows: And for a fifth plea the defendants say, that at the said time when, &c. the said close adjoined and was and the same now is part of the shore of the inland lake or water called Coniston or Thurston Water, and that the defendant Hughes Le Fleming, and all his ancestors, whose heir he is, for

sixty years before this suit enjoyed as of right, and without interruption, a free fishery in the said water, with the right of landing and bringing their fishing-nets into and upon any part of the shore of the said water as to the said free fishery appertaining. And the defendants further say, that the defendant Hughes Le Fleming, and the other defendants as his servants, and by his command, did what is complained of in the lawful and reasonable use and exercise of the said right, and not otherwise.

And for a sixth plea the defendants say, that at the said times, when, &c. the said close adjoined and was and the same now is part of the shore of the said inland lake or water called Coniston or Thurston Water, and that the defendant Hughes Le Fleming, and all his ancestors, whose heir he is, for thirty years before this suit enjoyed as of right, and without interruption, a free fishery in the said water, with the right of landing and bringing their fishing-nets into and upon any part of the shore of the said water as to the said free fishery appertaining. And the defendants further say, that the defendant Hughes Le Fleming, and the other defendants as his servants, and by his command, did what is complained of in the lawful and reasonable use and exercise of the said right, and not otherwise.

To these pleas the plaintiff demurred.

Mellish, for the plaintiff.—A claim in gross is not within the Prescription Act; there must be a dominant and servient tenement; section 5. shews this conclusively; it professes to give the form of pleading for all cases within the act, and its provisions would not apply to a right in gross. Again, in *Welcome v. Upton* (1), Parke, B. says, "If the only question in the case had been whether a right of common in gross be within the statute 2 & 3 Will. 4. c. 71. s. 5, we should probably have granted a rule for the purpose of giving that question further consideration, although we might be disposed to think that the present case is within the equity of the statute;" and in *Bailey v. Stephens* (2), Willes, J. says,

(1) 6 Mee. & W. 536; s. c. 9 Law J. Rep. (N.S.) Exch. 154.

(2) 12 Com. B. Rep. N.S. 91; s. c. 31 Law J. Rep. (N.S.) C.P. 226.

(6) 11 Q.B. Rep. 852; s. c. 17 Law J. Rep. (N.S.) Q.B. 114.

"There is no doubt an easement in gross could not be claimed by an occupier under the Prescription Act;" and in *Mounsey v. Iremay* (3), Martin, B., in delivering the judgment of the Court, intimated that the Court were inclined to think an easement in gross was not within the statute, though after the doubts expressed in *Welcome v. Upton* (1), and in *Gale on Easements* (p. 152, 3rd edit.), they were not prepared to decide that this was so. Again, mere user would not shew a right in a man and his ancestors, for the thirty or sixty years might be in one man's life, and he then surely could not prescribe in his ancestors.

Manisty (J. R. Russell, with him), contra. —The owner of the bank is, *prima facie*, the owner of the bed of the lake, and we may, therefore, suppose a grant of the right of fishing with the right to land nets as appendant to it; this is a profit à prendre, it might be prescribed for, and why should the statute not apply? The preamble is perfectly general, and the mischief to be remedied applies equally to a right in gross and to one appurtenant. And even if we suppose that there was a reservation, the reasoning is the same, for this would take effect as a grant—*Wickham v. Hawker* (4), where it was decided that a reservation of hunting, &c., to a man, his heirs and assigns, was a grant of an assignable profit and within the Prescription Act. Again, in *Gray v. Bond* (5), it was held that a jury might presume, from twenty years' user, a grant of a right to land nets from the owners of the land to the lessees of the fishery. In *Welcome v. Upton* (1), the expressions of Parke, B. are in the defendants' favour; so are the notes to *Gale on Easements*, 3rd edit. pp. 10, 13, 151, 152; and section 5. applies only where you prescribe in a "que" estate. The case of an enjoyment during one man's life alone presents no difficulty; such a right as this is one which may be granted to a man and his heirs—*Gray v. Bond* (5), and the judgment of Erle, C.J. in *Bailey v. Stephens* (2); and the enjoyment being had, such a grant may be presumed.

Mellish, in reply.—There is no case to shew that previous to the statute you could

prove such a right as this by simple user; in *Wickham v. Hawker* (4) there was a deed which was actually produced; and in *Gray v. Bond* (5), as in *Davies's case* (6), the right was appurtenant and not in gross. Rights in gross ought not to be favoured in the same way as rights appurtenant to land. Such a right as the present does not come within the mischief of the statute; for the recital refers to "time immemorial," and a defeat by reason of "shewing the commencement;" whereas before the statute in no case had such a right been proved (nor could it be proved) without in some way shewing its nature and origin, as by producing a grant.

He also argued the question as to whether the words of the pleas meant to assert a sole and several fishery, or a common of fishery, and the consequences in the two different cases; and he cited, *Malcolmson v. O'Dea* (7), Co. Lit. 121 b, 122 a, Com. Dig. tit. 'Piscary,' but the view the Court took on the first point renders it unnecessary to allude further to the second point.

Cur. adv. vult.

The judgment of the COURT (Erle, C.J., Willes, J., Byles, J. and Smith, J.) was delivered (July 10,) by—

SMITH, J.—To a declaration in trespass for breaking and entering the plaintiff's close and landing fishing-nets there, the defendant pleaded that the land was part of the shore of an inland lake called Coniston Water, and that the defendant Le Fleming and all his ancestors, whose heir he is, for sixty years before the suit enjoyed as of right, and without interruption, a free fishery in the said water, with the right of landing their nets on the shore as to the free fishery appertaining, and then justified the trespasses under these alleged rights. There was a similar plea alleging the enjoyment for twenty years. To these pleas the plaintiff demurred, and the demurrer raises the question, whether the rights, so pleaded to belong to the defendant in gross, are within the Prescription Act, 2 & 3 Will. 4. c. 71.

The construction of the statute on this point is not free from difficulty, and,

(3) 3 H. & C. 486; s. c. post, Exch. 52.

(4) 7 Mee. & W. 63; s. c. 10 Law J. Rep. (N.S.) Exch. 153.

(5) 2 B. & B. 667.

(6) 3 Mod. 246.

(7) 10 H.L. Cas. 593, 618.

although the question has arisen in the courts, it has not been decided. We are now called on to determine it, and upon consideration of all the provisions of the act, we are led to the conclusion that rights claimed in gross are not within it.

The language of the first section may be sufficiently large to include some rights in gross. The subjects of claim are "right of common or other profit or benefit to be taken and enjoyed from or upon any land." The first and governing subject of claim referred to is "right of common." This general phrase, which defines no species of common, is no doubt wide enough to include a right of common in gross, as common of pasture; but it is not an apt or proper phrase to designate a several right to the exclusive pasturage of land, or any other several and exclusive right to take any particular profit of the land. A sole and several right of pasturage in gross claimed by prescription was upheld by the Court of Exchequer, in *Welcome v. Upton* (1). (See also *Co. Lit.* 122 a). So a right to take all the wood in a certain close may lawfully exist as a profit à prendre in gross—*Sir Francis Barrington's case* (8). But such a right cannot be claimed as appurtenant to land, because it is in its nature wholly unconnected with the enjoyment of the supposed dominant tenement and its necessities—*Bailey v. Stephens* (2). So a right to a several fishery and a right to take minerals may lawfully exist as a right of profit à prendre in gross. These rights in gross, however, would not be aptly or properly described by the expression "right of common" in the Prescription Act, and the succeeding words may reasonably be construed to relate to a profit or benefit of the same nature. If, then, there are some rights of profit à prendre in gross which do not fall within the fair meaning of the act, it seems a reasonable ground for presuming that the legislature did not intend to deal with rights in gross at all, but contemplated only those more usual and ordinary rights of common and profit à prendre which are in some way appurtenant to land, and are limited to the wants of a dominant tenement.

It may be observed that the instances in which rights in gross have come before the Courts are very rare, and that the mischief referred to in the preamble of the Prescription Act arose in the litigation which was of constant occurrence between the owners of dominant and servient tenements.

We think, however, that the 1st section ought not to be read alone, but must be construed by reference to the other provisions of the Act.

The 2nd section relates to easements and watercourses. We think this section refers to easements properly so called, and to rights which are in some way appurtenant to a dominant tenement. The Court of Exchequer, in the case of *Mounsey v. Iremay* (3), appears to have come to this conclusion. In the judgment of that Court it is said, "We further think that the 2nd section itself points to a right belonging to an individual in respect of his land." Again, "What we think Lord Tenterden contemplated were incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment." The limited scope of the 2nd section affords some ground for arriving at what was the intention of the legislature in the 1st section, especially as the introductory words are the same in both; viz. "No claim which may be lawfully made at the common law by custom, prescription, or grant."

But the fifth clause, which relates to pleading, seems to us to give a key to the construction of the act. That section professes to enact forms of pleading applicable to all the rights within the act theretofore claimed to have existed from time immemorial, and which forms, it declares, shall in all such cases be sufficient. These forms have clear relation to rights which are appurtenant to land, and to such rights only. The second branch of the section enacts: "That in *all* pleadings to actions of trespass, and in *all* other pleadings wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial," including therefore all rights claimable by prescription, "it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during

(8) 8 Rep. 136 b.

such of the periods mentioned in the act as may be applicable to the case, and *without claiming in the name or right of the owner of the fee, as is now usually done.*" The whole principle of this pleading assumes a dominant tenement and an enjoyment of the right by the occupiers of it. The proof must, of course, follow and support the pleading. It is obvious that rights claimed in gross cannot be so pleaded or proved. If, therefore, they are held to be within the act, the enactment as to pleading cannot be satisfied; for, then, that mode of pleading which the statute enacts shall, in all cases of rights theretofore claimed from time immemorial, be sufficient, would not only not be sufficient, but in certain cases manifestly inapplicable. Assuming the legislature to have had in view in this clause (as its language imports) all the rights formerly claimable by prescription to which the act was intended to apply, it is necessary implication to hold that prescriptive rights in gross are not within the scope of the statute at all. If the statute were in other respects free from doubt, possibly the effect of this clause might be got over; but we own that we think it indicates with tolerable clearness the subjects with which the legislature intended to deal.

It was suggested in the course of the argument that great difficulties would arise as to the evidence necessary to establish the nature and quality of rights in gross, if they were assumed to be within the statute, which do not occur in the case of rights proved and determined by user and enjoyment by the occupiers of a dominant tenement; as, for instance, whether sixty or thirty years' enjoyment by one man in the course of his own life, and no more, would establish any right, either a right in that man for life, or a descendible right in gross, although there might be nothing in the nature of his single enjoyment to indicate perpetuity. If rights in gross were intended to be dealt with, it might reasonably be expected that some guide to solve difficulties of this kind, either by the mode of pleading or otherwise, would have been found in the act. In the view we take it is not necessary to decide whether the words "free fishery" in these pleas mean

a sole and several fishery, or a common of fishery. Whichever they mean, the right is claimed in gross. Having come to the conclusion that the provisions of the Prescription Act are not applicable to rights so claimed, it follows that the pleas are bad, and that our judgment on the demurrers must be given for the plaintiff.

Judgment for the plaintiff.

1865. { THE VESTRY OF THE PARISH
June 23. { OF ST. MARYLEBONE (*appellants*) v. VIBRET (*respondent*).

Metropolis Local Management Act, 1855, ss. 69, 73.—Sewers—Drains.

A vestry of a parish mentioned in Schedule (A.) to 18 & 19 Vict. c. 120, having resolved, under section 73, that the drainage of several houses into an old sewer was insufficient, and that such sewer should be discontinued, gave notice to the owners of such houses to make new drains into a new sewer, and upon default of the owners, the vestry made them themselves. They then attempted to recover the expense from the house-owners (by summons against the occupier under section 96. of 25 & 26 Vict. c. 102.) before a Magistrate, on the ground that they were acting under section 73. The Magistrate decided that the facts brought the case within section 69. and refused to make any order:—Held, that there was nothing to shew that the drains were insufficient; that the vestry could not by their finding conclusively bring the case within section 73; that it was competent for the Magistrate to refuse his order on the ground that the case fell within section 69; and that his decision on this matter (which was partly a question of law and partly one of fact) was right, as the facts shewed that the new drains were rendered necessary by the draining into the new sewer, and not by the insufficiency of the old drains.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 214.]

1865. }
July 10. } IRWIN v. SIR GEORGE GREY.

Error in Fact—Contradicting the Record—Special Jury—Omission to Summon—Tales—Jury Act (6 Geo. 4. c. 50.)—Calling the Names of the Jurors in Court.

Upon a judgment for the defendant, the plaintiff assigned as errors in fact, that the defendant obtained a rule for a special jury, whereupon twenty-four special jurymen were duly struck, pursuant to the statute 6 Geo. 4. c. 50, as the jurors to be returned for the trial of the issue; that eight of this special jury so struck were not summoned, and the names of the special jurors not having been called over in court, at or after ten o'clock, the hour named in the summons, only ten of the special jurors appeared and were sworn on the said jury:—Held, that the errors so assigned were invalid, as they contradicted the record, which must be considered as containing a statement that all the requisites for having a sufficient jury had been observed, and that the Court sat at a time when, and was otherwise constituted so that it could properly exercise jurisdiction.

Held, also, that these and like objections are not, for all purposes, admitted by demurring to the assignment of errors, but only so when properly assigned and lawfully assignable as ground of error.

Semble—If the plaintiff had sustained any real injustice by the errors complained of, his remedy was to have applied by motion to the Court, when the Court, in the exercise of its equitable jurisdiction, would have interfered, if necessary.

Error in fact.

The nature of the errors assigned and the points argued are fully stated in the judgment of the Court.

On the argument, the plaintiff appeared in person, and *The Solicitor General* (T. Jones and Hannen being with him), for the defendant, when the following authorities were cited in addition to those mentioned in the judgment—*Haldane v. Beauclerk* (1), Co. Lit., 156, 2 Chit. Arch., 11th edit. 1461, *Bousse v. Cannington* (2),

Helbut v. Held (3), *Plommer v. Webb* (4), *Malins v. Werby* (5), *Ex parte Newton* (6), *Bac. Abr.*, tit. 'Error,' K. 5, and *Andrews v. Elliott* (7).

The case was argued on the 19th and 20th of June.

Cur. adv. vult.

The judgment of the Court was now delivered by—

WILLES, J.—This is error in fact upon a judgment for the defendant founded upon a verdict in his favour pronounced by a jury of the county of Middlesex, upon a trial before the Lord Chief Justice. The argument took place on the 19th and 20th of June 1865, before my Brother Byles and myself, when we took time to consider.

The assignment of error states, in effect, that the defendant obtained a rule for a special jury, whereupon twenty-four special jurymen were duly struck, pursuant to the statute, as the jurors to be returned for the trial of the issue; that eight of this special jury so struck were not summoned to attend as jurors on the trial; that by reason of those persons not having been summoned, and the names of the special jurors not having been called over in court at or after ten o'clock, the hour named in the summons, only ten of the special jurors appeared and were sworn on the said jury. The precise objections upon which this assignment of error is founded are, therefore, first, that eight of the special jury were in fact unsummoned; secondly, that the names of the special jurors were not called over at or after ten o'clock; and lastly, that as a consequence there were only ten special jurymen on the jury, upon which, therefore, there must have been two talesmen.

The plaintiff in error relied upon the Jury Act (6 Geo. 4. c. 50), s. 30, by which it is enacted that when a special jury is struck, "the jury so struck shall be the jury returned for the trial of such issue," and he shewed much industry in citing numerous cases in which a trial by a

(3) 2 Lord. Raym. 1414.

(4) Ibid. 1415, note.

(5) 1 Lev. 76.

(6) 16 Com. B. Rep. 97; s. c. 24 Law J. Rep. (N.S.) C.P. 148.

(7) 25 Law J. Rep. (N.S.) Q.B. 1, 336.

(1) 3 Exch. Rep. 658; s. c. 18 Law J. Rep. (N.S.) Exch. 227.

(2) Cro. Jac. 244.

common jury after a special jury had been struck was set aside by the Court upon motion, amongst which are *Holt v. Meadcroft* (8), *Ilague v. Hall* (9), *Newman v. Graham* (10) and *Montague v. Smith* (11); and he placed much reliance upon the opinion expressed by Lord Denman in *O'Connell's case* (12), as to the right to challenge the array when the jury-book is improperly made up. It was further insisted by the plaintiff that, notwithstanding the language of section 37. of the Jury Act, viz., "where a full jury shall not appear," a prayer of *tales* can only be made when the jury are in default, which they are not if they have not been summoned; that the issue not having been tried by a lawful jury, the judgment is a nullity; and that the names of the jury ought to have been called over at or after ten o'clock.

On the part of the defendant this line of argument was not traversed, nor was it denied that either party has a right to challenge the array if improperly constituted, or the individual jurymen if disqualified; nor that he has a right to object to a prayer of *tales* made before the proper jury panel has been perused; nor that the Court would, by virtue of its general jurisdiction to prevent abuse of its process, set aside the verdict upon motion absolutely, in the event of the defect of special jurors having been caused by malpractice of the successful party; nor that the Court would, in case of neglect, besides punishing the officer, redress any injustice which such neglect might have occasioned. But it was insisted that defects of the kind objected to in these proceedings, if not raised by challenge or motion, must be treated either as mere irregularities or as defects which have been passed by, and that the assertion of them at the present stage is in contradiction of the record, which either expressly or impliedly alleges regular proceedings, and so that the assignment of error is in violation of the well-established and wholesome rule that there shall be no averment of error against the record. Upon

this point numerous authorities were cited, which were cited and commented upon by Lord Tenterden in *The King v. Carlile* (13). It was further argued that, consistently with the record, the plaintiff may have appeared at the trial and assented to the proceedings, intending to take his chance of the verdict being in his favour, and that so the objections, if any, may have been waived.

As to the first ground of objection, namely, that eight of the special jurors were not summoned by the sheriff, the assignment of error does not state how this omission took place. It imputes no fault to the defendant or to the sheriff, so that this objection falls nothing short of maintaining that an omission, whether wrongful or not, to summon any one or more jurymen or jurymen, makes all the subsequent proceedings void, if such omission, either alone or conjointly with any other irregularity, may have led to a talesman being upon the jury. This proposition is so novel as to require some authority to sustain it, and none has been adduced. Many causes have been tried, and are tried at every sitting, by a jury partly composed of talesmen, in cases where, either without any default on the part of either the parties or the sheriff's officer, or because of the inadvertence of the latter, one or more of the special jurymen have not been summoned. Similar irregularities, if they be such, must have been over and over again committed, without objection, since the passing of the Jury Act. It is simpler and safer, however, to conclude, not that all these trials have been unwarranted, and the judgments founded thereupon erroneous as contrary to the Jury Act, but that the express language of the 37th section of that statute was framed to exclude any such objection; and that a prayer of *tales* may be made when and "if a full jury shall not appear," without regard to the causes of their not appearing, over which the Court in banco may exercise a control by motion, if justice so requires. And this is consistent with what is stated in 3 *Black. Com.*, 365, that "if, by means of challenges or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*." As

(8) 4 M. & S. 467.

(9) 5 Man. & G. 693.

(10) 11 Com. B. Rep. 153.

(11) 17 Q.B. Rep. 688; s. c. 21 Law J. Rep. (N.S.) Q.B. 73.

(12) 11 Cl. & F. 155.

(13) 2 B. & Ad. 362.

for the alleged error in not calling over the names of the special jurors in court at or after ten o'clock, the hour named in their summons, it is not quite clear whether it is meant to say that the Court sat before ten, or that, sitting after ten, it proceeded without calling over the names of the special jurors, in a slipshod fashion directing such of the special jury as were in court to get into the box without naming them, and then proceeding to swear two talesmen to make the jury. Whichever be the true construction of the assignment of error, the Court has full control over such and similar irregularities upon motion; and in that proceeding it is enabled to decide according to the merits, and to interfere or not according as the irregularity complained of has wrought injustice in the particular case; of which good examples will be found in *Curtis v. March* (14), where the Court granted a new trial, because the Judge through mistake had sat before ten, and a verdict was found against a defendant who was taken by surprise; and in *Williams v. the Great Western Railway Company* (15), where the Court refused a new trial upon a verdict properly found for a railway company by a jury, one of whom was a shareholder, though that fact was unknown to the opposite party. In this form of proceeding we have no such control, but must decide "aye" or "no," whether there be ground of error, and if there be, we have no alternative, but must reverse the judgment, though no injustice appears to have been done, and, even if we should be of opinion that there is no cause of action upon the record. And in our opinion that equitable jurisdiction to which the plaintiff might have appealed if he had sustained any real injustice, is the limit of our authority over such irregularities; for the record of a superior court, when made up, is the conclusive statement of a proceeding conducted with all the formalities required for a judgment, and it states, either expressly or by necessary implication, that the proceeding was one in which the Court exercised its jurisdiction in a judicial way, and therefore that the jury was one not merely in name but in

law and fact, and that the Court sat at a time when, and was otherwise so constituted that, it could properly exercise jurisdiction. It is scarcely necessary to observe that with respect to the objections urged, a writ of error in fact does not lie to correct an error of the Court which can only be set right by a writ of error in law, when such error does appear and ought to appear on the record—*Mellish v. Richardson* (16), and that the record of the postea is equally conclusive as the record of the Court itself: *Lilly's Practical Register*, tit. 'Error.' To shew that the errors assigned are in contradiction to this record, it is only necessary to refer to the old form of entry of the postea upon the record in *Tidd's Forms*. viz. "and the jurors of that jury being summoned, some of them, that is to say, E. F.," &c. "come and are sworn upon that jury, and because the residue of the jurors of that jury do not appear, therefore others of the bystanders being chosen by the sheriff of the county aforesaid, at the request of the said A. B. (or C. D.) and by the command of the said Chief Justice are appointed anew, whose names are annexed to the within-written pannel, according to the form of the statute in that case made and provided." The Judges, in framing the present compendious form of record did so not to alter the law in so material a point, but to express shortly and in a manner not so open to former objections that all the requisites for having a sufficient jury had been observed. Upon this ground, the validity of which has been so often affirmed, and for such convincing reasons in the authorities referred to by the Solicitor General, which we need not recite, we are satisfied that the judgment is not open to either of the objections urged against it by the plaintiff, and that it ought to be affirmed. To prevent misapprehension, we may add that these and like objections are not for all purposes admitted by demurring to the assignment of errors, but only so in the event of their being properly assigned and lawfully assignable as ground of error. In this case it was useless to inquire into the facts, because, admitting them for argument's sake to be true, they are not capable of being assigned as errors in fact, and we cannot allow of their validity without departing from au-

(14) 3 Hurl. & N. 866; s. c. 28 Law J. Rep. (N.S.) Exch. 36.

(15) Ibid. 869; s. c. 28 Law J. Rep. (N.S.) Exch. 2.

(16) 7 B. & C. 869.

cient and established principles of law. The judgment will therefore be affirmed.

Judgment for the defendant affirmed.

1865. { THE CITY OF DUBLIN STEAM-
July 10. { PACKET COMPANY v. THOMP-
SON.

Ship and Shipping—Measurement of Tonnage of Steam Ships—Merchant Shipping Act, 17 & 18 Vict. c. 104. ss. 23, 29.—Rules, Validity of.

With reference to regulating the mode of ascertaining the register tonnage of steam ships, the 23rd section of the Merchant Shipping Act (17 & 18 Vict. c. 104.) provides, that in every ship propelled by steam power an allowance shall be made for the space occupied by the propelling power, and that the amount so allowed shall be deducted from the gross tonnage of the ship; and in directing how such deduction shall be estimated, the section makes a distinction between ships propelled by paddle-wheels and those propelled by screws, and provides that where the tonnage of the space occupied by the boilers and machinery is above a certain per-centage, and there is no agreement between the Commissioners of Customs and the owners, the deduction shall consist of the actual space so occupied, with the addition, in case of paddle-wheels, of one-half, and in case of screws, of three-fourths of the tonnage of such space, and the measurement and use of such space shall be governed by the rules which are afterwards set out in that section. The 29th section empowers the Commissioners, with the sanction of the Board of Trade, to make such modifications and alterations in the tonnage rules as may become necessary, "in order to the more accurate and uniform application thereof, and the effectual carrying out of the principles of admeasurement therein adopted."—Held, that this last section did not authorize the making of rules which, abolishing the distinction between paddle-wheels and screws, in estimating the deduction to be made for space occupied by boilers and machinery, substituted one uniform allowance for all classes of steam vessels, together with a new mode of ascertaining by admeasurement such allowance.

The following SPECIAL CASE was stated by consent without pleadings.

The plaintiffs are a company trading between England and Ireland, and are possessed of many steam vessels of large tonnage, which are used by them in their trade of carrying passengers and goods to and from England and Ireland.

The defendant is one of the surveyors of Customs at the port of Liverpool, and represents the Commissioners of Customs, with whom the present question has arisen.

The question in dispute arises upon the construction of certain provisions of the Merchant Shipping Act, 1854, which regulate the mode of ascertaining the registered tonnage of steamships, and as to the power of the Commissioners of Customs to refuse the allowance for propelling power, which, as the plaintiffs insist, is provided for by the act of parliament as hereinafter mentioned.

By the Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104.) s. 23, it is enacted as follows: "In every ship propelled by steam or other power requiring engine-room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship ascertained as aforesaid, and the remainder shall be deemed to be the registered tonnage of such ship; and such deduction shall be estimated as follows (that is to say):

(a) As regards ships propelled by paddle-wheels in which the tonnage of the space solely occupied by and necessary for the proper working of the boilers and machinery is above 20 per cent. and under 30 per cent. of the gross tonnage of the ship, such deduction shall be thirty-seven one-hundredths of such gross tonnage; and in ships propelled by screws in which the tonnage of such space is above 13 per cent. and under 20 per cent. of such gross tonnage, such deductions shall be thirty-two one-hundredths of such gross tonnage.

(b) As regards all other ships, the deduction shall, if the Commissioners of Customs and the owner both agree thereto, be estimated in the same manner; but either they or he may in their or his discretion require the space to be measured and the deduction estimated accordingly; and whenever such measurement is so required the deduction shall consist of the tonnage of the space

actually occupied by or required to be inclosed for the proper working of the boilers and machinery, with the addition in the case of ships propelled with paddle-wheels of one-half, and in the case of ships propelled with screws of three-fourths of the tonnage of such space; and the measurement and use of such space shall be governed by the following rules (that is to say):

(1.) Measure the mean depth of the space from its crown to the ceiling at the limber strake; measure also three, or, if necessary, more than three breadths of the space at the middle of its depth, taking one of such measurements at each end, and another at the middle of the length; take the mean of such breadths; measure also the mean length of the space between the foremost and aftermost bulkheads or limits of its length, excluding such parts (if any) as are not actually occupied by or required for the proper working of the machinery; multiply together these three dimensions of length, breadth and depth, and the product will be the cubical contents of the space below the crown; then find the cubical contents of the space or spaces (if any) above the crown aforesaid, which are framed in for the machinery or for the admission of light and air, by multiplying together the length, depth and breadth thereof; add such contents to the cubical contents of the space below the crown; divide the sum by 100; and the result shall be deemed to be the tonnage of the said space.

(2.) If in any ship in which the space aforesaid is to be measured the engines and boilers are fitted in separate compartments, the contents of each shall be measured severally in like manner, according to the above rules, and the sum of their several results shall be deemed to be the tonnage of the said space.

(3.) In the case of screw steamers in which the space aforesaid is to be measured, the contents of the shaft-trunk shall be added to and deemed to form part of such space, and shall be ascertained by multiplying together the mean length, breadth and depth of the trunk, and dividing the product by 100.

(4.) If in any ship in which the space aforesaid is to be measured any alteration

be made in the length or capacity of such space, or if any cabins be fitted in such space, such ship shall be deemed to be a ship not registered until re-measurement.

(5.) If in any ship in which the space aforesaid is to be measured any goods or stores are stowed or carried in such space, the master and owner shall each be liable to a penalty not exceeding 100*l*."

By the 29th section of the same act it is further enacted as follows: "The Commissioners of Customs may, with the sanction of the Treasury, appoint such persons to superintend the survey and admeasurement of ships as they think fit; and may, with the approval of the Board of Trade, make such regulations for that purpose as may be necessary; and also, with the like approval, make such modifications and alterations as from time to time become necessary in the tonnage rules hereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted."

There are several other sections of the act which have some bearing on this question, and to which it may be useful to refer, viz., sections 20, 21, 84, 86. and 87.

On the 23rd of October 1860 the Commissioners of Customs, with the approval of the Board of Trade, issued the following rules: "In pursuance of the powers granted by the 29th section of the Merchant Shipping Act, 1854, the Board, with the approval of the Board of Trade, direct, with a view to the more accurate and uniform application of the principle of granting a certain allowance to steamers for their propelling powers, that, in lieu of the rules set forth in section 23. of the Merchant Shipping Act, and in paragraphs 4, 5, 6, 18. and 20. of instructions to measuring surveyors, of 1855, the following rules be adopted in future, viz.:

(Rule) In every ship propelled by steam or other power requiring engine-room, an allowance of space or tonnage shall be made for the space occupied by the propelling power; and the amount so allowed shall be deducted from the gross tonnage of the ship, and such deduction shall be estimated as follows:

(1.) Measure the mean length of the

engine-room between the foremost and aftermost bulkheads, or limits of its length, excluding such parts, if any, as are not actually occupied by or required for the proper working of the machinery; then measure the depth of the ship at the middle point of this length from the ceiling at the limber strake to the upper deck in ships of three decks and under, and to the third deck or deck above the tonnage deck in all other ships; also the inside breadth of the ship, clear of spousing (if any) at the middle of the depth; multiply together these dimensions of length, breadth and depth for the cubical contents; divide this product by 100, and the quotient shall be deemed to be the tonnage of the engine-room, or allowance to be deducted from the gross tonnage on account of the propelling power.

(2.) In the case of ships having more than three decks, the tonnage of the space or spaces betwixt decks (if any) above the third deck, which are framed in for the machinery, or for the admission of light and air, found by multiplying together the length, breadth and depth thereof, and dividing the product by 100, shall be added to the tonnage of such space.

(3.) In the case of screw steamers the tonnage of the shaft-trunk shall be deemed to form part of and be added to such space, and shall be ascertained by multiplying together the length, breadth and depth of the trunk, and dividing the product by 100.

(4.) In any ship in which the machinery may be fitted in separate compartments, the tonnage of each such compartment shall be measured severally in like manner, according to the above rules, and the sum of their results shall be deemed to be the tonnage of the said space.

Ordered, that the proper officers in London, and the collectors and comptrollers at the outports, do govern themselves accordingly in all future operations for estimating the allowance to steamers for their propelling powers; and with regard to the engine-rooms, or allowance to the steamers already measured, that they be re-measured agreeably to the above modification of the rule on the application of their owners or

agents, and on delivery of the original certificate for indorsement."

At the time of the passing of the Merchant Shipping Act, 1854, the plaintiffs were and still are possessed of (amongst other ships) the paddle-wheel steamer *St. Colomba*. Her tonnage space, solely occupied by and necessary for the proper working of the boilers and machinery, was and is above 30 per cent. of her gross tonnage.

After the passing of the said act the plaintiffs applied, in accordance with the provisions thereof, to have the said ship measured, and the vessel was accordingly measured by the proper officer, and a deduction for the space occupied by the propelling power was allowed according to clause (b) of the 23rd section of the act, including the addition of one-half the tonnage of the space of the propelling power. Her register tonnage for dues was then ascertained and fixed at 206 tons, and her tonnage was accordingly so entered in the registry of shipping in the port of Dublin.

In 1862 the plaintiffs lengthened the said ship *St. Colomba* by adding to her length 40 feet, and as this increased her tonnage, it became necessary, in accordance with the provisions of the Merchant Shipping Act, 1854, to have her re-measured, and she was accordingly re-measured by the proper officer for the purpose in the port of Liverpool, where the alterations in her were being made, and without any application being made by the plaintiffs. The tonnage space solely occupied by the propelling power was then above 30 per cent. of her tonnage, as before mentioned.

On this re-measurement the gross tonnage of the ship was increased by 122 tons. The officers who conducted the measurement measured her according to the directions contained in the new Customs Rules of the 23rd of October 1860. They allowed only the exact space occupied by or required to be inclosed for the proper working of the boilers and machinery, and declined to allow the one-half the tonnage of the said space, as directed by the 23rd section of the said act. By this mode of measurement the tonnage for dues was increased to 456 tons. The plaintiffs objected to this mode of measuring and making the allowance for

the propelling power, and required to have the allowance made according to their views of the provisions of the act of parliament, and insisted that the Commissioners of Customs had no power to refuse such allowance.

The question for the opinion of the Court was, whether the additional allowance of one-half the tonnage of the space occupied by the propelling power ought or not to have been made by the officers of registry at Liverpool.

On the 20th of June—

Bovill (*Watkin Williams* with him) argued for the plaintiffs, and

The Solicitor General (*Giffard* and *C. Pollock* with him), for the defendant.

Cur. adv. vult.

KEATING, J. now delivered the judgment of the Court (1).—In this case a steamship belonging to the plaintiffs, called the *St. Colomba* (paddle-wheel), at the passing of the 17 & 18 Vict. c. 104. (the Merchant Shipping Act), had been measured under the provisions of the 23rd section of that statute, and its register tonnage ascertained in the mode pointed out thereby. An increase, however, in the length of the ship in 1862, by augmenting her tonnage, rendered a fresh survey necessary, and she was accordingly re-measured according to the directions contained in certain new Custom Rules of the 23rd of October 1860, framed by the Commissioners of Customs, with the sanction of the Board of Trade, the application of which to the plaintiffs' ship increased the registered tonnage beyond that which would have resulted from a measurement under the former system. To this the plaintiffs objected, and contended that the new Rules issued by the Commissioners of Customs were inoperative as contrary to the provisions of the act of parliament, and the question for the Court is, whether they are right in that contention, and we think they are.

The 23rd section of the Merchant Shipping Act provides that, in every ship propelled by steam, "an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship, . . . and such deduction shall be estimated as

follows: as regards ships propelled by paddle-wheels in which the tonnage of the space solely occupied by and necessary for the proper working of the boilers and machinery is above 20 per cent. and under 30 per cent. of the gross tonnage of the ship, such deduction shall be thirty-seven one-hundredths of such gross tonnage; and in ships propelled by screws in which the tonnage of such space is above 13 per cent. and under 20 per cent. of such gross tonnage, such deductions shall be thirty-two one-hundredths of such gross tonnage." In all other ships, where there is no agreement between the Commissioners and the owners, the deduction shall consist of the actual space occupied by the machinery, &c., with the addition in case of paddle-wheels of one-half, and in case of screws of three-fourths of the tonnage of such space, and the measurement and use of such space, shall be governed by the following rules; and then follow five rules for measuring the space referred to.

The 29th section of the act gives power to the Commissioners, with the sanction of the Board of Trade, to make such modifications and alterations in the tonnage rules as may become necessary in "order to the more accurate and uniform application thereof, and the effectual carrying out of the principles of admeasurement therein adopted." It was under this section that the new rules referred to were made, and those rules in effect repeal the provisions of section 23. of the statute as to all distinctions between the different classes and kinds of steam vessels therein referred to, as well as the different deductions appropriated to each class, and substitutes one uniform allowance for all classes of steam vessels, together with a new mode of ascertaining by admeasurement such allowance.

The Solicitor General, for the defendant, contended that the provisions in the statute establishing the distinctions referred to were not enactments properly so called, but merely tonnage rules, the alteration of which by the Commissioners came within the express powers conferred upon them by section 29, and that, although section 23. was subdivided into several rules, yet that it was itself a tonnage rule, and so within these powers, and he referred to the mode in which the rules were designated in the margin of the

(1) *Willes, J., Byles, J. and Keating, J.*

statute in support of his views. On the other hand, it was insisted that the tonnage rules referred to in section 29. of the act were the rules specified as such in the different sections of that part of the statute, and which regulate the mode of measurement and nothing more; so that the allowance of any deductions from the gross tonnage was not more clearly an enactment than the direction that such deduction should be estimated according to the specified differences in the classes of vessels enumerated in the section, whilst the mode of measuring the spaces according to such classification is expressly governed by the five rules set out at the end of the section, nor could the statements in the margin control or affect the terms of the enactment. We think this the correct view of the statute, and that it was not the intention of the legislature to give to the Commissioners the powers contended for by the defendant. Whether the new rules so framed would or would not be beneficial to the mercantile marine of the country, is a question which, although mooted at the bar, we do not inquire into. The rules themselves being, in our opinion, *ultra vires*, our judgment will be for the plaintiffs.

Judgment for the plaintiffs.

1865. } COLLES AND OTHERS v.
June 19. } EVANSON.

*Bankrupt—Lease, Surrender of—12 & 13
Vict. c. 106. s. 145.*

To a declaration for breaches of covenants contained in a lease, in writing, of certain premises from the plaintiffs to the defendant, the defendant pleaded his discharge in bankruptcy, a refusal by the creditors' assignee to accept the lease, his own execution of a surrender of the lease to the plaintiffs, his tender of the deed of surrender, and offer to deliver up possession to them, without, however, alleging that the lease was lost or destroyed, or that he was prevented from giving it up:—Held, that the plea was bad.

This was a demurrer to a plea.

The declaration was for breaches of covenants contained in a lease of certain premises by the plaintiffs to the defendant,

whereby the defendant undertook to pay certain rent and keep up an insurance on the premises.

The fourth plea, after alleging at length that before the breaches the defendant had petitioned the Court of Bankruptcy, had been adjudicated bankrupt, and an assignee appointed, and that before suit he had obtained his discharge, went on as follows: "And the defendant further says, that after the said appointment of the said creditors' assignee of the estate and effects of the defendant as hereinbefore mentioned, and before this suit, the said assignee of the estate and effects of the defendant declined to take the said lease in the declaration mentioned, or the benefit thereof, and that within fourteen days after the defendant had notice that the said assignee had so declined, and before this suit, he, the defendant, duly made and executed and delivered a certain deed under his seal, whereby he, the defendant, surrendered to the plaintiffs the said demised premises, and all the residue of the said term then to come and unexpired therein, and all his, the defendant's, estate and interest therein, and was then and before this suit ready and willing to, and tendered and offered to deliver the said deed to the plaintiffs, and at the same time offered to deliver up possession of their said premises to the plaintiffs accordingly.

To this plea the plaintiffs demurred.

Horace Lloyd, in support of the demurrer. —The case of *Slack v. Sharpe* (1) will be relied on by the other side; but that case has been disapproved of—Crowder, J. and Willes, J., in *Maples v. Pepper* (2), and Parke, B. in *Briggs v. Sowry* (3). The case of *Manning v. Flight* (4) shews that a strict construction should be put on a section like this.

Coleridge, in support of the plea.—The question is, whether the actual piece of paper is to be given up, and *Slack v. Sharpe* (1) is an authority that it need not. The words of 6 Geo. 4. c. 16. s. 75. are the same as in section 145. of the Bankrupt

(1) 8 Ad. & E. 366.

(2) 18 Com. B. Rep. 177; s. c. 25 Law J. Rep. (N.S.) C.P. 243.

(3) 8 Mees. & W. 729; s. c. 11 Law J. Rep. (N.S.) Exch. 193.

(4) 3 B. & Ad. 211.

Law Consolidation Act, 1849. The case of *Grimman v. Legge* (5) and other cases shew that a surrender destroys a lease. Suppose the lease destroyed, everything possible has been done by the lessee. Suppose the paper delivered up, but not possession, the words but not the spirit of the section would be fulfilled; and this shews that a literal construction is not to be adopted.

WILLES, J.—This is an action by a lessor against a lessee, on the covenants in a lease. The plea is founded on section 145. of the Bankrupt Law Consolidation Act, 1849, and contains no statement that the lease is lost or destroyed, or that the bankrupt is prevented from giving up the lease, and I therefore think the plea is bad. Section 145. seems to imply that it contemplated a discharge on the giving up of a lease in writing, and if that section requires a literal construction, and applies only to a lease in writing, then the matter seems clear. But still, if the lessee shewed the impossibility of an actual delivery up of the lease, and gave up possession of the premises, this might be sufficient. *Slack v. Sharpe* (1) puts a different construction on the section, and I, for my part, do not say that that decision is not right. That case decides that the intention is to relieve the tenant, and that the section, therefore, applies to cases where the lease is by parol; and the language of the section is there explained to be that upon giving up the lease (*if any*) the bankrupt shall not be liable. It is urged here that we should act on that case, as the defendant has executed a surrender in so far as he has not been prevented by the refusal of his landlord. But in order to fulfil the requirements of *Slack v. Sharpe* (1) the plea should have shewn that there was no lease in writing, and that there has been a substantial compliance with the section, and I am of opinion that it is bad for not shewing the impossibility of a delivery up of the lease.

BYLES, J. and KEATING, J. concurred.
Judgment for the plaintiffs.

1865. }
May 25. } *Re MARY GRAHAM.*

Baron and Feme — Conveyance — Dispensing with Concurrence of Husband — 3 & 4 Will. 4. c. 74. s. 91.

The Court will not make an order enabling a married woman to convey, under 3 & 4 Will. 4. c. 74. s. 91, unless there has been a sale of the property which she is desirous of having the power to convey.

Bridge moved for an order, under the 3 & 4 Will. 4. c. 74. s. 91, to dispense with the concurrence of the husband of Mary Graham in the conveyance of certain property by her, to which she had become entitled under the will of her late father. It appears on affidavit that the husband has deserted his wife, and has not been heard of for fifteen years, and his residence is unknown. Part of the property has been sold, and it is probable that Mrs. Graham may sell the rest, and as the whole is very small, it is asked that one general order enabling her to convey may now be made, so as to save the expense of a future application to the Court, to enable her to convey the rest of the property when sold. The Court is never in the habit of inquiring to whom the property has been sold, nor will it sanction any particular form of conveyance—*In re Woodall* (1). There the rule, as drawn up in that case, is given in the note to the report, and it gives power to the married woman to convey her interest in the property generally “to such person or persons as she may think fit.”

[BYLES, J.—No authority was asked of the Court in that case for such a general licence as is here asked for.]

ERLE, C.J.—The practice has always been to make the order only where there has been some specific sale. It is now asked that the married woman may be enabled to convey part of the property in case she should find a purchaser for it. That has never been done, and the Court cannot make such general order.

Refused as to such general order.

(5) 8 B. & C. 324.

NEW SERIES, 34.—C.P.

(1) 3 Com. B. Rep. 639.

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1865. { THE EARL OF SHREWSBURY
June 6. { AND ANOTHER v. KEIGHT-
LEY AND OTHERS.

Statute, Construction of—Private Estate Act—Leasing Power—Destruction of Power—Vesting settled Estates in Trustees to Sell.

By a private Estate Act of 1720 (6 Geo. 1. c. 29.) a family settlement of certain lands was confirmed, with a restriction on alienation; and a power to grant leases "at the usual and accustomed rents, boons and services," was conferred on each tenant in tail when in possession under the limitations of such settlement. By section 1. of an act of 1803 (43 Geo. 3. c. 40.) a portion of these lands was vested in trustees for sale, "freed, released and discharged, and absolutely acquitted, exempted and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations and agreements, in and by," inter alia, the said Estate Act of 1720, created and declared, except only such leases as had been theretofore made in pursuance of the powers contained in the said settlement and act, and the trustees were to re-invest the proceeds of the sale in the purchase of other lands to be settled to the same uses and subject to the same powers as the lands so sold. The 7th section of the act of 1803 enacted, that until sale the said lands should be held and enjoyed, and the rents, issues and profits thereof should be received by such person as would have been entitled thereto in case such act had not been made:—Held, that the power of leasing given by the Estate Act of 1720 was destroyed as to the lands vested in the trustees for sale by the act of 1803, with the exception only of the leases which had been then made; and that therefore a lease made in 1838, in conformity with such power, was void as against the heir, notwithstanding section 7. of the act of 1803, and the fact that the lands had never been sold.

This was an action of ejectment brought by the plaintiffs against the defendants to recover possession of certain messuages, lands, and hereditaments, in the township of Oxtan, in the parish of Woodchurch and county of Chester, to the possession whereof the plaintiffs, or one of them, claimed to be entitled, and to eject all other persons therefrom.

The cause came on to be tried, before Williams, J., at the Spring Assizes, holden at Chester, 1864, when a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following

CASE.

Charles Earl and Duke of Shrewsbury, being seised in his demesne as of fee of the whole of the township of Oxtan, in the county of Chester, by indentures of lease and release, dated the 30th and 31st of October 1700, settled the said township with other lands, after his own death and failure of his issue, and after other uses not necessary to be here mentioned and since determined, to the use of George Talbot for life, remainder to the first and other sons of the said George Talbot successively in tail male, remainder to John Talbot for life, remainder to his first and other sons successively in tail male, remainder to Sir John Talbot for life, remainder to the first and other sons successively in tail male, reversion to the said Charles Earl and Duke of Shrewsbury in fee; and the said settlement contained powers of jointuring and leasing.

On the 1st of February 1717 the said Duke died, having by his will, dated the 19th of July 1712, devised other estates to the uses of the said settlement, and leaving his cousin Gilbert Earl of Shrewsbury his heir-at-law.

By indentures of lease and release, dated the 3rd and 4th of March 1718 (being the settlement on the marriage of the said George Talbot and Mary Fitzwilliam), the said Gilbert Earl of Shrewsbury and certain other persons, according to their respective interests, conveyed, *inter alia*, the said township, after the determination of certain estates therein (which have long since determined) to the use of the said George Talbot for life, remainder (subject to a jointure rent-charge) to the use of the first and other the sons of the said George Talbot on the body of the said Mary Fitzwilliam, in tail male successively, remainder to his first and other sons by any after-taken wife successively in tail male, remainder to the said John Talbot for life, remainder to his first and other sons successively in tail male; and the now stating settlement contained powers of jointuring and leasing.

By "The Shrewsbury Estate Act, 1720" (6 Geo. 1. c. 29), the said marriage settlement and all the uses therein limited were ratified and confirmed.

By section 2. of the said act it was enacted that, after the decease of the said George Talbot and John Talbot, and failure of issue male of their respective bodies (which events have happened), certain lands formerly of the said Duke, including the said township, should be and remain to the use of the said Gilbert Earl of Shrewsbury for life, remainder to his first and other sons successively in tail male, remainder to the use of all and every person or persons being issue male of the body of John the first Earl of Shrewsbury, to whom the title, honour and dignity of Earl of Shrewsbury should, after the decease of the said Gilbert Earl of Shrewsbury, George Talbot and John Talbot, without issue male of their respective bodies, by virtue of the letters patent of creation of the said earldom, descend and come, severally and successively one after another, as they and every of them should succeed to and inherit the said earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons issuing to attend and wait upon the said earldom, and to be annexed to and descend with the same; and the said act contained powers to charge portions and other sums, and a restriction on alienation of the said estates.

By section 10. of the said act it was enacted that it should be lawful for the first and all and every son and sons of the body of the said George Talbot, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and to and for the first and every other son and sons of the body of the said John Talbot, of Longford, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and also to and for all and every other person and persons to whom the said hereditaments and premises were limited by the said act successively as aforesaid, by any deed or writing, by them respectively to be signed in the presence of two witnesses, to demise or lease all or any parts of the said hereditaments and premises, whereof the person

making such lease should be actually possessed, to any person or persons in possession, and not in reversion, for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there should be reserved and made payable yearly during the continuance thereof of the usual and accustomed yearly rents, boons, and services, with power of re-entry for non-payment thereof, and with the usual provision as to counterparts of the said leases.

At the time of the passing of the next-stated act, the said George Talbot was dead, and the said Gilbert Earl of Shrewsbury was also dead, and the title of Earl of Shrewsbury, and the aforesaid hereditaments and premises, had descended to Charles, fifteenth Earl of Shrewsbury, who was grandson and heir male of the body of the said George Talbot by the said Mary his wife.

By an act passed in 1803 (43 Geo. 3. c. 40), intituled "An Act for vesting part of the settled estates of the Right Honourable Charles Earl of Shrewsbury, in the counties of Salop, Berks, Wilts and Oxford, in trustees, to be sold, and for laying out the monies to arise by such sale in the purchase of other lands to be settled in lieu thereof to the same uses and subject to the same restrictions," after recitals shewing the purposes of the act, it was enacted that certain hereditaments, limited and settled by the said indentures of the 3rd and 4th of March 1718, and "The Shrewsbury Estate Act, 1720," and mentioned in the schedule to the now stating act (which schedule included the whole of the said township of Oxton) should, from and after the passing of the said "Shrewsbury Estate Act, 1803," be and the same were thereby vested in and settled upon Thomas Wright and Charles Conolly, Esquires, their heirs and assigns for ever, freed, released and discharged, and absolutely acquitted, exempted and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisos, limitations and agreements in and by the said indentures of settlement of the 30th and 31st of October 1700, the will of the said Charles Duke of Shrewsbury, the said

indentures of the 3rd and 4th of March 1718, and the said "Shrewsbury Estate Act, 1720," respectively created, limited, provided and declared of and concerning the same hereditaments and premises, or any of them, except only such leases as had been theretofore made or granted of the same respectively, in pursuance of the powers contained in the said settlement and act of parliament, upon trust that they the said Thomas Wright and Charles Connolly should, with all convenient speed, with the consent and approbation of the said Charles, the then Earl of Shrewsbury, to be testified by some writing under his hand, and after his decease then with the consent of the person or persons who should then be in possession of the said estates respectively by virtue of the limitations before mentioned, sell and dispose of the said hereditaments and premises so by the said act of 1803 vested in them as aforesaid, either together or in parcels, by public sale or private contract, unto any person or persons who should be willing to become the purchaser or purchasers thereof, for the best price that could be reasonably gotten for the same, and, upon payment of the purchase-mones for which the said hereditaments and premises should be sold, should convey and assure the same respectively unto and to the use of the purchasers thereof, their heirs and assigns respectively, or as they should direct or appoint, freed and discharged and acquitted, exempted and exonerated as aforesaid. The said act also provided for the re-investment of the proceeds of such sales in the purchase of other estates, to be settled to the same uses and subject to the same powers as the lands which had been sold.

By the 7th section of the said "Shrewsbury Estate Act, 1803," it was enacted that, in the mean time, and until the said hereditaments and premises by the said act directed to be sold should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed and enjoyed, and the rents, issues and profits thereof should be had, received and taken by and be applied to and for the benefit of such person as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received

the same respectively, in case the said last-mentioned act had not been made.

The 8th section of the said act conferred powers of appointing new trustees of the said act.

The plaintiff George Rice Lord Dynevor has been duly appointed and is now the sole surviving trustee of the said act, and the lands for the recovery of which this action is brought are now vested in the said George Rice Baron Dynevor, as such trustee as aforesaid, - but subject to the leases hereinafter mentioned, or one of them, in case the same are or is valid and subsisting.

The lands for the recovery of which this action is brought have not, nor has any part thereof, ever been sold under the provisions of the said act.

By indenture of lease, made the 2nd of November 1830 (which for the purposes of this case is admitted to have been executed and perfected in conformity with the powers contained in the act of 1720, save in so far as herein appears to the contrary), the Right Honourable John Earl of Shrewsbury being then heir male of the body of the second son of George Talbot (whose first son had died without leaving any issue male), son of Gilbert Talbot, in the said "Shrewsbury Estate Act, 1720," mentioned, demised eighty acres in the said township of Oxtou (part of which are the lands sought to be recovered in this action) to Samuel Ackerley for ninety-nine years, from the said 2nd of November 1830, if three persons in the said indenture mentioned should so long live, at the yearly rent of 20*l.* for the first ten years, and 30*l.* for every year after the first ten; the said Samuel Ackerley covenanting to lay out 250*l.* in building on the said land within five years.

By indenture of lease of the 2nd of February 1838 (executed and perfected in like manner), the said John Earl of Shrewsbury, in consideration of the surrender of the said lease of the 2nd of November 1830, demised seventy-eight acres in the township of Oxtou (which are the lands sought to be recovered in this action) to Joseph Robinson Pim, for ninety-nine years, if three persons named in the said lease or either of them should so long live, at the yearly rent of 30*l.*, the said Pim covenanting to lay out 1,000*l.*

in building on the said land within five years.

One of the three persons named in the last-mentioned lease, upon whose deaths the same is determinable, is still living.

On the 9th of November, in the year of our Lord 1852, the said John Earl of Shrewsbury died, without leaving any male issue, and thereupon Bertram Arthur, the seventeenth and last Earl of Shrewsbury, succeeded to the title and estates annexed to it. He died a bachelor on the 10th of August 1856, and thereupon the issue male of George Talbot, on whom the estates were, by the settlement of the Duke of Shrewsbury and by the said act of 1720, settled in tail male, became extinct, and thereupon (upon failure and in default of issue male of the said Gilbert Earl of Shrewsbury, of the said George Talbot, and of the said John Talbot, in the said "Shrewsbury Estate Act, 1720," named) the present Earl of Shrewsbury became and now is the person, being issue male of the body of the said John, first Earl of Shrewsbury, to whom the said title, honour and dignity of Earl of Shrewsbury did, after the decease as aforesaid of the said Gilbert Earl of Shrewsbury, George Talbot and John Talbot, without issue male of their respective bodies, by virtue of the said letters patent of creation of the said earldom, descend and come.

Prints of the Shrewsbury Estate Acts 1720 and 1803 respectively, and copies of the leases of the 2nd of November 1830, and of the 2nd of February 1838, respectively, were to be taken as part of the case.

The question for the consideration of the Court was, whether John Earl of Shrewsbury had power to demise by the said indenture of lease of the 2nd of February 1838 the lands by "The Shrewsbury Estate Act, 1803," vested in the trustees for sale, so as to bind the plaintiffs.

Manisty (*Hannen* with him), for the plaintiffs.—It is admitted that if the Shrewsbury Estate Act, 1720 (6 Geo. 1. c. 29), had remained in force, John Earl of Shrewsbury was the person who might have granted the lease in question; but it is submitted that the leasing power which was conferred on him by section 10. of that act was destroyed by the act passed in

1803 (43 Geo. 3. c. 40). The 1st section of this last statute recites the settlement of March 1718 and the said act of 1720, and recites that parts of the settled estates consist of undivided shares, and others are dispersed, and far distant from the Earl's principal estates, and "that it would be greatly for the benefit of the said Earl and those entitled in remainder after him under the limitations in the said settlement and act of parliament, if all the said estates situated," &c. "were sold," and it then enacts that the lands and hereditaments mentioned in the schedule to the act (and which includes the lands sought to be recovered in this action) should be vested in the trustees for sale, Wright and Connolly, freed and discharged from all the powers created by the settlements of 1700 and 1718, and the act of 1720 (which would include, of course, the powers of leasing), except only the leases as had been then granted under such powers. The words of the 1st section of the act of 1803, which so takes the lands out of settlement and vests them in the trustees for sale, are fully set forth in the case, and they so completely destroy the previously existing powers to grant leases, that the Earl had no power to make the lease he did in 1838.

Sir Hugh Cairns (*Mellish* and *Kay* with him), for the defendants.—The lease in question is good, because the power of leasing conferred on the Earl by the first act, and which it is admitted by the other side would have authorized him to have made such lease in the way he did, if the act of 1803 had not been passed, was not affected by such last act as to lands which had not been sold when the power was exercised. It never was intended by the act of 1803 that, in order that the lands should be vested in trustees for sale, the whole machinery of enjoying the property (which would include, of course, that of leasing it for the best rents) should be destroyed, although the sale might probably not take place for some time, and, as has been the case here, perhaps not even take place at all. But the 7th section of this act of 1803 explains this, and shews that *until sale* the estates are to be enjoyed as if that act had not been passed, and therefore, conceding the legal estate in fee was vested in the trustees, still, until sale,

the Earl was tenant in tail in equity, and entitled to enjoy the rents, issues and profits, and as a necessary consequence to have power of leasing, such power being a necessary part of enjoying the estate. It certainly was very desirable in this case that the person so entitled to the profits should have such, for as the trustees had only a power to sell and no power to lease, if leases were to be granted at all, they could only be granted by virtue of this 7th section. "Of all kinds of powers," says Lord Mansfield, in *Taylor v. Horde* (1), "the most frequent is that to make leases. For the encouragement of farmers to occupy, stock and improve the land, it is necessary they should have some permanent interest. Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy to the best advantage during his own time; and they who come after must suffer by the land being untenanted, out of repair and in a bad condition." And in *Skeels v. Shearly* (2), Shadwell, V.C. observes, "As it is impossible that a settled estate can be enjoyed, except by means of the exercise of a power to lease, the Courts never allow leases granted by the tenant for life under his power to be defeated by the exercise of a power in the trustees to appoint new uses with the concurrence of the tenant for life." To the same effect is *Sugden on Powers*, 8th ed. 712, and *Shannon v. Bradstreet* (3), where Lord Redesdale shewed that a power to make leases was a power calculated for the benefit of the estate, and ought to be construed as liberally as powers of jointuring. The exercise of such a power would not impede the execution of the trust to sell; indeed, in practice, estates do not sell the worse, but, on the contrary, the better for being tenanted by solvent tenants at their full value. No precise words were necessary to reserve such power of leasing. "Powers," as stated by Lord St. Leonards (4), "are mere declarations of trust; and therefore any words, however informal, which clearly indicate an intention to give or reserve a power, are sufficient for the purpose." Moreover, the giving of such a

power to one who had no estate, or only an equitable estate for life in the lands, is not inconsistent with an estate in fee in the trustees—*Long v. Rankin* (5). The parties interested in passing the statute of 1803 could have had no object in destroying the power to grant leases, and there can be no doubt that if other lands had been bought with the proceeds of the sale of the lands in question, such newly-acquired lands would have been subject to the powers of leasing given by the previous act of settlement. The trust under section 7. comes in as the first trust, and it is therefore a limitation of the estate to the trustees in trust, until sale, to allow the Earl to possess the estate, with all the incidents of such possession, namely, that of leasing; and a lease granted under such power would not be defeated by the subsequent execution of the power of sale—*Sugden on Powers*, 8th edit. 489 to 491.

Manisty, in reply. — The power of leasing given by section 10. of the statute of 1720 was not at the best rents which could be gotten, but "at the usual and accustomed yearly rents, boons, and services," so that there would be nothing to prevent the lessor from taking a fine on the granting of the lease. The statute of 1803 directs the trustees to sell freed and discharged from the powers of leasing, except as regards leases then already granted; and there is nothing in the 7th section in any way to alter this. That section enacts no more than equity would have allowed to the Earl in the absence of any such clause.

ERLE, C.J.—I am of opinion that our judgment should be for the plaintiffs. By the statute of 1720, the settlement of March 1718 was confirmed, and the lands being thus in settlement, by section 10. of that statute a leasing power was given to each respective tenant in tail who should come into possession of the hereditaments under the limitations contained in that settlement; and it is obvious that it would be to the advantage of such tenant in possession not to lease at the best rents that could be obtained, but at the usual and accustomed rents, boons and services. Now, the estates being so settled, then came the statute of 1803, whereby a portion of such

(5) *Sugden on Powers*, Appendix, 895, 8th edit.

(1) 1 Burr. 120.

(2) 8 Sim. 153.

(3) 1 Sch. & Lef. 61.

(4) *Sugden on Powers*, 8th edit. 102.

estates was taken out of settlement and vested in trustees for sale, with directions to re-invest the proceeds in the purchase of other lands to be settled to the same uses and subject to the same powers as the estates which had been sold; and the words of the 1st section of that act are remarkably strong; they state that the lands are to be "freed, released and discharged; and absolutely acquitted, exempted and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisos, limitations and agreements in and by," *inter alia*, the said act of 1720 created and declared; and the said 1st section vests the lands so exonerated in trustees in fee, on trust for sale, and to convey the same to the purchasers, "freed and discharged and acquitted, exempted and exonerated as aforesaid." Now, if there was nothing more in the act than this, there would be an end of the power of leasing given by the previous act of 1720; but there is, however, the 7th section, which enacts, that until the lands be sold they "should be held, possessed and enjoyed, and the rents, issues and profits thereof should be had, received and taken by, and be applied to and for the benefit of such person as would have been entitled thereto" if the act had not passed. The question is, whether these words are to be construed in their literal sense, so as to give to the Earl for the time being the right to receive and take the rents, issues and profits only, or whether they are to be so construed that in respect of the lands not sold the Earl was to derive all the powers which were conferred on him by the settlement statute of 1720, and amongst them the leasing power given by section 10. of that act. The ordinary acceptation of the words would be only to allow the Earl for the time being to receive the rents and profits from the demises already made. I agree with Sir Hugh Cairns there would have been nothing more satisfactory to the estate than for the tenant in tail to have had the power of granting leases, if he had been bound to have got the best rents, but that is not so; and I think we should be defeating the statute of 1803 by holding that the tenant in tail had such power to lease for lives, and take, perhaps, a considerable fine for the lease, and so, in fact, to sell the land

during the time the tenancy should last. I have, therefore, come to the conclusion that the power of leasing was not revived by the 7th section, and that our judgment should be for the plaintiffs.

WILLES, J.—I am of the same opinion. At one time, under the influence of the argument addressed to us by the learned counsel on the part of the defendants, I was disposed to think that section 7. of the act of 1803 included the power to make such leases as would come within the terms of section 10. of the act of 1720; but I am now satisfied that the question which that would raise is not the question on which our decision should turn. Take, for example, a lease which might be made in 1803, under the powers given by section 10. of the act of 1720, and in respect of which the usual and accustomed rent had been reserved. Now it is clear that at the time this lease was granted, the lessor might have taken a fine from the tenant, with a covenant by him to lay out a large sum of money on the land; for so long as the usual and accustomed rent was reserved, the landlord might have taken for the lease any such fine as might be agreed on between him and the tenant. Such a transaction would, in effect, be a sale of the land *in futuro*; and whether such a lease comes within the meaning of section 7. of the act of 1803 depends on the question whether that section deals only with the profits as they from time to time arise, or whether it deals with the future profits. I am of opinion that it deals with the former only; and, further, I am of opinion that that 7th section, being a declaratory enactment, cannot authorize anything contrary to that which the trustees are directed to do by the 1st section; and that leads me to the conclusion that present profits only are dealt with by the 7th section. According to that section, the rents and profits are to be received by the tenant in tail for the time being, as if this act had not been passed; and I think that those words "rents and profits" are not to have the effect of enabling such tenant to enjoy, not only the rents and profits for the time being, but those *in futuro*. It appears to me that the 7th section excludes everything more than the temporary enjoyment of the rents and profits for the time being; and I think that

the exception in the 1st section in favour of leases then granted shews that the framers of the act had in their mind this power of leasing under section 10. of the previous act, and that they did not intend that it should be exercised. For these reasons, I do not think that such power has been preserved, and I revert to the conclusion that the lease in question is void.

BYLES, J.—I am of the same opinion. The key to the right interpretation of the statute of 1803 is, I think, to be found in its preamble. It appears from that, that several of the estates, including the subject-matter of this action, were dispersed in different counties, and that it was desirable they should be sold for the most money, and that the money arising from such sale should be invested in the purchase of other estates, to be settled to the same uses as the settled estates. The first and paramount object of the act was, therefore, to sell the lands for the best prices; and that would be defeated if, just before such sale, they could be demised at what might be termed nominal rents. The act, therefore, declares that all the powers of leasing given by the act of 1720 should be destroyed; but that in the mean time, until the lands were sold, the parties entitled to the rents and profits were to receive them as if the act had not been made; but if, as has been pointed out by the Chief Justice and my Brother Willes, their power of making leases was preserved, they would take not only the rents and profits, but the purchase-money for the time the leases had to run. Are we to imply the existence of such a power? The act carefully excepts leases which had been already granted, and if this power was intended to remain, why was it not expressed? Moreover, the act states that the trustees "should with all convenient speed" sell the lands, so that it contemplated a sale within a reasonable time after the act was passed. I hope that our judgment will do no injustice, and that the lessee will have ample redress from the covenant for quiet enjoyment.

SMITH, J.—I also agree that our judgment should be for the plaintiffs. I think the act of 1803 vested the lands in the trustees in fee simple, freed and discharged from all the powers and estates created and declared by the previous act, with one exception only, namely, the then existing leases;

and I think, also, that in the clause where such exception was expressly made, was the apt place to have inserted an exception in respect of this power of leasing, if it had been intended that such power should be preserved. The question, however, is whether such power has been preserved by section 7. One certainly would expect to find some strong words to shew that the direct effect of section 1. was not intended in this respect to take place; but I cannot collect any such intention from the words which are used in that 7th section. That section, and every word in it, may, on the contrary, be satisfied without disturbing the legal estate in fee as vested in the trustees by the 1st section. I am therefore of opinion, that when the lease in question was granted, the power of making such a lease did not exist.

Judgment for the plaintiffs.

1865. { THE EARL OF SHREWSBURY
June 8. { AND OTHERS v. BEAZLEY AND
OTHERS.

Statute, Construction of—Private Estate Act—Power of Leasing—Settlement.

By a private act of parliament certain lands were, in 1720, settled on those who should be Earls of Shrewsbury. In 1803 a portion of these estates, by another act, were vested in trustees for sale, freed from the uses, &c. of the prior act, with a provision that till sale they should be held for the benefit of those who but for the act would be entitled. In 1843, by a third act, which provided for the sale of another portion of the above estates, it was also provided that those to whom the estates limited by the first act were successively limited when by virtue of the limitations they came into possession or were entitled to the profits of the lands which should for the time being stand limited and settled to such of the uses of the said first act as should then be subsisting or capable of effect, might lease them in a particular way:—Held, on the construction of the acts, that this power of leasing extended to lands vested in trustees under the second act and still unsold.

This was an action of ejectment, brought by the plaintiffs against the defendants,

to recover possession of certain messuages, lands and hereditaments in the township of Oxton, in the parish of Woodchurch and county of Chester, to the possession whereof the plaintiffs or one of them claimed to be entitled, and to eject all other persons therefrom.

The cause came on to be tried, before the Honourable Mr. Justice Williams, at the Spring Assizes holden at Chester, 1864, when a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following

CASE.

Charles Earl and Duke of Shrewsbury, being seised in his demeane as of fee of the whole of the township of Oxton, in the county of Chester, by indentures of lease and release dated the 30th and 31st of October 1700, settled the township with other lands, after his own death and failure of his issue, and after other uses not necessary to be here mentioned and since determined, to the use of George Talbot for life, with remainder to the first and other sons of the said George Talbot successively in tail male, remainder to John Talbot for life, remainder to his first and other sons successively in tail male, remainder to Sir John Talbot for life, remainder to the first and other sons successively in tail male, reversion to the said Charles Earl and Duke of Shrewsbury in fee; and the said settlement contained powers of jointuring and leasing.

On the 1st of February 1717 the said Duke died, having by his will, dated the 19th of July 1712, devised other estates to the uses of the said settlement, and leaving his cousin Gilbert Earl of Shrewsbury his heir-at-law.

By indentures of lease and release, dated the 3rd and 4th of March 1718 (being the settlement on the marriage of the said George Talbot and Mary Fitzwilliam), the said Gilbert Earl of Shrewsbury and certain other persons, according to their respective interests, conveyed, *inter alia*, the said township, after the determination of certain estates therein (which have long since determined) to the use of the said George Talbot for life, remainder (subject to a jointure rentcharge) to the use of the first and other the sons of the said George Talbot on the body of the said Mary Fitz-

william, in tail male successively, remainder to his first and other sons by any after-taken wife successively in tail male, remainder to the said John Talbot for life, remainder to his first and other sons successively in tail male; and the now stating settlement contained powers of jointuring and leasing.

By "The Shrewsbury Estate Act, 1720" (6 Geo. 1. c. 29), the said marriage settlement and all the uses therein limited were ratified and confirmed. By section 2. of the said act it was enacted that, after the decease of the said George Talbot, and failure of issue male of his body (and other events which have happened), certain lands of the said Duke, including the said township, should be and remain to the use of the said Gilbert Earl of Shrewsbury for life, remainder to his first and other sons successively in tail male, remainder to the use of all and every person or persons being issue male of the body of John the first Earl of Shrewsbury, to whom the title, honour and dignity of Earl of Shrewsbury should, after the decease of the said Gilbert Earl of Shrewsbury, George Talbot and John Talbot without issue male of their respective bodies, by virtue of the letters patent of creation of the said earldom, descend and come, severally and successively one after another, as they and every of them should succeed to and inherit the said earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons issuing to attend and wait upon the said earldom, and to be annexed to and descend with the same; and the said act contained powers to charge portions and other sums, and a restriction on alienation of the said estates. By section 10. of the said act it was enacted, that it should be lawful for the first and all and every son and sons of the body of the said George Talbot, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and to and for the first and every other son and sons of the body of the said John Talbot, of Longford, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, and also to and for all and every other person and persons to whom the said hereditaments

and premises were limited by the said act successively as aforesaid, by any deed or writing, by them respectively to be signed in the presence of two witnesses, to demise or lease all or any parts of the said hereditaments and premises, whereof the person making such lease should be actually possessed, to any person or persons in possession, and not in reversion, for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there should be reserved and made payable yearly during the continuance thereof the usual and accustomed yearly rents, boons and services, with power of re-entry for non-payment thereof, and with the usual provision as to counterparts of the said leases.

At the time of the passing of the next-stated act, the said George Talbot was dead, and the said Gilbert Earl of Shrewsbury was also dead, and the title of Earl of Shrewsbury and the aforesaid hereditaments and premises had descended to Charles fifteenth Earl of Shrewsbury, who was grandson and heir male of the body of the said George Talbot by the said Mary his wife.

By an act passed in 1803 (43 Geo. 3. c. 40), intituled 'An act for vesting part of the settled estates of the Right Hon. Charles Earl of Shrewsbury in trustees to be sold, and for laying out the monies to arise by such sale in the purchase of other lands, to be settled in lieu thereof to the same uses and subject to the same restrictions,' after recitals shewing the purposes of the act, it was enacted, that certain hereditaments limited and settled by the said indentures of the 3rd and 4th of March 1718, and "The Shrewsbury Estate Act, 1720," and mentioned in the schedule to the now-stating act (which schedule included the whole of the said township of Oxton), should, from and after the passing of the said reciting act, be and the same were thereby vested in and settled upon Thomas Wright, Esq. and Charles Conolly, Esq., their heirs and assigns for ever, freed, released and discharged, and absolutely acquitted, exempted and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, pro-

visoes, limitations and agreements in and by the said indentures of settlement of the 30th and 31st of October 1700, the will of the said Charles Duke of Shrewsbury, the said indentures of the 3rd and 4th of March 1718, and the said "Shrewsbury Estate Act, 1720," respectively created, limited, provided and declared of and concerning the same hereditaments and premises, or any of them, except only such leases as had been theretofore made or granted of the same respectively in pursuance of the powers contained in the said settlement and act of parliament, upon trust that they, the said Thomas Wright and Charles Conolly, should, with all convenient speed, with the consent and approbation of the said Charles, the then Earl of Shrewsbury, to be testified by some writing under his hand, and after his decease then with the consent of the person or persons who should then be in possession of the said estates respectively, by virtue of the limitations before mentioned, sell and dispose of the said hereditaments and premises so by the said act of 1803 vested in them as aforesaid, either together or in parcels, by public sale or private contract, unto any person or persons who should be willing to become the purchaser or purchasers thereof, for the best price that could be reasonably gotten for the same; and, upon payment of the purchase-mones for which the said hereditaments and premises should be sold, should convey and assure the same respectively unto and to the use of the purchasers thereof, or as they should direct or appoint, freed and discharged, and acquitted, exempted and exonerated as aforesaid. The said act also provided for the re-investment of the proceeds of such sales in the purchase of other estates, and to be settled to the same uses and subject to the same powers as the lands which had been sold. By the 7th section of the said act of 1803 it was enacted, that in the mean time, and until the said hereditaments and premises by the said act directed to be sold should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed and enjoyed, and the rents, issues and profits thereof should be had, received and taken by and be applied to and for the benefit of such person as would

have been entitled thereto, and ought to have held, possessed or enjoyed and received the same respectively in case the said last-mentioned act had not been made. The 8th section of the said act conferred powers of appointing new trustees of the said act.

The said George Rice Lord Dynevor has been duly appointed and is now the sole surviving trustee of the said act, and the lands for the recovery of which this action is brought are now vested in the said George Rice Baron Dynevor, as such trustee as aforesaid, subject to the lease hereinafter mentioned, in case the same is valid and subsisting. The lands for the recovery of which this action is brought have not nor has any part thereof ever been sold under the provisions of the said act. In the year 1827 the said Charles Earl of Shrewsbury died without issue male, and upon his death the title and the said last-mentioned lands descended to John Earl of Shrewsbury, the lessor named in the lease hereinafter mentioned.

By an act, "The Shrewsbury Estate Act, 1843" (6 & 7 Vict. c. 28), after reciting, amongst other things, (as the fact was) that the said John, the then Earl of Shrewsbury, had no issue male, and that he was the heir male of the body of the said George Talbot and tenant in tail male in possession of the said settled hereditaments and premises, and that it would be for the benefit of the said John Earl of Shrewsbury and those who might succeed to the settled estates, if certain hereditaments were vested in trustees, in trust to sell the same, with a provision for investing the monies to arise thereby in the purchase of other hereditaments, to be settled to the uses and under the restrictions which should be subsisting or capable of taking effect in the settled estates not vested by the act of 1803 in trustees to be sold, and that it would be for the benefit of the said John Earl of Shrewsbury and those succeeding to the settled estates, if the said John Earl of Shrewsbury and the successive takers of the said settled estates were enabled to lease, and to enter into contracts for leasing, any part or parts of the said settled estates for such terms of years and under such provisions as would induce persons to build upon or improve the same,

or to repair the messuages or tenements or other buildings standing thereon, or to build others in lieu thereof, it was enacted, that all and singular the manors or lordships, messuages or farms, lands, tenements and other hereditaments particularly mentioned and described in the second schedule to the said act of 1843 (which schedule does not include any of the lands in the township of Oxtan), should from and after the passing of the said act be vested in certain persons in the said act mentioned, their heirs and assigns for ever, freed and absolutely acquitted, exempted, exonerated and discharged from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations and agreements, in and by the said indenture of the 31st of October 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March 1718, and "The Shrewsbury Estate Act, 1720," respectively created, limited, provided and declared of and concerning the same manors, messuages, farms, lands, tenements, hereditaments and premises, or any of them, upon trust with all convenient speed to sell and dispose of all and singular the said manors, &c., so by the said act vested as aforesaid, subject and without prejudice to any lease or leases which might have been made under the power of leasing in the said act thereafter contained. By section 11. of the said act, the aforesaid power of leasing contained in the said act of 6 Geo. 1. c. 29. was repealed, and by section 12. new powers of leasing were created. By the 33rd section of the said act it was enacted, that it should be lawful for the said John Earl of Shrewsbury, during his life, and after his decease for all and every other person and persons to whom the said hereditaments and premises limited by the said indenture of the 4th of March 1718, and the said "Shrewsbury Estate Act, 1720," are by the said settlement and act respectively limited successively as aforesaid, as and when they should respectively, by virtue of the limitations aforesaid, be in the actual possession or entitled to the receipt of the rents and profits of the lands which should for the time being stand limited and settled to such of the uses limited by the said settlement of 1718 and the said act of 1720 respectively as aforesaid, as should be then subsisting

or capable of taking effect, by indenture, to be sealed and delivered by him in the presence of two or more credible witnesses, to demise or lease all or any parts of the same lands, for any term or number of years not exceeding ninety-nine years in possession, to any person whomsoever, upon building leases, so as in such lease should be reserved the best yearly rent that could be reasonably had or gotten for the same, and that such leases should contain certain covenants in the said act particularly mentioned. Section 35. conferred powers to enter into contracts for leases. Section 36. contained a provision that such contracts should contain provisos for re-entry. Section 37. authorized the granting of new leases when possession had been recovered under the power of re-entry. Section 38. gave power to alter, vary and rescind contracts; and section 39. gave powers to confirm leases containing technical errors. By the 40th section of the said act, power is given to Earl John during his life, and after his decease for every person to whom the said hereditaments and premises limited by the indenture of the 4th of March 1718, and the act of 1720, were by the said settlement and act respectively limited, as and when they should respectively, by virtue of the limitations aforesaid, be in the actual possession or entitled to the receipt of the rents and profits of the lands, which for the time being should stand limited and settled to such of the uses limited by the said indenture of the 4th of March 1718 and the said act of 1720 respectively, as should then be subsisting or capable of effect, to demise or lease all the mines in, under or upon any part of the same lands situate in the township of Little Neston, Oxton, and other places in the county of Chester, Salop and Stafford, in the manner in the said section mentioned.

By indenture of lease, made on the 2nd day of February 1851, which for the purposes of this case is admitted to have been executed and perfected in conformity with the power contained in the act of 1843, save in so far as herein appears to the contrary, between the Right Hon. John Earl of Shrewsbury of the one part, and James Beazley of the other part, it was witnessed, that under and by virtue of the power and authority in that behalf given and reserved to the said Earl by "The

Shrewsbury Estate Act, 1843," and of every or any other power or authority enabling the said Earl in that behalf, the said Earl did demise to the said James Beazley a certain plot of land in the said township of Oxton for ninety-nine years from the 2nd of February 1851. The land comprised in this lease is sought to be recovered in this action. On the 9th of November in the year of our Lord 1852, the said John Earl of Shrewsbury died without leaving any male issue, and thereupon Bertram Arthur, seventeenth and last Earl of Shrewsbury, succeeded to the title and estates annexed to it. He died a bachelor on the 10th of August 1856, and thereupon the issue male of George Talbot, on whom the estates were, by the settlement of the Duke of Shrewsbury, and by the said act of 1720, settled in tail male, became extinct; and thereupon (upon failure and in default of issue male of the said Gilbert Earl of Shrewsbury, of the said George Talbot and of the said John Talbot, in the said act mentioned) the plaintiff, the present Earl of Shrewsbury, became and now is the person, being issue male of the said John, first Earl of Shrewsbury, to whom the said title, honour and dignity of Earl of Shrewsbury has, after the decease as aforesaid of the said Gilbert Earl of Shrewsbury, George Talbot and John Talbot, without issue male of their respective bodies, by virtue of the said letters patent of creation of the said earldom, descended and come. Prints of the acts of parliament referred to, and a copy of the lease hereinbefore mentioned, accompany and are to be considered part of this case. [These acts contained recitals and sections of great length, but in so far as they are material, are sufficiently set forth in the arguments of the counsel and in the judgments of the learned Judges.]

The question for the consideration of the Court in this action is,

Whether John Earl of Shrewsbury had power to demise, by the said indenture of lease of the 2nd of February 1851, the lands therein mentioned, so as to bind the plaintiffs?

If the Court shall be of opinion in the negative of the above question, the plaintiffs, or such one of them as the Court shall direct, shall be entitled to judgment to

recover the lands described in the writ in this action, with costs.

If the Court shall be of opinion in the affirmative of the above question, the defendants in the said action shall be entitled to judgment in the said action, with costs.

Manisty (Hannen and Howe, of the Chancery Bar, with him), for the plaintiffs.—The question in the present case is, whether the leasing power which is given to John Earl of Shrewsbury by section 33. of the act of 1843 (6 & 7 Vict. c. 28.) extended to lands in Oxton. It is submitted that it did not. The whole of the lands in Oxton had been taken out of settlement by the act of 1803 (43 Geo. 3. c. 40), and the object of the act of 1843 was to take some other of the settled estates out of settlement, and to vest them in trustees for sale, but it was not intended to undo what had been done by the act of 1803. A power of leasing for ninety-nine years for building purposes is certainly granted by section 33. of the act of 1843, and the defendants will rely on that power as authorizing the lease in question; but that power, it is submitted, has reference to very different lands from those in Oxton, which are the lands comprised in the present lease. The power is confined to the settled estates, and does not extend to those which had been previously taken out of settlement by the act of 1803, as was the case with the lands in Oxton. There are various clauses in the act of 1843 which confirm this view of it; thus, in the preamble to the 1st section, it is recited, that "it would be for the benefit of the said John Earl of Shrewsbury, and those who may succeed to the said settled estates," if the lands there mentioned were vested in trustees for sale. And in that same section the lands are vested in the trustees upon trust to sell, with the consent of the said Earl John, and "after his decease then with the consent of the person who for the time being shall be in the possession of the settled estates by virtue of the limitations before mentioned." Then the 33rd section, on which the defendants rely, gives the power of leasing to the said Earl John during his life, and after his decease to the persons entitled under the limitations of the settlement, "as and when they shall respectively, by virtue of the limitations

aforesaid, be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being shall stand limited and settled by virtue of or under," *inter alia*, the said Settlement Act of 1720, "as shall then be subsisting or capable of effect." How can that include the lands in Oxton which were then out of settlement? When the Earl made this lease of land in Oxton, it is clear that he was not in possession of such land under the limitations of the settlement, nor did such land stand limited and settled under the act of 1720.

Sir Hugh Cairns (Mellish and E. E. Kay, of the Chancery Bar, with him), for the defendants.—The act of 1843 had two purposes, one to vest the lands in trustees for sale, and the other to give aid to the leasing power given by the act of 1720, and to create new leasing powers. The contention of the other side is, that the moment lands are vested in trustees for sale they cease to be in settlement; but no sale having taken place, no distinction ought to be made, nor was intended to be made, between such lands and any other part of the settled estates. It is submitted that the expression "settled estates," in the 1st section of the act of 1843, includes the whole of the estates which had been settled, whether any part of them had or not been previously vested in trustees for sale by the act of 1803. The preamble to section 1. of the act of 1843 recites that "it would be for the benefit of the said John Earl of Shrewsbury and those succeeding to the settled estates if sufficient powers and authorities were given to the said John Earl of Shrewsbury and the successive takers of the settled estates to grant leases of any mines, layers, veins, seams, beds and strata of ironstone, coals, lead, copper and other minerals and substances within or under any of the said settled estates for such term," &c. Then section 40, which carries this out by giving the power to grant such mining leases, expressly mentions Oxton as one of the townships in which the lands having such mines are situate; so that it shews that Oxton is treated by that act as part of the settled estates. Section 2, moreover, which directs the monies arising from the sales by the trustees to be paid into the Court of

Chancery, describes the account to which it is to be there placed as "*ex parte* the purchasers of the settled estates of the Right Honourable John Earl of Shrewsbury"; and yet the plaintiffs contend that those estates are taken out of settlement the moment they are vested in trustees for sale. Then section 13. gives a power to the Earl for the time being to accept surrenders of leases granted under the power of leasing in the act of 1720, and to grant new leases for sixty years. The power to accept such surrender is not limited to any particular lease, but is a power "to accept a surrender or surrenders of *any* lease or leases which have been granted," &c., under that first act. With regard to section 33, under the authority of which the lease in question was made, it is submitted that Earl John when he made such lease was in possession by virtue of the limitations contained in the said settlement and act of 1720; for if not, how otherwise was he in possession of the lands in Oxton? And, further, it is submitted that those lands were then part of the settled estates; for, as there had been no sale, there was no purchase-money or anything else then to represent such part of the settled estates.

Manisty, in reply.—The Oxton estate is in trustees on a trust under the act of 1803, which (except as to power to accept surrenders) is intact. In 1843 Oxton, though in a certain sense, perhaps, part of the settled estates, was not settled to uses of the old settlement capable of taking effect, and was not part of the then settled estate. John Earl of Shrewsbury was not a person entitled by virtue of the specified limitations, but the person who would have been if they had existed; and the argument on the other side comes to this, that the power is to extend not merely to lands limited, but to those which but for the statutes would have been. The power of leasing referred to in the 1st section of the act of 1843 is ratified by section 13, the terms of which differ from those of section 33.

ERLE, C.J.—I am of opinion that the defendants are entitled to judgment. The lease is a lease, under section 33. of the act of 1843, of lands in Oxton; and the defendants are entitled to our judgment if the lease be valid. The history of the property

is, that large estates were settled, by act of parliament, in 1720, on the persons who should be Earls of Shrewsbury, and this land at Oxton is comprised in that settlement. In 1803 a portion of these estates were, by act of parliament, exonerated from the uses of the act of 1720, and vested in trustees for sale, section 7. of that act enacting, "that in the mean time and until the said manors, &c., hereby directed to be sold shall be sold in pursuance of the trusts aforesaid, the same premises, respectively, shall be held, possessed and enjoyed, and the rents, issues and profits thereof shall be had, received and taken by, and be applied to and for the benefit of such person and persons as would have been entitled thereto and ought to have held, possessed or enjoyed and received the same respectively, in case this act had not been passed." And it is very material to consider whether the Earl of Shrewsbury for the time being takes possession of the lands in Oxton. He has possession of Oxton by virtue of the act of 1720; he takes under the act of 1803; but that act refers to the act of 1720, and the rights of all persons have to be ascertained by that act. In 1843, it became expedient to part with some outlying property, and re-invest the proceeds in other lands, in order to make the estate more compact, and an act was then passed for the purpose of the sale of the farms set out in the schedule to such act. This was one object of the act of 1843; but it is clear that the proprietors of the estates obtained several other powers, applicable to the whole of the Shrewsbury estates, in particular the leasing power given by section 33, which extends to land unaffected by the act of 1803, and also in some degree to the lands in the schedule of the act of 1843 itself.—(His Lordship then read so much of section 33. as is set out in the case.)—In my opinion the Earl of Shrewsbury was the person in actual possession by virtue of the act of 1720, and the lands are lands limited to such of the uses limited by that act, "as shall then be subsisting or capable of taking effect." Subject to the power of sale, he was in possession under the act of 1720, and he therefore had power to demise. With respect to our decision in the previous case, the power of leasing here is binding on the remainderman, and is clogged in every way,

and quite distinct from that given by the act of 1720. The whole context is confirmatory of this view. Exceptions are made in different places as to different parts of the estates, and where no exception is made the statute ought to be construed to extend to all the estates. In the recital we find, "And whereas it would be for the benefit of the said John Earl of Shrewsbury and those who may succeed to the said settled estates if the said last-mentioned manors, &c. were vested in trustees in trust to sell the same, with a provision for investing in the purchase of other manors, &c., . . . to be settled to the uses and under the restrictions which shall be subsisting or capable of taking effect in the settled estates not vested by the act of 43 Geo. 3. . . . or by this act, in trustees to be sold." Here by "settled estates" is contemplated the whole estate, with an exception for which the reason is apparent. Again, section 7, as to the jointuring power, extends to the whole Shrewsbury estate, with a specific exception of the lands contained in the schedule to the act of 1803, and the second schedule of the act of 1843. And the same observation applies to section 14, which gives a power to grant annuities. In these sections there is an express exception of these lands. Now let us consider the general clauses. Section 12, which gives a power to grant leases for twenty-one years—(His Lordship read the section),—is subject to an exception as to Alton Towers and the lands usually enjoyed therewith, shewing the care taken to use the term "settled estates" in a wide sense. Section 13. does not bear on the question. Then section 33. evidently gave a power of leasing the lands to be sold under the act of 1843, for the sale is to be without prejudice to the leases granted under the act, and these lands stand in a like position with those to be sold under the act of 1803. This view is also confirmed by section 40, which relates to mining leases, and which, in setting out *nominatim* various lands to which it shall apply, mentions Oxton. It is said this must have been done by mistake; but the statute, on the contrary, has been drawn with great care. For these reasons, I am of opinion that the lease is valid, and that the defendants are entitled to our judgment.

WILLES, J.—I am of the same opinion. Our conclusion is in accordance with what might have been expected would be the provisions of the statute. Up to the year 1843, the Shrewsbury estates were enjoyed under the provisions of a statute passed in the reign of George the First, a statute which was passed under peculiar circumstances. By this statute the estates were settled on a Roman Catholic family, with a provision that on any person who inherited the property becoming a Protestant he might alien it, and a power of leasing for three lives or twenty-one years, or any term determinable on three lives, on the reservation only of the usual and accustomed rents. Therefore, in the previous case the Court was obliged to hold that the lease was void, for to hold that the leasing power given by section 10. of that statute applied to lands within the act of 1803 would have been to hold that the tenant for life under the powers of the old act might anticipate the sale of the lands which were to be sold by the trustees under the act of 1803. So matters stood till 1843; the whole property improved in value, and in that year a statute was passed which worked a remarkable effect on the family property, and which appears to have been intended to deal with the whole property except where expressly limited not to affect particular portions. One naturally looks to see whether the powers given by this act affect the powers for the sale of land or help them. The powers in the act of 1843 do not allow the person in possession of the estate to anticipate any of the income, but allow leases for the benefit of those enjoying from time to time. To a purchaser it would not matter whether this power of leasing affected the land or not; but to those enjoying the estates it makes all the difference, and the argument from convenience is in favour of the construction that the powers apply to the whole estate. And I think the language clear; I think that the language in section 33. and the other portions of the act shews they were so meant to apply. Section 33. applies to all the lands comprehended in the statute of Geo. 1. and not expressly excepted. (His Lordship referred to the section.)—I am clearly of opinion that the lessor enjoyed this land by virtue of that act; without that act he would not have enjoyed it at all. By

section 5. of the act of 1843, and section 7. of the act of 1803, till the sales, the property is to be enjoyed by such persons as would have been entitled if the acts were not passed, and how otherwise the lessor could take has not been suggested. Then the words in sections 7. and 14, as to jointuring and providing for younger children, are exactly similar to those in section 33; but the sections not being intended to affect the lands to be sold under the acts of 1803 and 1843, there are express words of exception. So that not only is the language sufficient, but we have two expositions of what the meaning and effect of these words would be but for the exception. And also in one power (the power of granting mining leases) these very lands are mentioned by name. So much for the body of the act. But I apprehend that we have another key to the meaning of the words in question, a key given by the recitals contained in the 1st section: "Whereas, the said John Earl of Shrewsbury . . . is tenant in tail male in possession of the said settled manors, &c. . . . and whereas several manors, &c. . . . set forth in the second schedule . . . (being part of the said settled estates)" referring to the whole property; "and whereas it would be for the benefit of the said John . . . and those who may succeed to the said settled estates, if the said last-mentioned manors &c. were vested in trustees to sell, with a proviso for investing . . . in . . . other manors, &c. . . . to be settled to the uses and under the restrictions which may be subsisting or capable of taking effect," the very words of section 33, "in the settled estates not vested by 43 Geo. 3. c. 40. . . . in trustees to be sold; . . . and whereas it would be for the benefit of the said John . . . and those succeeding to the settled estates, if the power contained in 6 Geo. 1. c. 29. of granting leases . . . were repealed, and . . . takers of the settled estates were enabled to grant leases," for a certain term, "and also upon surrender of any subsisting leases," with an exception, "to grant leases, &c." All these considerations make it a matter of demonstration to my mind that the powers given by section 33. have been properly exercised.

BYLES, J.—I am of the same opinion. The case says that the lease is in conformity with the power contained in the act of 1843,

save in so far as therein appears to the contrary, and I am of opinion the lease is within the power. The objection taken is that by 43 Geo. 3. c. 40. these lands were vested in trustees for the purpose of sale exempted from the uses of 6 Geo. 1. c. 29, and that therefore section 33. of the act of 1843 did not apply to them. It is quite plain that all that was necessary to effect the object of the statutes of 1803 and 1843, as to the sale of lands, was that the trustees should be able to make out a clear title to purchasers. But then what was to be done with the land in the mean time, and before they were sold? Why, by section 7. of the former and section 5. of the latter act, till sale, the land is to be enjoyed by such person as would have been entitled thereto, and have held and enjoyed them, but for the respective acts. At the time this lease was granted John Earl of Shrewsbury was the person so entitled, holding and enjoying these lands. How was he entitled, and how did he hold and enjoy, except under the statute of 6 Geo. 1. c. 29, the statute of 1720? Then comes section 33. of the statute of 1843, which says that the person entitled under such statute shall have the power of granting such a lease as this.

SMITH, J.—I am of the same opinion, as I think that section 33. of the act of 1843, construed by the title disclosed in the act, and the different provisions contained in it, includes the lands vested in trustees for sale. Section 1. shews an intention that the lands to be sold under this act should be subject to some leasing power; therefore over those there was to be some leasing power. It is said this intention is satisfied by sections 1, 2. and 3. giving power to grant new leases; but why the words are to be so limited I do not see. Again, it is said that there is a difference in the language. I do not think so. The words in section 12, giving a power to grant leases for twenty-one years, are the same as in section 33, and section 13. merely avoids a repetition of them, and refers to the preceding section. There are four powers of leasing—first, a power to lease for twenty-one years; secondly, a power to accept surrenders and grant new leases; thirdly, the power given by section 33; and, fourthly, a power to grant mining leases. Why should the power given by section 33. especially not be applicable? The

intention was, that inasmuch as there might be a long interval before the sale, and the inconvenience no doubt had been felt as to the want of leasing powers, there should be a power of leasing, care, however, being taken that the inheritance should not be deteriorated. I, therefore, am clearly of opinion that our judgment should be for the defendants.

Judgment for the defendants.

1865. }
June 3. } MURCHIE v. BLACK.

Easement—Right of Support from adjoining Land—Severance of Estate—Vendor and Purchaser—Contract.

G, the owner of certain land, sold it in lots, subject to conditions, by which, *inter alia*, the purchaser of lot 6, was required to covenant to build according to a certain elevation. The plaintiff, who was the purchaser of the adjoining lot 7, altered, with G's consent, an old building standing on such lot, by raising its wall several feet on the side next to lot 6. The defendant, who was the purchaser of lot 6, excavated the land as required to build according to the said conditions, and in consequence of this the plaintiff's building fell:—Held, that as the excavations were authorised by the conditions of sale, and were made therefore with the licence of G, the vendor, the plaintiff could not sue for the injury he had sustained by his building being so deprived of the lateral support of the land in lot 6.

Semble, that the plaintiff, assuming he had the right to such support, lost it by raising the old wall and so increasing the superincumbent weight.

This was an action to recover compensation for damages alleged to have been sustained by the plaintiff, by reason of the defendant having caused the plaintiff's house to fall down.

The cause came on to be tried, before Shee, J., at the Carlisle Spring Assizes, 1864, when a verdict was found for the plaintiff, by consent, for the money claimed in the declaration, subject to terms embodied in an order of Nisi Prius, thereupon made, and subject to the following

CASE.

On the 10th of February, 1862, Francis Graham was seised in fee simple in possession,

by virtue of a purchase and conveyance from Mr. Edwin Hough, of certain lands and premises situate on the south side of Devonshire Street, in the city of Carlisle, and described on the plan annexed to the case as lots 6, 7, 8, 9, 10. and 11.

On the 10th of February, 1862, the said F. Graham conveyed the said lands to E. Hough by way of mortgage in fee, to secure the repayment of 2,000*l.* advanced by the said E. Hough to the said F. Graham. Before F. Graham's said purchase, the lands so purchased by him had, with other pieces of land situate on the south side of the said street, and which were described in the said plan as lots 1, 2, 3, 4. and 5, been laid out by Mr. Hough in lots, as shewn in the said plan, for building purposes; of the lands so laid out, lots 1, 2, 3, 4. and 5. had, before F. Graham's said purchase, been sold by Mr. Hough, who, at the time of such sale, was seised thereof in fee simple in possession. Lots 2, 3. and 4, and part of lot 5, had been built upon before the 27th of March 1863.

After the said purchase by the said F. Graham, and before the 27th of March, 1863, F. Graham had sold lots 9. and 11, and the same had been conveyed to the purchaser thereof.

On the 27th of March, 1863, the lands described on the plan as lots 6, 7, 8. and 10. were put up for sale by auction in separate lots, but no sale of any lot then took place.

On the 30th of April, 1863, a verbal agreement was made between the said F. Graham and the defendant, with the consent of the said E. Hough, for the purchase by the defendant by private contract of lot 6, and on the 12th of May, 1863 an agreement in writing, embodying the terms of the said verbal agreement, and which agreement in writing had been prepared on, and dated, the 30th of April, 1863, was signed by the said F. Graham and the defendant. This agreement (a copy of which was annexed to the case) was written at the foot of the conditions of sale, on which the lands had been put up for sale by auction, and subject to such conditions, so far as they were applicable to a sale by private contract, it was stated in the said agreement that the defendant should be a purchaser. (A copy of the said conditions of sale so referred to in the agreement was also annexed to the case.)

By these conditions it was stated, as to lot 6, that "the purchaser will be required to covenant to build according to the elevation of lot 2, or such other elevation as the vendor shall approve," and that "the wall between lot 5. and this lot, and this lot and lot 7, and between lots 7. and 8, and between lots 8. and 9, and between lots 9. and 10, and between lots 10. and 11, shall, when built, be deemed party-walls, and if erected by the purchaser of one of such lots, the owner of the adjoining lot shall be bound to pay him one-half of the cost of erecting such wall, whenever the owner of the adjoining lot shall make use of the same." By the expression "elevation of lot 2," occurring in the said conditions, is meant the elevation of the building then standing on the lot described as lot 2.

On the 26th of May, 1863, an agreement was made between the said F. Graham and the plaintiff, with the consent of the said E. Hough, for the purchase by the plaintiff of lot 7, and an agreement, dated the 26th of May 1863 (a copy of which was annexed to the case, and which was similar in form to that between Graham and the defendant), was thereupon signed by the plaintiff and the said F. Graham. The plan and lots referred to in the conditions mentioned in the said agreement with the plaintiff are the same as those referred to in the said conditions of sale mentioned in the said agreement dated the 30th of April 1863, and signed on the 12th of May 1863, of which said agreement, and of the conditions referred to therein, the plaintiff had no positive knowledge at the time of his entering into the said agreement of the 26th of May 1863, but he then had reason to suppose, and did suppose, that the defendant had entered into an agreement corresponding in its terms and conditions to the agreement then entered into by the plaintiff.

On the 29th of May, 1863, the plaintiff was put into possession by F. Graham of lot 7, with Mr. Hough's consent, and continued in possession thereof till the house afterwards erected upon it fell.

Lots 6. and 7. so respectively purchased by the plaintiff and the defendant were plots of land on which respectively buildings stood at the time of such purchases respectively. The western wall of the old building standing on lot 7. was an ancient wall, having

been built above twenty years. It stood on lot 7. at the time of its purchase, and remained continuously there till the fall of the plaintiff's building as hereinafter mentioned. And when the plaintiff was put into possession it stood fifteen feet above the surface of lot 7. The intended party-wall between lot 6. and lot 7, referred to in the conditions mentioned in the respective agreements of the 30th of April, 1863 and the 26th of May, 1863, would have cleared every part of the above-mentioned old wall at the front or north end for about two-thirds of the length; for the remaining third it would have taken away about two and a half inches of the old wall below the surface of the ground, but would not have interfered with it above the surface, as the intended party-wall was to be a fourteen-inch wall below the surface, and a nine-inch wall above the surface. The said old wall is a fourteen-inch wall throughout, inclusive of the foundation.

The plaintiff, on being put into possession as before mentioned, made preparation for altering and raising the old building so then standing upon lot 7, a verbal understanding having been come to between himself and F. Graham at the time of his agreeing to purchase that lot, that the building to be erected thereon should not be immediately constructed in accordance with the elevation of lot 2, but that he should be at liberty to put up a temporary building thereon in the first instance. In accordance with this understanding, the plaintiff proposed to effect the alterations of the old building on lot 7. by leaving the western wall of it standing, and raising its height. The plaintiff, with the consent of F. Graham, but without the knowledge of Mr. Hough, raised the western wall of the old building to the height of twenty-four feet from the surface, being nine feet additional to its former height. The wall so raised formed the side of the plaintiff's house next to lot 6. The alterations so made by the plaintiff were completed on the 7th of July, 1863. The raising of this wall and the building of the plaintiff's house made a considerable addition to the weight of the wall as it was before it was raised. About one-third more support was needed for the raised wall and the new house than had been required for the support of the old wall, as it stood when the plaintiff was put

into possession. When the lateral support of the earth is removed, more labour and material is required, or greater risk is incurred in supporting a heavier building than is required or incurred in supporting a lighter building. Such increase of labour and material or risk was small in the case of the plaintiff's raised wall as compared with the wall before it was so raised, but such increase existed, and a builder contracting for the support of the respective buildings would take it into consideration, but would estimate it at less than 20s. The house built by the plaintiff was a lighter house than a house would have been which should have been erected according to the elevation of lot 2. On the 3rd of August, 1863, the defendant took possession of lot 6, and made preparations to pull down the old buildings standing upon it, and to build thereon a new house according to his agreement dated the 30th of April, 1863, and the conditions therein referred to; and for that purpose he proceeded to make the excavations in lot 6. for the said new house to be erected thereon. In consequence of the excavations so made, and before they were completed, the plaintiff's building on lot 7. gave way, and on the 1st of September, 1863, fell. The excavations so made were, in accordance with the defendant's said agreement of the 30th of April, 1863, and the conditions therein referred to; and were such excavations as were required for a building similar to that on lot 2; the elevation of which is referred to in the said conditions. The said excavations were of considerable depth below the surface of lot 6, which was on the same level as the surface of lot 7. They were entirely within lot 6, and at the time when the house fell had not approached within some feet of the plaintiff's wall. The earth then left unexcavated on lot 6, adjoining lot 7, was more than sufficient to support the earth on lot 7. in its natural state, without any superincumbent weight, but it was not sufficient to support the earth of lot 7, with the superincumbent weight of the plaintiff's building thereon, as that building was after the wall had been raised, and it was not such as, in the opinion of competent builders or architects, could have been relied upon to support the earth of lot 7, with the superincumbent weight of

the old building before it was raised. The probabilities are, that the excavations which caused the fall of the plaintiff's house, would have caused the fall of the old wall in its unaltered state. The proper means for supporting such a building as the plaintiff's, either in its original or altered state, when the lateral support of the earth adjoining is removed, are, by underpinning or under-propping, which consists in taking away earth upon which the building stands, and inserting brick pillars or wooden posts in its place. This was not done with respect to the plaintiff's house. The only means taken for its support were the placing stays or props against the side of it, which was done on three several occasions, about the 20th, 25th and 31st of August, when shrinks or cracks shewed themselves in the house, but which means were quite insufficient.

After the building had begun to crack and until within a day or two of its fall, it might have been saved had the proper means been resorted to; but neither the plaintiff nor the defendant would incur the expense of resorting to them; neither party placed any impediment in the way of the other supporting the building by any means the other might think proper, and each expressed his readiness to assist the other, disclaiming at the same time his own obligation to support the house, and insisting that such obligation rested on the other. Thus the stays were put up by the co-operation of both, as an act of mutual concession; but the means known by both to be effectual for supporting the house were omitted.

No conveyance of lot 6. to the plaintiff, or of lot 7. to the defendant, was executed till after the plaintiff's house fell in the manner stated.

The Court was to be at liberty to draw all inferences of fact which a jury would be justified in drawing.

The question for the decision of the Court was, whether the plaintiff was entitled to recover.

E. James (T. Jones with him), for the plaintiff.—The plaintiff is entitled to recover. Whenever any one owner of an entire property separates it, and conveys one portion of it to one person and another portion to another person, each portion is impressed with the

same rights and burdens they had when both were held by one and the same owner. Therefore, when lot 6. was sold to the defendant, the house which was standing on lot 7. had a right to the support of the land of lot 6. The rule is stated to the above effect in *Gale on Easements*, 3rd edit. p. 83, *et seq.*, and at p. 98 the case of *Richards v. Rose* (1) is cited as an authority to shew that upon the severance of ownership of two or more houses, obviously and necessarily requiring mutual support, there is, by an implied grant or reservation, as the case may be, the right to support, and that such right equally subsists, whether the owner parts first with one and then with the other, or with two together, the last being afterwards divided. It is submitted that Graham, when he sold these lots, impliedly reserved to himself the right of support to the buildings then on the land, and that the exercise of such right has not been precluded by the additional weight which the plaintiff placed on the old wall. At all events, as by the conditions of sale the purchaser was informed of the right to erect other buildings, and, consequently, the additional weight was in the contemplation of all parties, it is manifest that the plaintiff has a right of action against the defendant for depriving him of the retaining ground which was necessary to support the plaintiff's house; and the defendant cannot say that the plaintiff has lost his right to such support by reason of the additional weight which he placed on the old building. *Taplin v. Jones* (2), in which the House of Lords affirmed the decision of the Exchequer Chamber, supports this view. Lord Wensleydale, in *Gayford v. Nicholls* (3), recognizes the right of support of soil by reason of a presumed grant where both houses were originally in the possession of the same owner; and the same principle is borne out by the case of *Pyer v. Carter* (4). The cases of *Brown v. Robins* (5), *Stroyan v. Knowles* (6), *The Caledonian Railway*

Company v. Sprot (7), *Dugdale v. Robertson* (8), and *The North-Eastern Railway v. Elliott* (9), are also authorities in favour of the plaintiff's right of support from the defendant's land.

Manisty (*Kemplay* with him), for the defendant. — The general principle contended for on behalf of the plaintiff is not disputed, but under the special circumstances of this case it is submitted that the plaintiff had no right to the support from the defendant's land, and is not entitled to maintain this action. The plaintiff cannot stand in a better position than Graham, his vendor, stood on the 30th of April 1863, when the contract was made with the defendant as to lot 6, by which that lot was sold by Graham to the defendant, on the condition that he should build thereon according to the elevation of lot 2, or such other elevation as the vendor should approve. So that, unless Graham or the plaintiff, who stood in Graham's place, approved of a different plan, the defendant was bound to erect a building according to such elevation, and it is found in the case that the excavations were in accordance with the defendant's agreement of the 30th of April, 1863, and were such as were required for a building similar to that on lot 2.

E. James, in reply. — The vendor never agreed to waive the rights which, according to the authorities, the law had given him.

ERLE, C.J. — I am of opinion that our judgment in this case should be for the defendant. The action is brought by the plaintiff against an adjoining owner for depriving the plaintiff's building of the support it had from the defendant's land. Each party had become possessed of their respective lots (the plaintiff of lot 7. and the defendant of lot 6), in the course of 1863, and previously to their becoming so possessed there had been a unity of possession in Graham. The plaintiff therefore stands exactly in the same position as if lot 7. had remained in possession of the vendor. Then

(1) 9 Exch. Rep. 220; s. c. 23 Law J. Rep. (N. S.) Exch. 3.

(2) *Post*, 342.

(3) 9 Exch. Rep. 708; s. c. 23 Law J. Rep. (N. S.) Exch. 205.

(4) 1 Hurl. & N. 916; s. c. 26 Law J. Rep. (N. S.) Exch. 258.

(5) 4 *Ibid.* 186; s. c. 28 Law J. Rep. (N. S.) Exch. 250.

(6) 6 Hurl. & N. 454; s. c. 30 Law J. Rep. (N. S.) Exch. 102.

(7) 2 Macqueen, 449.

(8) 8 Kay & J. 695.

(9) 1 Jo. & H. 146; s. c. 29 Law J. Rep. (N. S.) Chanc. 803.

if that had been so, lot 7. would have been entitled to the lateral support of the soil of lot 6, according to the authorities which have been cited by the plaintiff's counsel; but my judgment turns on the question whether there is not in the conditions under which the lot 6. was sold to the defendant, a stipulation which justifies what otherwise would have been actionable against the defendant. The vendor sold that lot to the defendant, who purchased it with a contract, under which it was obligatory on his part, or at least it was within the terms of it, that the defendant doing his duty to the vendor should do that which brought down the plaintiff's house. Therefore the licence of the vendor took away that which would otherwise have been a cause of action. That is how the case appears to me to stand on the title between these parties. There is, however, another point which it is not now necessary to go into, and that is, whether the plaintiff, though he should be entitled to the lateral support of lot 6, was entitled to such support in respect of the superincumbent weight of the plaintiff's building. It seems to me that if that point had been gone into, the plaintiff would not have had a right to such support; inasmuch as he had imposed a much greater weight than previously existed, and without which, probably, the old building would not have gone down. However, for the reasons already mentioned, I think the defendant is entitled to our judgment.

WILLES, J.—I am of the same opinion. Assuming the plaintiff to have had the right to the support of the adjoining land, I think he lost it by what my Lord has adverted to. This is not like the case of ancient lights, but an additional weight placed upon an old wall, and thereby the entire building must be treated as one weight, just as if a carpenter were to make a table capable of sustaining one hundredweight, and a person were to put half a ton upon it, and the table were to break in consequence of the increased pressure, could any complaint be made against the carpenter. On the other ground stated by the Chief Justice, I am also of opinion, that the defendant is entitled to our judgment, as he did no more than he was bound to do by the contract with his vendor.

BYLES, J.—I am of the same opinion. Had there been no special contract here,

and no additional superincumbent weight on the plaintiff's land, the cases cited for the plaintiff might have applied, but I agree with the defendant's counsel, that the facts render the consideration of those cases unnecessary, for the plaintiff's claim is subject to the vendor's right and the vendor's obligations, and the vendor not only expressly licensed, but by the condition of sale obliged the defendant to build in a way which would require him to do what he did. There is no stipulation that he should underpin or underprop, or give notice to any one, and if notice were necessary, the case shews that the plaintiff well knew what was going on. I also think there is no proof of any actual injury caused by the defendant's works, because it is not shewn that it was not caused by the superincumbent weight of the building which the plaintiff put on his land, and therefore it might have been caused by the act of the plaintiff himself. On both grounds, I think the defendant is entitled to our judgment.

SMITH, J.—The right to the support of the adjoining land is an implied right, and does not therefore exist where, as here, there are express stipulations to the contrary. There was, I think, here, at least a licence by the vendor to the defendant to do what he did, and the vendor must be supposed to contemplate the consequences thereof. Then, was the defendant under these circumstances bound to have gone on the plaintiff's land to prop up the plaintiff's building? I think that he was not, and that he is not liable for the injury the plaintiff has sustained, for the defendant did only what he was authorized by the vendor to do, and it is not found that he did that in a negligent manner. It is unnecessary to give any opinion on the other point in the case.

WILLES, J.—I wish to add, that the present case is analogous to that of *Roubotham v. Wilson* (10), affirmed in error, and in the House of Lords (11).

Judgment for the defendant.

(10) 6 El. & B. 593; s. c. 25 Law J. Rep. (N.S.) Q.B. 362.

(11) 8 H.L. Cas. 348; s. c. 30 Law J. Rep. (N.S.) Q.B. 49.

[IN THE HOUSE OF LORDS.]

1865.
Feb. 17, 20, 21; } TAPLING v. JONES.
March 16. }

Easement—Ancient Lights—Abandonment by Encroachment—New Windows—Right to obstruct—Prescription Act, 2 & 3 Will. 4. c. 71. s. 3.

A. was the owner and occupier of a house of three stories which had an ancient window on each floor. He altered the windows in the two lower floors, leaving the window in the third floor unaltered. He also built two new stories to his house, with windows intended to be permanent. A. did not intend by making these alterations to abandon any privilege of his ancient windows. B, the owner of adjoining premises, could not obstruct the new windows in the upper floors without also obstructing the old windows, and he built on his own land a wall which had the effect of obstructing all A.'s windows. A. afterwards blocked up his new windows, and sued B. for continuing the obstruction of the wall, which the defendant refused to remove:—Held, that B. had not at any time the right to build a wall which would have the effect of obstructing the ancient lights in A.'s house, although the new windows could not otherwise have been obstructed.

The right to an ancient light since the Prescription Act depends upon the statute, and does not rest on any presumption of a grant or a fiction of a licence having been obtained from the adjoining proprietor.

Renshaw v. Bean (1) and Hutchinson v. Copestake (2) overruled.

This action was commenced in the Court of Common Pleas, on the 24th of February 1858, and was brought for an alleged obstruction of the access of light and air to certain windows in the west side of a warehouse, No. 107, Wood Street, Cheapside, in the City of London, the property of the respondent, the defendant in error and the plaintiff below.

The declaration consisted of two counts. The first count alleged a right on the part

of the defendant in error to the access of light and air to certain ancient windows of a messuage and building in that count mentioned, and stated, by way of breach, that the plaintiff in error, by wrongfully building and continuing a wall near to such windows, prevented the light and air from coming to or entering the same. The second count alleged a right to the unobstructed access of light and air to the said windows, and averred as a breach that such access was obstructed by the wrongful continuance of a wall, on a close opposite and near to such windows.

The defendant pleaded, first, not guilty; secondly, a traverse of the right alleged in the first count; and, thirdly, a traverse of the right alleged in the second count.

There was a replication joining issue on these pleas.

Upon these issues the cause came on to be tried, at the Sittings at the Guildhall of the city of London, on the 16th of February 1859, when a verdict was entered for the defendant in error, for the damages claimed in the declaration, subject to a special case. A special case was afterwards stated, which, so far as it is material, was to the following effect:

"The plaintiff is a wholesale dealer in silk, and now carries on his business at Nos. 107, 108 and 109, Wood Street. The plaintiff had for several years prior to 1857 carried on his business at Nos. 108 and 109, Wood Street, but he acquired possession of the premises No. 107, Wood Street, for the first time in the year 1857, having become the purchaser of them in the month of July in that year. Up to the time when the plaintiff acquired possession of the said premises No. 107, they were used and occupied as a public-house, known by the sign of the "Magpie and Pewter Platter," and were, and are, in a line with and next adjoining Nos. 108 and 109. The said premises, Nos. 107, 108 and 109, abut, on the rear or west side thereof, upon the east side of certain premises fronting in Gresham Street West, and therein numbered 1 to 8, hereinafter called the Gresham Street property. In the year 1852 the plaintiff pulled down his premises, Nos. 108 and 109, Wood Street, which were then old and dilapidated houses, and erected on their site new warehouses. In doing

(1) 18 Q.B. Rep. 112; s.c. 21 Law J. Rep. (N.S.) Q.B. 219.

(2) 9 Com. B. Rep. N.S. 863; s.c. 31 Law J. Rep. (N.S.) C.P. 19.

so, he altered the position and enlarged the dimensions of the windows previously existing, increased the height of the building, and set back the rear or back line of those warehouses.

The defendant, who is a carpet-warehouseman, on the 23rd of July 1852, was tenant of the said Gresham Street property, and now holds the same under a lease for a term of eighty-one years since granted to him. In and about the year 1856 the defendant pulled down the buildings then standing on the Gresham Street property in order to erect thereon a warehouse.

The plaintiff, in July 1857, immediately after his purchase of No. 107, Wood Street, made alterations in it by lowering the first and second floors so as to make them correspond with his adjoining new warehouses, Nos. 108 and 109, and by lowering two of the windows in such floors so as to suit the new position of the floors. One of the lowered windows was about one foot longer than before, and the other about the same size as the old one, and both occupied parts of the old apertures. A small window on the first floor was blocked up. He also built two additional stories to No. 107, in the first of which, viz. the fourth story of the premises, he put out a new window, and in the fifth or attic story he placed a window extending across the entire width of the building. These new windows and lights were so situated that it was impossible for the owners of the said Gresham Street property to obstruct or block them without also obstructing or blocking, to an equal or greater extent, that portion of the said windows and lights which occupied the site of the said ancient windows in No. 107.

The said alterations and additions in No. 107, Wood Street, so far as the windows are concerned, were completed by the plaintiff in the month of August 1857.

After the alterations and additions to No. 107, Wood Street, had been so completed, the defendant proceeded to erect his said intended warehouse and premises on the Gresham Street property, and built up the eastern wall thereof to such a height as to obstruct the whole of the windows and lights of No. 107, Wood Street.

The defendant refused to remove the said eastern wall of his warehouse and premises or any part of it.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover in respect of the obstruction of light and air complained of. If they are of opinion that he is so entitled, then the verdict entered for the plaintiff is to stand and the damages to be reduced to 40s.; if they think the plaintiff is not so entitled, then the verdict entered for the plaintiff is to be set aside and a verdict entered for the defendant."

The Judges of the Court of Common Pleas were equally divided in opinion, the Lord Chief Justice and Mr. Justice Williams being in favour of the plaintiff below, Mr. Justice Keating and Mr. Justice Byles being in favour of the defendant below. Mr. Justice Keating thereupon withdrew his opinion, and judgment was given in favour of the plaintiff below (3).

The defendant below brought error upon that judgment, and the Court of Exchequer Chamber affirmed the judgment. There was a difference of opinion among the Judges, Mr. Justice Wightman, Mr. Justice Crompton, Mr. Baron Bramwell and Mr. Justice Blackburn being in favour of the plaintiff below, and the Lord Chief Baron and Mr. Baron Martin being in favour of the defendant below (4).

The Attorney General and Archibald, for the appellant.—The right to an easement must rest on some presumed grant, and the extent of the grant is always to be referred to and measured by the user and the effect of it. The cases shew that whatever may be the origin of the right, such right is measured by usage. So, if the effect on the property subject to the right is varied, the party having the right cannot claim the benefit of the right as to the old part which has remained unaltered, so as to shield the user of the new part. Such an alteration sets the owner of the servient tenement free to protect himself. As to the origin of the right being presumed to be in grant before the Prescription Act—

(3) 11 Com. B. Rep. N.S. 283; s. c. 31 Law J. Rep. (N.S.) C.P. 110.

(4) 12 Ibid. 826; s. c. 31 Law J. Rep. (N.S.) C.P. 342.

Daniel v. North (5), *Barker v. Richardson* (6)—the old theory of the law still remains—*Bright v. Walker* (7). The effect of material alterations which if acquiesced in would increase the servitude of the servient tenement is to destroy the servitude, unless the new encroachment can be shut out without affecting the old right. The consent is to a different thing. The old right cannot be used as a shield for fresh encroachment. The continuance of what the servient tenant has done to protect himself from such encroachment cannot be prevented by the owner of the dominant tenement restoring the property to its original state. The servient tenant consented only to something of which the dominant tenant has deprived himself of the right to insist upon by altering the state of circumstances—*Luttrell's case* (8). The first case having direct application to the present is *Cherrington v. Abney* (9), and see *Com. Dig.* (10) and *Martin v. Goble* (11). The cases of *Dougall v. Wilson* (12), *Cotterell v. Griffiths* (13), *Chandler v. Thompson* (14) and *Thomas v. Thomas* (15) are not relied upon, but merely mentioned in their order of date. The later cases on which reliance is placed are—*Garritt v. Sharp* (16), *Blanchard v. Bridge* (17), *Renshaw v. Bean* (1), *Wilson v. Townsend* (18), *Davies v. Marshall* (19), *Cooper v. Hubbuck* (20) and *Hutchinson v. Copestake* (2). The opinion of the majority of the Judges in the present case has been approved of by Vice Chancellor Wood in *Weatherly v. Ross* (21). The respondent

abandoned his old rights; he had no intention of resuming them when he made the alterations, and he cannot resume them now—*Liggins v. Inge* (22), *Stoke v. Singers* (23), *Gale on Easements*, pp. 500, 483-4, and *Martin v. Hendon* (24).

Sir H. Cairns and *Clearby*, for the respondent, were not called upon.

THE LORD CHANCELLOR.—By the 3rd section of the act, 2 & 3 Will. 4. c. 71, intituled 'An Act for shortening the time of prescription in certain cases,' it is enacted, "that when the access and use of light to and for any dwelling-house, workshop or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Upon this section it is material to observe, with reference to the present appeal, that the right to what is called "an ancient light" now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be vested on any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise arise from uninterrupted user or possession during the requisite period. This observation is material, because I think it will be found that error in some decided cases has arisen from the fact of the Courts treating the right as originating in a presumed grant or licence.

It must also be observed, that after an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible; and it would seem, therefore, that it cannot be lost or defeated by a sub-

- (5) 11 East, 372.
- (6) 4 B. & Ald. 579.
- (7) 1 Cr. M. & R. 211; s.c. 3 Law J. Rep. (N.S.) Exch. 250.
- (8) 4 Rep. 87 a.
- (9) 2 Vern. 646.
- (10) Page 421, 5th edit.
- (11) 1 Campb. 320.
- (12) 2 Wms. Saund. 175 a.
- (13) 4 Esp. 69.
- (14) 3 Campb. 80.
- (15) 5 Tyrw. 810; s.c. 4 Law J. Rep. (N.S.) Exch. 179.
- (16) 3 Ad. & E. 325; s.c. 4 Nev. & M. 834.
- (17) 4 Ibid. 176; s.c. 5 Law J. Rep. K.B. 78.
- (18) 1 Dr. & Sm. 324; s.c. 30 Law J. Rep. (N.S.) Chanc. 25.
- (19) 4 Law Times, N.S. 105.
- (20) 30 Beav. 160; s.c. 31 Law J. Rep. (N.S.) Chanc. 123.
- (21) 1 H. & M. 849; s.c. 32 Law J. Rep. (N.S.) Chanc. 128.

- (22) 7 Bing. 632; s.c. 9 Law J. Rep. C.P. 202.
- (23) 8 El. & B. 31; s.c. 26 Law J. Rep. (N.S.) Q.B. 257.
- (24) 11 Law Times, N.S. 590.

sequent temporary intermission of enjoyment not amounting to abandonment. Moreover, this absolute and indefeasible right, which is the creation of the statute, is not subjected to any condition or qualification; nor is it made liable to be affected or prejudiced by any attempt to extend the access or use of light beyond that which, having been enjoyed uninterruptedly during the required period, is declared to be not liable to be defeated.

Before dealing with the present appeal, it may be useful to point out some expressions which are found in the decided cases, and which seem to have a tendency to mislead. One of these expressions is the phrase, "right to obstruct." If my adjoining neighbour builds upon his land, and opens numerous windows which look over my gardens or my pleasure-grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. I have simply the same right that I before possessed—I have simply the same right of building or raising any erection I please on my own land, unless that right has been by some antecedent matter either lost or impaired, and I gain no new or enlarged right by the act of my neighbour.

Again, there is another form of words which is often found in the cases on this subject, namely, the phrase, "invasion of privacy, by opening windows." That is not treated by the law as a wrong for which any remedy is given. If A. be the owner of beautiful gardens and pleasure-grounds, and B. is the owner of an adjoining piece of land, B. may build upon it a manufactory with a hundred windows overlooking the pleasure-grounds, and A. has neither more nor less than the right which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly-erected manufactory.

If in lieu of the words, "the access and use of light to and for any dwelling-house," in the 3rd section of the statute, there be read, as there well may, "any window of any dwelling-house," the enactment (omitting immaterial words) will run thus, "when any window of a dwelling-house shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right to such window shall be deemed absolute and indefeasible."

Suppose then that the owner of a dwelling-house with such a window, that is, with an absolute and indefeasible right to a certain access of light, opens two other windows, one on each side of the old window, does the indefeasible right become thereby defeasible? By opening the new windows he does no injury or wrong in the eye of the law to his neighbour, who is at liberty to build up against them, so far as he possesses the right of building on his land; but it must be remembered that he possesses no right of building so as to obstruct the ancient window; for to that extent his right of building is gone by the indefeasible right which the statute has conferred.

Believing this to be the sound principle, I cannot accept the reasoning on which the decisions in *Renshaw v. Bean*(1) and *Hutchinson v. Copestake*(2) were founded. The facts of those two cases were not exactly the same as in the present; for in neither was any ancient window preserved unaltered, but the old windows had been enlarged and new ones added; in which state of things it was held, that inasmuch as it was not possible for the adjoining proprietor to obstruct the new windows and the access of the ancient lights, without at the same time obstructing the original apertures, the owner of the house must be considered as having lost his right to the ancient lights, at all events until he restored his house to its original condition.

According to these cases the law must be thus stated, namely, if the owner of a dwelling-house with ancient lights opens new windows in such a position as that the new windows cannot be conveniently obstructed by an adjoining proprietor without obstructing the old, he, the adjoining proprietor, is entitled so to do, at all events so long as the new windows remain. Upon examining the judgments it will be seen that the opening of the new windows is treated as a wrongful act done by the owner of the ancient lights, which occasions the loss of the old right he possessed; and the Court asks whether he can complain of the natural consequence of his own act.

I think two erroneous assumptions are involved in or underlie this reasoning: first, that the act of opening the new win-

dows was a wrongful one; and, secondly, that such wrongful act is sufficient in law to deprive the party of his right under the statute. But, as I have already observed, the opening of the new windows is in law an innocent act, and no innocent act can destroy the existing right of the one party or give any enlarged right to the other, namely, the adjoining proprietor.

In the present case an ancient window in the plaintiff's house has been preserved and remained unaltered during all the alterations of the building, and the access of light to that window is now obstructed by the appellant's wall. A majority of the Court below have held, that the obstruction was justified whilst the new windows which the plaintiff some time since opened, remained, but was not justifiable when those new windows were closed and the house so far as regards the access of light was restored to its original state; but, on the plain and simple principles I have stated, my opinion is, that the appellant's wall so far as it obstructed the access of light to the respondent's ancient unaltered window, was an illegal obstruction from the beginning; and I have great difficulty in acceding to the reasoning that this permanent building of the appellant was a legal act when begun, and completed, but has subsequently become illegal through a change of purpose on the part of the respondent. On such a principle the person who opens new lights might allow them to remain until his neighbour, acting legally according to these judgments, has at great expense erected a dwelling-house, and then by abandoning and closing the new lights might require his neighbour's house to be pulled down. I think the judgment ought to be affirmed, but not on the ground or for the reasons given by the majority of the Judges in the Courts below. I therefore move, your Lordships, that the judgment of the Court below be affirmed.

LORD CRANWORTH. — My Lords, the question raised by the special case is, whether the plaintiff in error was justified in erecting, opposite and near to the house of the defendant in error, a building which prevented the access of light and air through several ancient windows through which light and air had been accustomed to pass

to the house in question without interruption.

Previously to the erection by the plaintiff in error of the buildings complained of, the defendant in error made extensive alterations in his house, and in so doing opened new and enlarged several of the old windows; and it was not disputed that the plaintiff in error was justified in obstructing the new and the enlargements of the old windows. He effected this obstruction by erecting a permanent building on his own land, so near to the house of the defendant in error as to obstruct the whole of his lights, the old as well as the new. The special case finds as a fact that it was impossible for him to obstruct or block the new windows without at the same time obstructing or blocking that portion of the windows and lights which occupied the site of the ancient windows; and his counsel argued, on the authority of *Renshaw v. Beas* (1), that under these circumstances he had a right to erect the building in question. After it had been so erected the defendant in error caused the altered windows to be restored to their original state, and he also filled up with brickwork the spaces occupied by the new windows, and having done this, he called on the plaintiff in error to remove the building which thus blocked up the ancient, and only the ancient windows. This application was not complied with, and thereupon the defendant in error brought his action in the Court of Common Pleas against the plaintiff in error for obstructing his ancient lights.

At the trial a verdict was found for the plaintiff in error, subject to a special case; which was afterwards argued before the Court of Common Pleas; and the Court being equally divided in opinion, the junior Judge, following the usual practice, withdrew his opinion, and judgment was there given for the now defendant in error, according to the opinions of what was then the majority of the Court. The case was then brought to the Court of Error, where the judgment below was affirmed, four of the six learned Judges who heard the case concurring in opinion with the Court of Common Pleas in favour of the defendant in error, and two dissenting. The case was then brought by writ of error to this House, and the plaintiff in

error was heard at the Bar. We did not call on the defendant in error to support his case, being of opinion that the plaintiff in error had laid no ground for disturbing the judgment below; though our opinion was not founded on the same ground as that on which the majority of the Judges below seem to have proceeded.

The case raised two questions. First, whether the plaintiff in error was justified in erecting the building whereby the access of light and air to the house of the defendant in error was obstructed? and secondly, if he was, then whether he was bound to remove it after the windows of the defendant's house had been restored to their ancient condition? The second question does not arise, and I will therefore proceed to state shortly the grounds on which my opinion rests.

The right to enjoy light through a window looking on a neighbour's land, on whatever foundation it might have rested previously to the passing of the 2 & 3 Will. 4. c. 71, depends now on the provisions of that statute.

The special case finds that the windows of the house of the defendant in error, previously to the alterations made by him in 1857, were ancient windows; by which we must understand windows through which he had enjoyed access of light without interruption for twenty years. His right, therefore, to that light was by the express provision of the statute absolute and indefeasible. It is not disputed that when the plaintiff in error erected his wall, he obstructed the light to which the defendant in error was so entitled, and that so he prevented him from enjoying what the statute declares was his absolute and indefeasible right. The plaintiff in error, in justification of the course he took, relies on the fact that, before he raised his wall and so caused the obstruction complained of, the defendant in error had made material alterations in his house, enlarging the old windows and adding new ones. There was nothing to make it unlawful for the plaintiff in error to obstruct the access of light to these new windows, and to so much of the altered old windows as did not occupy the old site through which light had formerly passed; and as it was impossible to

do this without at the same time obstructing the light which had previously passed through the old windows (so at least we must take the fact to be), the plaintiff in error contends that he had a right to obstruct the whole.

I am unable to comprehend the principle on which such a claim can rest, where a person has wrongfully obstructed another in the enjoyment of an easement, as, for instance, by building a wall across a path over which there is a right of way, public or private, any person so unlawfully obstructed may remove the obstruction; and if any damage thereby arises to him who wrongfully set it up, he has no right to complain. His own wrongful act justified what would otherwise have been a trespass. But this depends entirely on the circumstance that the act of erecting the wall was a wrongful act; whereas the opening of a window is not an unlawful act; every man may open any number of windows looking over his neighbour's land; and on the other hand, the neighbour may, by building on his own land within twenty years after the opening of the window, obstruct the light which would otherwise reach it. Some confusion seems to have arisen from speaking of the right of the neighbour in such a case, as a right to obstruct the new lights. His right is a right to use his own land by building on it as he thinks most to his interest, and if by so doing he obstructs the access of light to the new windows he is doing that which affords no ground of complaint. He has a right to build, and if thereby he obstructs the new lights he is not committing a wrong. But what ground is there for contending that, because his building so as to obstruct a new light would afford no ground of complaint, therefore, if he cannot so build without committing a trespass, he may commit a trespass? I can discover no principle to warrant any such inference.

I will put this case.—Suppose the owner in fee simple of close A. were to build a house at the edge of close A. with windows overlooking close B, held by himself, as tenant for life, or by a tenant for life, who, from feelings of kindness, would not object to the opening of the windows of the new house: at the end of twenty years he would,

according to the 3rd and 7th sections of the act, have acquired an absolute and indefeasible right to the access of light across close B. It surely cannot be contended that the remainderman, because he could not otherwise prevent the owner of the house from acquiring this right, might, before the expiration of twenty years, come on the land of the tenant for life, and there erect a building to obstruct the light of the new windows. And yet the argument of the plaintiff in error must go this length, for there is no difference in principle between a trespass on the soil and any other trespass.

In the case under discussion the new windows were opened by the same person who had a right to access of light through the old windows; but this might have been otherwise. Suppose the owner of an ancient window on a first floor not to be the owner of the second floor, and that the owner of that floor should open a window which the owner of the adjoining land could not obstruct without at the same time obstructing the ancient light; no one, I suppose, would argue that in such a case the owner of the land overlooked could obstruct the ancient light, and yet I can see no difference in principle between the two cases. It may be said that, in the case I have just put, the owner of the ancient light was in no default, and could not be affected by the act of a stranger. But neither is he in any default when he opens a new window himself. He does what he lawfully may do, and if the act done is lawful, I do not understand how the consequence can be different when it is the act of the party himself and when it is the act of a stranger. If after the owner of the second floor had opened a new window, and within twenty years the owner of the first floor had purchased the second floor, would the continuance by him of the new window authorize the neighbour in obstructing the old light if he could not otherwise obstruct the new one? This will hardly be contended. So, again, suppose the owner of the first floor to have demised the second floor to a tenant, and that he without the licence of his landlord put out the new window; this might entitle the landlord to complain of his tenant as having

been guilty of waste, but it can hardly be contended that it would justify the neighbour in obstructing the ancient light enjoyed by the landlord. So, again, if the landlord had given his permission to the tenant to open the window, I cannot see any difference which this would make; the tenant would, *quoad hoc*, be unimpeachable of waste; but it would be lawful to the landlord to make such a demise, which could not in any respect affect the relative rights of the landlord and his neighbour.

Suppose the owner of a house has a right of way to the door of his house over his neighbour's land, a case put by Mr. Justice Blackburn in his judgment, the argument of the plaintiff in error would go to shew that if the owner of the house should put a pane of glass in his door, his right of way would or might be at an end. For it would be lawful for the neighbour to obstruct it if he could not otherwise obstruct the light.

I will not, however, multiply illustrations. The plain principle seems to me to be, that no one can interfere with the absolute and indefeasible right of another, unless where such interference is made necessary by the wrongful act of the party possessing the right.

I do not attempt to disguise from myself that, unless the facts of this case can be distinguished from those in *Renshaw v. Bean* (1), the conclusion at which I have arrived is directly at variance with the decision of the Court of Queen's Bench in that case. But I own I think that the facts there were substantially the same as those now before us, and the Court decided there that the obstruction of the ancient light was in such a case justifiable. Lord Campbell, in delivering the judgment of the Court in that case, stated that the Court did not proceed on the ground that the plaintiff, whose ancient lights were obstructed, had lost the right which he had previously enjoyed of having light and air through such portions of the new windows as had formed portions of the ancient windows; but his Lordship added, "If, by the alterations which the plaintiff made, he exceeded the limits of that right, and so put himself into such a position that the access could not be obstructed by the defendant without

at the same time obstructing the former right of the plaintiff, he has only himself to blame." The observations I have already made sufficiently indicate the reasons on which I cannot assent to this reasoning; and unless that reasoning be sound, the judgment cannot be supported.

The case of *Renshaw v. Bean* (1) was followed by that of *Hutchinson v. Copestake* (2), not only in the Court of Common Pleas, where the decision of the Court of Queen's Bench was considered to be binding, but also in the Exchequer Chamber, though there some of the Judges seem to have proceeded on the special facts of that case. It is, however, the duty of this House, as the ultimate Court of Appeal, to lay down the law on what they consider to be correct principles, and though we should be slow to decide contrary to the decisions of the Courts of Westminster Hall, where they have been long received and acted on, even if we see cause to question the grounds on which they were supposed to rest, yet no such principle ought to restrain us from correcting what we consider to have been an erroneous decision pronounced only thirteen years ago; more especially when we have, as in this case, the opinions of two very learned Judges expressing their very decided dissent from it, and when we think we can discover in the judgments of the Chief Justice of the Common Pleas and of Mr. Justice Williams great doubts, to put it no higher, of the soundness of the decision which we are overruling.

My clear opinion is that the judgment below ought to be affirmed.

LORD CHELMSFORD.—My Lords, I agree with the judgment of the Court of Exchequer Chamber, but on different grounds from those on which it proceeded.

The only facts of the special case which are necessary to be noticed are, That in making the alterations in his house, which originally consisted of three stories with one window in each story, the respondent altered the windows in the two lower stories, but so as to make them both occupy part of the old apertures, and retained the window in the third story unaltered, and built two additional stories, in each of which he put out a new window. That after these

alterations were completed, the appellant, who had previously made preparations for erecting a warehouse on the site of some old buildings which he had pulled down, built up a wall to such a height as to obscure the whole of the lights in the respondent's buildings; it being impossible (as the special case states) for the appellant to obstruct or block up the upper windows without obstructing or blocking up the portion of the windows or lights which occupied the site of the ancient windows. The special case also states that the new upper windows could not have been obstructed in a more convenient manner (by which I understand more convenient for the appellant) than by building up a wall of sufficient height on his premises. After the appellant's wall was finished the respondent caused the altered windows in his building to be restored to their original state, and the new windows in the upper stories to be blocked up, and then called upon the appellant to pull down his wall and restore to the respondent's premises their former light and air. The appellant refused, and thereupon the action was brought.

Upon this state of facts two questions have been raised: First, whether the appellant can justify the obstruction of the ancient lights in the respondent's house on the ground that it was otherwise impossible for him to obstruct the new lights. Secondly, supposing him to have this right, whether it continued after the necessity for its exercise ceased, by the discontinuance of the new lights.

The first question brings directly into review before this House the decision of the Court of Queen's Bench in the case of *Renshaw v. Bean* (1), which in its circumstances (as stated by Lord Campbell in his judgment) closely resembled the present case. The Court there held that "the plaintiff having by the alterations which he made exceeded the limits of his former rights and put himself into such a position that the access could not be obstructed by the defendant in the exercise of his lawful rights, on his own land, without at the same time obstructing the former right of the plaintiff, he had only himself to blame for the existence of such a state of things, and must be considered to lose the former

right which he had, at all events until he should, by himself doing away with the access and restoring his windows to their former state, throw upon the defendant the necessity for so arranging his buildings as not to interfere with the admitted right."

In this statement of the grounds of decision the word "right" does not appear to be used with appropriate precision and accuracy. It is not correct to say that the plaintiff, by putting new windows into his house, or altering the dimensions of the old ones, "exceeded the limits of his right," because the owner of a house has a right at all times (apart, of course, from any agreement to the contrary) to open as many windows in his house as he pleases. By the exercise of the right he may materially interfere with the comfort and enjoyment of his neighbour, but of this species of injury the law takes no cognizance. It leaves every one to his self-defence against an annoyance of this description, and the only remedy in the power of the adjoining owner is to build on his own ground, and so to shut out the offensive windows. But as it would be hard upon the owner of a house to which the free access of light and air had been permitted for a long period to continue for ever indebted to the forbearance of his neighbour for its enjoyment, the Courts of law, upon the principle of quieting possession, formerly held that where there had been an uninterrupted use of lights for twenty years, it was to be presumed that there was some grant of them by the neighbouring owner, or, in other words, that he had by some agreement restricted himself in the otherwise lawful employment of his own land. The Prescription Act (2 & 3 Will. 4. c. 71.) turned this presumption into an absolute right, founded upon user on one side and acquiescence on the other.

It was argued, on behalf of the appellant, that under this act the right to the enjoyment of lights was still made to rest on the footing of a grant. I do not see what benefit his case would derive from the establishment of this position; but it appears to me to be contrary to the express words of the statute. By the Prescription Act, after twenty years' user of lights, the

owner of them acquires an absolute and indefeasible right, which so far restricts the adjoining owner in the use of his own property that he can do nothing upon his premises which may have the effect of obstructing them. The right thus acquired must necessarily be confined to the exact dimensions of the opening through which the access of light and air has been permitted. As to everything beyond, the parties possess exactly the same relative rights which they had before. The owner of the privileged window does nothing unlawful if he enlarges it, or if he makes a new window in a different situation. The adjoining owner is at liberty to build upon his own ground so as to obstruct the addition to the old window, or to shut out the new one; but he does not regain his former right of obstructing the old window, which he had lost by acquiescence, nor does the owner of the old window lose his former absolute and indefeasible right to it, which he had gained by length of user. The right continues uninterruptedly until some unequivocal act of intentional abandonment is done by the person who has acquired it, which will remit the adjoining owner to the unrestricted use of his own premises.

It will, of course, be a question in each case whether the circumstances satisfactorily establish an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention is clearly manifested, the adjoining owner may build as he pleases upon his own land; and should the owner of the previously-existing window restore the former state of things, he could not compel the removal of any building which had been placed upon the ground during the interval; for a right once abandoned, is abandoned for ever. But the counsel for the appellant carried their argument far beyond this point. The part of the case which was the most difficult for them to encounter was that which relates to the unaltered window in the third floor. As to this, they contended that the alteration of the windows below and the addition of the windows above so changed the character of the previously-acquired right to light and air as entirely to destroy it. But it is not easy to comprehend how this effect can be produced by acts wholly unconnected with an

ancient window, which the owner has carefully retained in its original state. And the learned counsel did not seem to expect much success from their argument in its application to the unaltered window, but directed it, with more plausibility, to the alterations of the windows on the lower floors. As to these, they contended that the owner of ancient windows is bound to keep himself within their original dimensions; and that if he changes or enlarges them in any way, although he retains the old openings, in whole or in part, he must either be taken to have relinquished his right or to have lost it. But upon what principle can it be said that a person, by endeavouring to extend a right, must be held to have abandoned it, when, so far from manifesting any such intention, he evinces his determination to retain it, and to acquire something beyond it? If under such circumstances abandonment of the right cannot be assumed, as little can it be said that it is a cause of forfeiture.

It must always be borne in mind that it is no unlawful act for the owner of a house to break out a window, or to enlarge an ancient window, although in the latter case some difficulty may be thrown upon an adjoining owner to distinguish the old part from the new, and so to ascertain which part he has a right to obstruct, and which is privileged from his obstruction. The alterations may be of such a nature (as in the present case) as to make it impossible for him to prevent the further restriction of his liberty to build on his own premises, without at the same time interfering with the right previously acquired against him. Yet it would be a very strange extension of the law of forfeiture, to hold that the owner of an ancient window doing nothing but what he may lawfully do, loses his existing right, because it stands in the way of the means of interfering with an act against which the owner of the adjoining land would otherwise have been able and would have been entitled to defend his property. Even supposing what was done by the respondent amounted to an unlawful encroachment, the question put by Mr. Baron Alderson in *Thomas v. Thomas* (15) appears to be unanswerable,—“How does the plaintiff, by claiming more than he law-

fully may, destroy his title to that which he lawfully may claim?” But the Court of Queen's Bench in the case of *Renshaw v. Bean* (1) held, that “because the respondent in the exercise of his lawful rights on his own land could not obstruct (what they called) the excess of the plaintiff's former right, without obstructing that former right, he had only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had.” This doctrine appears to me to be founded neither upon principle nor upon authority. It amounts to this. The plaintiff having acquired an absolute right to ancient windows against the defendant, does an act which it was lawful for him to do, subject to the right of the defendant to render it useless; but because he has contrived his measures so as to prevent the defendant hindering the attempt to obtain a new right without destroying or at least suspending the exercise of the old, therefore the old right may be lawfully interrupted, if indeed it is not altogether lost.

It may be said (and this was urged in argument at the bar), that unless such is the law, a person who has an ancient window may acquire a right to any number of additional windows by so contriving their position as to place them completely under the protection of the ancient window, and thus effectually prevent the adjoining owner's interference with them. Undoubtedly, this is a very possible case; and yet there does not appear to be anything unreasonable or unjust in denying even under such circumstances a power over the ancient lights which did not previously exist; for consider the case upon the presumption of a grant as it stood before the Prescription Act. The rights of the parties would of course be taken to be regulated by such grant, and it would have been contrary to principle to permit the grantor to derogate from his own grant, merely because he could not otherwise prevent an act which might prejudicially affect him, but which the grantee was not prohibited from doing by law. And precisely the same consequences seem to follow from the right being now acquired by user and acquiescence—while the user is ripening into a right the adjoining owner has the power completely

in his own hands. If he has no objection to the particular window, but is desirous of preventing any enlargement or alteration of it, or any new window being opened, he may inform his neighbour of his determination to build up against the window unless he will enter into an agreement not to enlarge or alter it nor to open any new one without his permission.

The adjoining owner can therefore always protect himself by a little vigilance, and if he allows rights to be acquired under shelter of which he is prevented using his land for the purpose of defence against the acts of his neighbour, he must blame his own want of foresight and precaution, and not the law, which will not permit an ancient right to be invaded upon any such assumed ground of necessity.

I am, therefore, of opinion that the case of *Renshaw v. Bean* (1) cannot be supported, and that the appellant cannot justify the erection of his wall and the consequent obstruction of the ancient lights on the respondent's building.

The determination of the first question in the respondent's favour renders it unnecessary to consider whether the respondent had a right to insist upon the removal of the appellant's wall, after he had restored his windows to their original state. In the view which I have taken, it is impossible for me to deal with the second question in the way in which it has been treated in the Court of Common Pleas and in the Exchequer Chamber. If I had been of opinion that the acts of the respondent conferred upon the appellant the power of interfering, for however short a time, with the right of the respondent, I should have been compelled, as a consequence, to hold that the obstruction could not be rendered temporary by any subsequent act of the respondent, because a right once lost can never be revived. But it is unnecessary to dwell upon this point, because it is obvious that after the decision of this case the question can never again be raised. I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed.

Judgment affirmed.

1865.
May 31. }

MOCKFORD v. TAYLOR.

Pleading—Several Counts—Trove and Detinue—Striking out.

As a general rule counts in trove and detinue ought not to be allowed together, and the latter ought to be struck out; this is, however, subject to exception if the plaintiff satisfies the Judge that there is good reason for allowing both.

This was a rule calling on the plaintiff to shew cause why one of the counts of the declaration should not be struck out.

There were two counts, one in trove and one in detinue, and the Judge at chambers had refused to make an order under the first pleading rule of Trinity Term, 1853, for striking one of them out.

Hance shewed cause.—First, the Court will not review the decision of the Judge at chambers; secondly, counts in trove and detinue cannot now be said to be founded on the same cause of action, as now under the latter there may be recovery in specie. (He was, however, in answer to a question of the Court, unable to shew any distinction in the character, &c. of the goods in respect of which the action was brought, or any special reason for pleading both counts.)

Tapping, in support of the rule, was not called on.

ERLE, C.J.—You had better go back to chambers with an intimation to the Judge that we think that, as a general rule, only one of such counts should be allowed, and that the count in trove should be the one generally allowed. This general rule, however, must be taken, subject to the exception, that both should be allowed if the plaintiff satisfies the Judge that justice will be better administered by the allowance, as, for instance, where the article is a precious article which the owner ought to be allowed to recover in specie.

The rest of the COURT (1) concurred.

(1) Willes, J., Byles, J. and Keating, J.

1865.
June 2, 3; }
July 10. } GAVED v. MARTYN.

Watercourse—Artificial Channel—Water brought to the Surface artificially—Easement—User as of Right—Prescription Act, 2 & 3 Will. 4. c. 71.

The plaintiff, who was the occupier of certain clay-works, had enjoyed for twenty years, without interruption, the use of a watercourse, called the clear-water leat, which brought water to such works. Part of this water had been collected from natural springs, from whence it had been brought over the defendant's land by an artificial channel made by the plaintiff's predecessor at the clay-works. The rest of the water had been obtained by the plaintiff from a stream brought artificially to the surface by the operation of miners who had not permanently abandoned their right to the same. The plaintiff claimed also a prescriptive right by twenty years' uninterrupted user to another watercourse, called the foul-water leat. There was evidence at the trial that the plaintiff's predecessor at the clay-works had leave from the tenant and owner of the land which had since become the defendant's, to cut such watercourse from a brook down to the clay-works, on the terms of paying a peppercorn rent, and of such tenant being at liberty to stop it whenever there was a scarcity of water for his own purposes:—Held, that as to such foul-water leat there was evidence on which a jury might find that the plaintiff's enjoyment thereof was not under a claim of right, but precarious, and that, therefore, a twenty years' user by the plaintiff under such circumstances, though without interruption, was not an enjoyment as of right within the meaning of the Prescription Act, 2 & 3 Will. 4. c. 71.

Held, also, that as to that part of the water in the clear-water leat which had an artificial origin from mining, the plaintiff could not by twenty years' user acquire an easement therein under the 2 & 3 Will. 4. c. 71, but that as to that part which had been collected from natural springs the plaintiff had, as against the defendant, acquired by user a right to its flow, notwithstanding that the land in which such supply was obtained was within the district of tin-bounds, and

subject therefore to the contingent rights of the owners of such bounds, who have by custom a right to use all water in their district for mining operations.

Held, further, that the plaintiff as such occupier of the clay-works to which the water was brought, had a sufficient interest to enable him to maintain his claim to a prescriptive right to the flow of such water.

Action for interfering with the plaintiff's right to certain watercourses.

The first and second counts of the declaration were each for removing a launder or water-carrier, and diverting and obstructing the water of a watercourse from flowing by the aid of such launder along the plaintiff's land and premises. The third count was for preventing the water of a brook from flowing along a leat called the foul-water leat to the plaintiff's premises.

The following are the facts as proved at the trial before the Common Serjeant at the Cornwall Summer Assizes for 1864. The plaintiff was the occupier of some china clay-works, in the parish of St. Austell, in the county of Cornwall, called the Carrancarrow Clay Works, which he had occupied, under Lord Mount-Edgcumbe, the owner of the Carrancarrow estate, and had done so since the year 1835. Adjoining this estate was an estate called Goonamarth, which formerly formed part of Mr. Trevanion's property, but which had been purchased by the defendant in 1855, and had been since occupied by the defendant or his tenants.

Two streams flowed into the Carrancarrow clay-works, one called the foul-water leat, the other the clear-water leat, both of which were used by the plaintiff in the clay-works, it being essential that there should be a proper supply of water for the carrying on of such works.

With regard to the clear-water leat, it derived its water from two sources; one from water collected in the valley between the Carrancarrow and Goonamarth estates, which ran down there from natural springs, and was brought to the leat by a wooden trough, called a launder, placed over a brook or stream which flowed through such valley, and was known as the Cox-burrow brook. This launder was called the lower launder, and was put there about the year 1830, by Edward and William Hooper,

who preceded the plaintiff in the occupation of the clay-works, and who by means of a channel which they made for that purpose, brought the water they found so collected there to such launder, in order to supply the clay-works with clear water, the launder being used to prevent the water from mixing with the water in the brook, which was liable to be fouled by the washing from the tin-mines in the neighbourhood. The other source was from a tin-tie stream situate higher up the brook than the lower launder, and nearly opposite some clay works called the Cawn Clay Works, on the Goonamarth estate. This stream came from an artificial adit made by the tin-miners, and it appeared that in 1842, the plaintiff, wanting an increase of water for his works, took the water which came from this tin-tie, across the brook by another launder, called the upper launder, which he placed there to receive it, and then by means of a leat, he brought the water from such upper launder to the place from whence the previous supply of the lower launder was taken, and where, uniting with that, it passed through such lower launder to the clear-water leat.

According to the custom of the county the tin-streamers have the free use of the water over the whole of the district within their tin-bounds, and they claim the right not only to use the water, but to divert it into other streams. There was evidence that between the years 1825 and 1828, one Vivian, who worked then at the Cawn Clay Works, had paid to one of the Hoopers who was then the owner of the tin-bounds, 4*l.* a year for the use of the water from the above-mentioned tin-tie, and that afterwards, Higman, the then lessee of the Goonamarth Clay Works, paid the said Hooper 10*l.* a year, which was subsequently reduced to 6*l.* 10*s.*, for the use of such water. It appeared also, that the plaintiff, in 1842, paid Hooper at the rate of 4*l.* a year, but it was a disputed question at the trial whether such payment was made by the plaintiff for the privilege of taking the water from the tin-tie, or whether only for having it pure, which it would not have been if the owner of the tin-bound had exercised his right of using the water. The upper launder rested on the land which was part of the Goonamarth estate, and which

therefore had since become the defendant's. The lower launder was on the land occupied by the plaintiff, and outside the limits of the tin-bounds, but the place where the supply had been collected and conducted to the lower launder before the upper launder was placed, was within such limits.

In the year 1830, the said Edward and William Hooper, who were then in occupation of and working the Carrancarrow Clay Works, cut the foul-water leat from the brook a little above the lower launder, and by that means the water from the brook was brought down to their clay-works. With respect to the cutting of such foul-water stream the defendant produced in evidence at the trial two witnesses of the name of Geach, who said that in 1830 a meeting took place between the elder Hooper, their father, who occupied and worked some works lower down the stream at the lower Goonamarth, partly in Mr. Trevanion's and partly in Lord Mount-Edgcumbe's property, and the tollers or stewards of these two last-mentioned persons; that the question of whether Hooper should be allowed to cut the foul-water leat was discussed, and it was agreed that he should be allowed to do it on payment of a peppercorn or furze prickles per annum to Geach, and on the clear understanding that it was to be taken down whenever the water was scarce and wanted below; that the Hoopers cut the leat in consequence, and that the Geaches on one or two occasions cut down the leat. It appeared, however, that although Geach's works were continued till 1838, and the Geaches further had some interest in them till about 1847, they had left before 1835, so that this taking down was never during the plaintiff's occupation, and possibly when the Carrancarrow works were unworked for Hooper (who had occupied not only the works but also the farm on which they were, and who retained the farm when the plaintiff came in 1835), had ceased to work them for a year or two before the plaintiff took them. When the plaintiff took possession of the Carrancarrow Clay Works, in August 1835, both the foul-water leat and the lower launder were in existence; and until 1855, when the defendant became the owner of the Goonamarth estate, the plaintiff had always enjoyed the use of both the foul and clear-water leats

without interruption, but after 1855 the user had been contentious, the defendant several times removing the two launders and destroying the foul-water leat, and the plaintiff as often restoring them, until the last interference of the defendant in respect of which the present action was brought.

At the trial, the plaintiff did not put in evidence any documentary title, but he proved that he was in possession of the Carrancarrow Clay Works, and that he had been so since 1835, and he stated that he had got a licence from Lord Mount-Edgumbe to dig and search for clay in the land let to Hooper, who was his Lordship's tenant of the Carrancarrow farm. This, it was objected for the defendant, was not sufficient to enable the plaintiff to maintain such an action as the present, and the point was reserved, if necessary, for the opinion of this Court.

The following questions were left by the learned Judge to the jury:

First, was the foul-water leat cut from the brook with the consent of Geach and under the terms and conditions spoken of by the two Geaches, or was it done by Hooper of right without any agreement?

Secondly, was there a cutting off of the water from the leat on one or more occasions when water in the brook was scarce; and if so, was that done in virtue of the conditions to that effect originally imposed or done in assertion of a general right to have the water flow down the brook?

Thirdly, is the water in the part of the leat above the lower launder derived altogether from the source of supply above the upper launder, or is it partially so derived and partially derived from springs and sources of supply between the upper launder and the lower launder?

Fourthly, have the plaintiff and those through whom he claims had an uninterrupted enjoyment of the two leats, or of either of them, as of right for more than twenty years without interruption?

Fifthly, was the payment of 4*l.* a year to Hooper a payment made for a right to have the water, or was it a payment only in consideration of Hooper not fouling by using it for streaming tin?

To these questions the jury returned the following answers, viz.:

To the first question, that it was with the consent of Geach.

To the second question, that there was, for both reasons.

To the third, partially from both sources.

To the fourth, they have had uninterrupted possession of the leat marked green (which was the clear-water leat) from the upper launder downwards, but have not had uninterrupted possession of the foul-water leat too.

To the fifth, only for the purpose of preventing Hooper from fouling it.

Thereupon, under the direction of the learned Judge, a verdict was entered for the plaintiff upon the first and second counts, and for the defendant on the third count, the amount of damages being by consent left to an arbitrator to determine.

Montague Smith afterwards obtained a rule *nisi* to enter a verdict for the plaintiff on the third count, pursuant to leave reserved at the trial, on the ground that the licence granted by Geach, assuming it to be given, was merely a personal licence from him to Hooper, and that it did not affect the plaintiff, who was not privy to that bargain, and who enjoyed from 1835 as of right; or for a new trial on the ground of misdirection, the learned Judge having in effect directed the jury that if they believed the evidence of the two Geaches the plaintiff's enjoyment of the foul-water leat was not an enjoyment as of right, and also on the ground that this evidence came upon the plaintiff by surprise.

Karslake, for the defendant, also obtained a rule *nisi* to enter a verdict for the defendant on the first and second counts, pursuant to leave reserved at the trial on the ground that the plaintiff was a mere licensee, and had no sufficient possession of the water to enable him to maintain the action; secondly, that the user of the water had been contentious since 1855, and that there was no proof given of enjoyment for twenty years as of right; thirdly, that the watercourses in question being altogether artificial, no right to continue to receive their flow could be acquired by the plaintiff; and, fourthly, that the plaintiff being unable to acquire a right to the water in the tin-tie as against the tin-bounder, was incapable of acquiring it at all; or for a

dows was a wrongful one; and, secondly, that such wrongful act is sufficient in law to deprive the party of his right under the statute. But, as I have already observed, the opening of the new windows is in law an innocent act, and no innocent act can destroy the existing right of the one party or give any enlarged right to the other, namely, the adjoining proprietor.

In the present case an ancient window in the plaintiff's house has been preserved and remained unaltered during all the alterations of the building, and the access of light to that window is now obstructed by the appellant's wall. A majority of the Court below have held, that the obstruction was justified whilst the new windows which the plaintiff some time since opened, remained, but was not justifiable when those new windows were closed and the house so far as regards the access of light was restored to its original state; but, on the plain and simple principles I have stated, my opinion is, that the appellant's wall so far as it obstructed the access of light to the respondent's ancient unaltered window, was an illegal obstruction from the beginning; and I have great difficulty in acceding to the reasoning that this permanent building of the appellant was a legal act when begun, and completed, but has subsequently become illegal through a change of purpose on the part of the respondent. On such a principle the person who opens new lights might allow them to remain until his neighbour, acting legally according to these judgments, has at great expense erected a dwelling-house, and then by abandoning and closing the new lights might require his neighbour's house to be pulled down. I think the judgment ought to be affirmed, but not on the ground or for the reasons given by the majority of the Judges in the Courts below. I therefore move, your Lordships, that the judgment of the Court below be affirmed.

LORD CRANWORTH. — My Lords, the question raised by the special case is, whether the plaintiff in error was justified in erecting, opposite and near to the house of the defendant in error, a building which prevented the access of light and air through several ancient windows through which light and air had been accustomed to pass

to the house in question without interruption.

Previously to the erection by the plaintiff in error of the buildings complained of, the defendant in error made extensive alterations in his house, and in so doing opened new and enlarged several of the old windows; and it was not disputed that the plaintiff in error was justified in obstructing the new and the enlargements of the old windows. He effected this obstruction by erecting a permanent building on his own land, so near to the house of the defendant in error as to obstruct the whole of his lights, the old as well as the new. The special case finds as a fact that it was impossible for him to obstruct or block the new windows without at the same time obstructing or blocking that portion of the windows and lights which occupied the site of the ancient windows; and his counsel argued, on the authority of *Renshaw v. Bean* (1), that under these circumstances he had a right to erect the building in question. After it had been so erected the defendant in error caused the altered windows to be restored to their original state, and he also filled up with brickwork the spaces occupied by the new windows, and having done this, he called on the plaintiff in error to remove the building which thus blocked up the ancient, and only the ancient windows. This application was not complied with, and thereupon the defendant in error brought his action in the Court of Common Pleas against the plaintiff in error for obstructing his ancient lights.

At the trial a verdict was found for the plaintiff in error, subject to a special case; which was afterwards argued before the Court of Common Pleas; and the Court being equally divided in opinion, the junior Judge, following the usual practice, withdrew his opinion, and judgment was there given for the now defendant in error, according to the opinions of what was then the majority of the Court. The case was then brought to the Court of Error, where the judgment below was affirmed, four of the six learned Judges who heard the case concurring in opinion with the Court of Common Pleas in favour of the defendant in error, and two dissenting. The case was then brought by writ of error to this House, and the plaintiff in

unless there be an agreement in writing. Was there evidence to go to the jury here that Gaved enjoyed the watercourse in the same manner that Hooper had done? It was a watercourse cut within five years from the time that Gaved came into possession, a watercourse through Hooper's farm. Hooper was still living on the same farm, and continued to do so for the greater part of the twenty or thirty years, during which Gaved enjoyed it; it is on the face of it an artificial watercourse, and at the end of that time the person who succeeded to Geach claimed to have authority to stop it. Under this state of facts, I think there was evidence on which the jury were authorized to find, if they chose to do so, that it had not been enjoyed for twenty years preceding that time by a person claiming right thereto, but that the use had been precarious in the sense of that word as used in the Civil law. There are three ways of defeating a prescriptive right—by shewing that a man has been clandestinely using it, or has enjoyed it by violence, or in the third case, *à precario*, has had permission from some one else. The present case comes within the last class. We do not lay down the rule that it follows of necessity that Gaved must be affected by the licence that Hooper had, but that it is a matter which the Judge was bound to leave to the jury, and they having found their verdict on it, we think there is no ground for our interfering.

WILLES, J.—I am of the same opinion. The Court is asked to enter the verdict for the plaintiff, or, in the alternative, to grant a new trial, on the ground that the learned Judge misdirected the jury with respect to the agreement made between Hooper and Geach. If, as at one time I thought, the learned Judge had told the jury that the effect of the agreement between Geach and Hooper was to stamp the character of precariousness upon the enjoyment by a tenant who succeeded to Hooper—if he had laid that down as a proposition of law, his summing-up might have been objectionable. But though the answer to the first question seems to indicate that this was in the mind of the learned Judge, when we turn to the fourth question, it appears that this was not his meaning. The meaning of the first question was, no doubt, to leave to the jury

the important consideration, whether the evidence of the Geaches was to be relied upon. The fourth question superadds this consideration: whether or not, if their evidence is to be relied on, the jury having taken that into consideration come to the conclusion, as a matter of fact, that this enjoyment by Gaved was precarious. Therefore the two questions which are presented to us by the rule are in reality the same, and they amount to this: whether there was any evidence on which the jury might properly find that the enjoyment by Gaved was precarious. The plaintiff, in seeking to establish a right under the statute, may prove his enjoyment for the shorter period of twenty years; and in relying on his enjoyment for this period, must (with this exception, that he need not satisfy the jury of the existence of a lost grant, or that his enjoyment was from the time of legal memory) make out the same case as if he was seeking to establish a prescriptive right, or a right under a lost grant at common law. In answer to such a claim it would clearly be admissible evidence to prove that the enjoyment originated in an agreement between a former occupier of the dominant and a former occupier of the servient tenement, the effect of which was, that the enjoyment was precarious; and upon proof of the existence of such an agreement, and of circumstances such as those existing in the present case, it would be a question for the jury whether the enjoyment by the then tenant, the tenant of the dominant tenement at the time in question, was not an enjoyment pursuant to a special agreement; in other words, whether it was not a precarious enjoyment. In the present case, I apprehend there is abundant evidence upon which the jury might, if they thought proper, in answer to the fourth question, come to the conclusion that the enjoyment of Gaved was a precarious occupation, similar to that of Hooper. First of all, there is the existence of the agreement in Hooper's time; an agreement with Geach, who might well protest against the injustice of Hooper's letting in some new tenant next week, of whose existence he had no notice, and who by this enjoyment for twenty years, granted as a mere matter of neighbourly kindness to Hooper, might acquire a right against Geach under

the statute. It is a reason why, if there be any evidence in the cause to prevent such an unjust conclusion being arrived at, the jury should have acted on that evidence. There is an agreement between Geach and Hooper, and by that agreement the water which flowed in a natural channel was to be diverted into an artificial channel by artificial means. I must say that, considering the jealousy which exists very naturally with regard to rights to water, it requires extraordinary credulity to suppose that a tenant coming into the enjoyment of a leat of this description should be ignorant of its character, or could arrive at any other conclusion than that it was by permission of the person who had the control over the natural stream that the leat was used. That would naturally put him on inquiry whether the permission had originated in a deed, so that the right was one he could expect to enjoy or insist upon, or whether it had originated only in licence. So far with respect to the question whether it was possible for Gaved to have known of the character of the enjoyment of the water in the foul-water leat. Then, as to Geach and the persons on his side, it was not very unnatural for the jury to come to the conclusion that they would be likely to be aware of the change of occupation from time to time. A man who had the occupation of this farm might have become acquainted with the persons who were at the china-works, and they might have a knowledge of the character, or probable character, of the leat; and that is evidence from which the jury might conclude that Gaved was content to go on enjoying it as before. If there was a knowledge of the change of occupation—that is, evidence from which the jury might conclude there was a tacit sufferance by Geach in the enjoyment of the leat being continued by the new tenant, Gaved, as it was by the old tenant, Hooper, with whom the agreement had been entered into, and subject to the conditions applying between Geach and Hooper, namely, that the enjoyment should be an enjoyment of a precarious character. Upon these grounds, it appears to me there was evidence upon which the jury might well find that the enjoyment of the foul-water leat during the twenty years before action was an enjoyment by the permission, express or implied, of the occupier of the Goonamarth estate. I may

remark that in *Toynbee v. Brown* (2) the learned counsel, in the course of his argument, made a somewhat similar point to that we are now considering; but it was with reference to a case of light; and he said, by the express terms of the statute, a person who enjoyed lights, paying a rent for them for twenty years under a parol agreement, would be entitled to have them afterwards without paying any rent at all. Then the learned counsel put a case: "Suppose an agreement by a tenant for life that he and his successors, owners of certain property, should allow the use of light, could that agreement be set up to defeat the title of a party who had subsequently acquired a right to the use of the light by twenty years' uninterrupted enjoyment?" To which Alderson, B. answered, "If the parties had gone on acting upon the agreement, that would be evidence from which the jury might negative an adverse enjoyment, which is the foundation of the right." So here, the agreement, taken with the other circumstances in the case, is evidence for the jury, upon which their verdict negating an adverse enjoyment may well stand.

BYLES, J.—I am of the same opinion. Here the origin of the user of the stream is clearly shewn by the admissions on both sides. Whatever rights may have been since acquired, it is admitted to have been originally not a user as of right, but a user by permission of the tenant or owner of the stream or both. There is no doubt about that. Hooper then had no right. The plaintiff succeeds Hooper, and he did exactly what Hooper did, neither more nor less, until Martyn came. He did nothing, but enjoyed as his predecessor had done, but this enjoyment is not enough. The statute says he must be a person claiming right thereto. I quite agree with what fell from my Brother Willes; it is for the plaintiff to shew that he claimed right thereto; and until Martyn came in, there is no evidence that he did anything more than his predecessor did, who certainly did not claim right thereto. The question is left to the jury in this form—"As far as the foul-water leat is concerned, have the plaintiff and those through whom he claims had uninterrupted enjoyment of the foul-water leat as of right for

(2) 3 Exch. Rep. 117; s. c. 18 Law J. Rep. (N. S.) Exch. 99.

more than twenty years?" Answer, "They have not had such a user as of right of the foul-water leat." It seems to me that question was rightly put to the jury, and that the verdict of the jury was also right.

Coleridge and *Bullar* then shewed cause against the defendant's rule.—With respect to the lower launder and the claim to the right of having the water to flow over it, there can be little doubt as to the plaintiff's right. An uninterrupted enjoyment for more than twenty years before the defendant interfered was proved to have existed. The upper launder was placed afterwards in order to increase the water in the lower launder, and there may perhaps be some difference as to the right with respect to the two launders. As to both, it is submitted that there was evidence of a user for a sufficient time to create a right. A tin-bounder has merely certain rights of user of the water for his tin operations; but he has no right to the land; and there was nothing in the fact that the water to the upper launder came from a tin-tie to prevent the landowner from interfering and stopping the water from passing over the launder and afterwards down to the plaintiff's works. No doubt the defendant interfered after 1855, when he took possession of the Goonamarth estate; but as often as he removed the launders they were restored, and the interruption was not sufficient to prevent the plaintiff's enjoyment of the water for the purpose of his clay-works. It is said that the payment to Hooper shewed that the water was got from the tin-bounder, and that the plaintiff had only a qualified right to it, that is, as against the tin-bounder; but the verdict of the jury answers that objection, as it proves that the payment was not for the water, but only that the tin-bounder should abstain from fouling it. Then it will be said, as it was at the trial, that the plaintiff was only a licensee, and could not acquire as such the right which he claims in this action. No authority was or can be cited in support of this objection; moreover, the plaintiff proved that he was the occupier of the clay-works, and it is in respect of such occupation that he has hitherto enjoyed the use of the water which he complains the defendant has interfered with.

Karslake and *Pinder*, in support of the defendant's rule.—The plaintiff had only an incorporeal right; he was merely a licensee to dig and search for clay, and that is not sufficient to entitle him to maintain this action—*Harker v. Birkbeck* (3), *Doe d. Hanley v. Wood* (4), *Muskett v. Hill* (5), *Laing v. Whaley* (6), and *The Stockport Waterworks Company v. Potter* (7). Next, with respect to the claim arising out of the upper launder. It is clear that the tin-tie was originally created by the tin-bounders, and both that and the adit were wholly within the tin-bounded district, so that the tin-bounders would have a right at any time to divert the stream flowing from such tin-tie. The custom, in Cornwall, giving the right to the bounder to divert the water within the bounded district is stated in the note, by Mr. Smirke, to *Rogers v. Brenton* (8). This water was only an artificial stream, and its being allowed by the tin-bounders to flow over the land could confer no right to it in anyone; therefore, the putting up this launder, and using the water as the plaintiff did, was no evidence of any user as of right. It was competent for the bounder at any time to have taken the stream away, and he stood with reference to it in the same position as the cutter of the sough in *Arkwright v. Gell* (9). In *Greatrex v. Hayward* (10), Parke, B. says, "The right of the party to an artificial watercourse as against the party creating it, must depend upon the character of the watercourse, and the circumstances under which it was created. This watercourse is clearly of a temporary nature only, and is dependent upon the mode which the defendant may adopt in draining his land. This is the precise case which was put by this Court in *Wood v. Waud* (11), where it is said by the Court

(3) 3 Burr. 1556.

(4) 2 B. & Ald. 724.

(5) 5 Bing. N.C. 695; s.c. 9 Law J. Rep. (N.S.) C.P. 201.

(6) 3 Hurl. & N. 675; s.c. 27 Law J. Rep. (N.S.) Exch. 422.

(7) 3 H. & C. 300.

(8) 10 Q.B. Rep. 65.

(9) 5 Mee. & W. 303; s.c. 8 Law J. Rep. (N.S.) Exch. 201.

(10) 8 Exch. Rep. 291; s.c. 22 Law J. Rep. (N.S.) Exch. 137.

(11) 3 Ibid. 748; s.c. 18 Law J. Rep. (N.S.) Exch. 305.

in the judgment, which underwent much consideration, that 'The flow of water for twenty years from the eaves of a house, could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof.' The flow of water from a drain for the purposes of agricultural improvements for twenty years could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains, for the greater improvement of his land. The state of circumstances in such cases shews that one party never intended to give, nor the other to enjoy the use of the stream as a matter of right." Moreover, the payment to Hooper was a recognition by the plaintiff of the rights of the owner of the boulder, and so long as the latter might want the water in the adit for mining operations, the landowner would have no right to stop up the water from flowing. In *Beeston v. Weate* (12), the distinction is pointed out between the right to compel the continuance of a stream of artificial origin, and the right to have the benefit of a natural stream, by proof of a user, with the aid of artificial means—*Gale on Easements*, 3rd edit. p. 280. The right to the water over the lower launder is similar to the right to that which passes over the upper launder. The water taken to supply the lower launder was got from within the district of the tin-bounds, and was subject to the rights of the tin-bounders, and could never be used as of right against the landowner.

ERLE, C.J.—With respect to the claim of these parties relating to the water carried over the upper launder, I am unable to give a confident judgment at the present moment without further consideration. With respect to the claim to the lower launder, it seems to me that the verdict ought to stand. The water has been brought to the clay-works of the plaintiff, and I take it upon the evidence that the plaintiff was in the occupation of the clay-works, and that he had such an interest as would entitle him to maintain this claim to water

flowing to the tenements in his occupation. I think that it was quite consistent with his occupation of the clay-works that he should have an easement to dig and search for clay all over Hooper's farm, and that he should be able to maintain a valid claim to the water by prescription. Then, does the evidence shew that, as to the lower launder, although he has had it and enjoyed the flow of the stream for twenty years without interruption, that he could not acquire a right to take the water by reason that that water was collected or found in land which was within and subject to the tin-bounds? It appears that the water flowed in a channel through land which was subject to tin-bounds, and that that channel brought down a quantity of water that flowed in a mead where it was collected and then flowed down from there to the clay-works occupied by the plaintiff. If for twenty years he had conducted water through that channel down to the clay-works under circumstances to which the statute applies, he would acquire a right to the water. But it is said that he could not have such a right, because the channel down which it flowed was within land which was within the district of tin-bounds, and that it was subject to the contingent rights of the bound-owners, if they chose to work the mine; and it is said that water subject to those contingent rights cannot become vested in any other persons absolutely as against all the world. I do not think that argument is tenable. If the rights of the tin-bounder are in operation, and he claims to exercise those rights, that which is called at common law the corporeal right of the tin-bounder may operate in respect of the water; but if the tin-bounder is not acting, in my opinion the general law of the land applies to Cornwall as much as to other places, and though the land is within the limits of tin-bounds, yet there being no tin-bounders at work or claiming to work, or setting up any right to water, the man who dug the watercourse, and conducted the water for twenty years to his clay-works, has a prior right to that water, notwithstanding the water originally flowed and was within land subject to tin-bounds. That would give the plaintiff the verdict with respect to the count founded on the lower launder.

(12) 5 El. & B. 986; s. c. 25 Law J. Rep. (N. S.) Q. B. 115.

As to the count relating to the upper launder, I must take time to consider.

WILLES, J.—I am of the same opinion. With respect to the first question, whether the plaintiff can maintain his action in respect of his possession of the clay-works, I am clearly of opinion that he can, because he was the occupier in possession of the land through or to which the water flowed; and the occupier in possession, as a rule, may maintain an action for the diversion of water which ought to flow through the land of which he is in possession. The plaintiff has the additional right of searching the land of which he is in possession and also other land, for the purpose of getting minerals there. If such an occupation ancillary to the enjoyment of mineral rights were not sufficient to maintain this action, the effect would be that there never could be a right of the kind acquired by occupiers within Lord Tenterden's Act. With respect to the second question, whether the user of the water was contentious, and therefore not as of right since the year 1855, I confess I was not impressed by the argument which has been addressed to us for the defendant. It must always be a question for the jury to determine, and which they have decided in this case, by saying that the enjoyment was of right in their judgment, notwithstanding the evidence. With respect to the third question, namely, whether the artificial origin of the watercourse prevented it from being of such a character that a right to it might be acquired by prescription, a very different question arises with respect to the upper launder, the water flowing over which was supplied altogether from an artificial opening made with a view to the tin streaming, and the lower launder the water to supply which comes in part from an adit driven not by the tin-borders, but by the plaintiff, or the person under whom he claims, for the purpose of supplying water to that launder. That water in one sense may be artificial, with an artificial opening through which it flows; but in every other sense it is natural, because it is supplied by springs running out of the land, and would flow on for ever unless interrupted. With respect, therefore, to such supply of water over the lower launder, no doubt the flow of it was originally of a permanent character, and there-

fore was subject to the law of prescription. That is the distinction that was pointed out in the case of *Wood v. Waud* (11), upon a consideration of the case of *Arkwright v. Gell* (9), from which it was inferred by some that artificial water was not the subject of prescription, and of the case of *Magor v. Chadwick* (13), in which it was laid down that the law of watercourses is the same whether natural or artificial. In *Wood v. Ward* (11), these two cases were considered, and the distinction was pointed out between an artificial watercourse, where from the nature of the case it is obvious that the enjoyment of it depended on temporary circumstances and one of a permanent character. In the present case, so far as the lower launder is concerned, it furnishes a good example of a stream artificially made, but in its origin supplied by a natural spring, and subject to the law of prescription. With respect to such stream the plaintiff has acquired a prescriptive right, subject to the question whether the circumstance of the water being within the tin-bounds prevents the operation of the prescription. In my opinion such circumstance no more prevents the operation of the Prescription Act to an incorporeal hereditament than it would in the case of a corporeal hereditament. The right of the tin-borders by custom is one apart from the ownership of the land, or the enjoyment of any right springing from it, with the exception of the particular right to produce tin and to take all reasonable means for that purpose, and the right of the owner of the soil, or of the incorporeal hereditament arising out of the soil, may well be determined by the ordinary law, whilst the tin-border may be considered as coming in by what I may not improperly describe as a title paramount under the custom. I do not trace in the Prescription Act any intention to allow the inhabitants of Cornwall, where the custom of tin-bounding prevails, to be in a less favourable condition in reference to acquiring rights of water by prescription than the inhabitants of other parts of England. With respect, therefore, to the lower launder, I concur in the judgment of the Chief Justice, that the rule ought to be discharged. As to the

(13) 11 Ad. & E. 571; s. c. 9 Law J. Rep. (n.s.) Q.B. 159.

claim arising out of the upper launder, I wish time to consider it.

BYLES, J. concurred.

WILLES, J.—The effect of the payment to Hooper was not much discussed in the argument, because, in truth, upon the finding of the jury, there was no payment for the use of the water, and the right to throw dirt into the water may be considered as established by the case of *Carlyon v. Lovering* (14).

Cur. adv. vult.

The judgment of the Court on the claim relating to the upper launder was now (July 10) delivered by—

ERLE, C.J.—The point remaining for decision is the right of the plaintiff to maintain his action on the count for removing the upper launder. The facts for the plaintiff are, that this launder was placed in 1842 to convey water in the leat to the plaintiff's works, and notwithstanding the evidence of contention between the parties we take the jury to have decided the question of fact rightly, that the enjoyment of this water by the plaintiff was as of right without interruption; but their verdict was taken, subject to the leave reserved to the defendant's counsel to move to reverse that verdict if the facts relied on for the defendant negatived in point of law the existence of the right claimed by the plaintiff. The result of these facts is, that the water in the stream in question was brought to the surface artificially by the operations of miners, and conveyed in the tie or open adit to the place in the brook where the upper launder was afterwards placed so as to receive it, and that the use of the stream, which might include a change of its direction, had not been abandoned by the miners. It appeared that the land where the facts relevant to the right to the stream in the upper launder took place was within the tin-bounds which at the earliest period mentioned in the evidence belonged to William Hooper, and had passed from him through mesne assignments to the defendant. The mouth of the adit, from which the stream of the tie flowed, the course of that stream from thence over the surface in the tie either to tin-streamworks,

or to the Cawn clay-works, or to the brook, or to and beyond the upper launder towards the Carrancarrow clay-works of the plaintiff, were all within the limits of the tin-bounds above mentioned, and so were subject to the rights of the owner thereof. It appeared, also, that the owner of the tin-bounds had worked for tin, and had *de facto* exercised his right over the waters from time to time during all the time to which the evidence related. In 1826 and 1827 one Vivian had paid the bound-owner 4*l.* a year for taking the water from the tie to the Cawn clay-works. One Higman had paid annually 10*l.* to Hooper the father, and afterwards to Hooper the son, for taking the water of the tie down to 1851, and the plaintiff himself in 1852 agreed to pay to the bounder 4*l.* annually, and did pay three-quarters. It is true that these payments were made to the bounder to induce him to omit the exercise of his right to use the stream for tin, whereby the water would have been fouled; and that the water itself was not the subject of the agreement. But the point to be ascertained is, whether the miners had abandoned their right and interest in the stream brought to the surface by mining operations; and if the tin-bounder claimed and exercised the right of using the stream within the bounds when, where and how he chose, he had not abandoned his right thereto. It is not necessary here to consider further the rights of owners of tin-bounds; but it is not superfluous to add, that the right to tin-bounds is most clearly a part of the law and privilege of the Stannary, and, as such, part of the law of England (*Co. Lit.* 11 b); and that a Judge administering the law of England is as much bound within the Stannaries to protect rights derived from the Stannary Laws and to learn from those laws what those rights are, as in Kent he is bound to know what is the tenure of land there, and what are the rights incidental to that tenure. The antiquity and the operation of the Stannary Laws, both generally and also in relation to tin-bounds, are considered, and the authorities are collected, in the report of *Vice v. Thomas*, published by Mr. Smirke, vice-warden of the Stannaries in 1843. These being the facts relating to the streams, the question remains whether the plaintiff, by turning that stream

(14) 1 Hurl. & N. 784; s. c. 26 Law J. Rep. (N. S.) Exch. 251.

from the brook over the upper launder into the leat leading to his works, and enjoying the use thereof without interruption for more than twenty years, acquired a right thereto under the Prescription Act? Although the jury have found that he did this as of right, that must be taken to be a finding of the fact of the enjoyment, subject to the point reserved for the defendant, whether such enjoyment of a stream of this character could be by law "as of right" within the meaning of the Prescription Act? And we are of opinion that the plaintiff acquired no right to this stream by this user thereof for twenty years, because the stream was an artificial stream made to flow over the defendant's land by the operations of miners, and the miners had not permanently abandoned their right of control over the water in the stream when the plaintiff diverted it by the upper launder to his works. Rights and liabilities in respect of artificial streams when first flowing on the surface are entirely distinct from rights and liabilities in respect of natural streams so flowing. The water in an artificial stream flowing in the land of the party by whom it is caused to flow is the property of that party, and is not subject to any rights or liabilities in respect of other persons. If the stream so brought to the surface is made to flow upon the land of a neighbour without his consent, it is a wrong for which the party causing it so to flow is liable. If there is a grant by the neighbour, the terms of the grant regulate the rights and liabilities of the parties thereto. If there is uninterrupted user of the land of the neighbour for receiving the flow as of right for twenty years, such user is evidence that the land from which the water is sent into the neighbour's land has become the dominant tenement, having a right to the easement of so sending the water, and that the neighbour's land has become subject to the easement of receiving that water. But such user of the easement of sending on the water of an artificial stream is of itself alone no evidence that the land from which the water is sent has become subject to the servitude of being bound to send on the water to the land of the neighbour below. The enjoyment of the easement is of itself no evidence that the party enjoying it has

become subject to the servitude of being bound to exercise the easement for the benefit of the neighbour. A right of way is no evidence that the party entitled thereto is under a duty to walk, nor a right to eaves-dropping on the neighbour's land that the party is bound to send on his rain-water to that land. In like manner, we consider that a party, by the mere exercise of a right to make an artificial drain into his neighbour's land, either from mine or surface, does not raise any presumption that he is subject to any duty to continue his artificial drain by twenty years' user. Although there may be additional circumstances by which that presumption would be raised or the right proved, if it be proved that the stream was originally intended to have a permanent flow, or if the party by whom or in whose behalf the artificial stream was caused to flow is shewn to have abandoned permanently, without intention to resume the works by which the flow was caused, and given up all right to and control over the stream, such stream may become subject to the laws relating to natural streams. But the facts here do not raise either of those points. The law relating to natural streams is entirely different. The flow of a natural stream creates mutual rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality. These mutual rights and liabilities may be altered by grant, or by user of an easement to alter the stream, as by diverting, or fouling, or penning back, or the like. If the stream flows at its source by the operation of nature, that is, if it is a natural stream, the rights and liabilities of the party owning the land at its source are the same as those of the proprietors in the course below. If the stream flows at its source by the operation of man, that is, if it is an artificial stream, the owner of the land at its source, on the commencement of the flow, is not subject to any rights or liabilities towards any other person in respect of the water of that stream. The owner of such land may make himself liable to duties in respect of such water by grant or contract; but the party claiming a right

to compel performance of those duties must give evidence of such right, beyond the mere suffering by him of the servitude of receiving such water. The rights of the plaintiff in respect of the two launders exemplify this distinction. For the lower launder the plaintiff had made a water-course on the defendant's land, and collected the water of natural springs therein, and brought it to this launder. For the upper launder the plaintiff had gone to the edge of the defendant's land, and received there into the launder the water of the tie, where it would have flowed into the natural stream and become part thereof. In respect of the lower launder, there was dominant *actio* and servient *patientia* for twenty years, and so there was good evidence of an easement for the plaintiff, the dominant tenant. In respect of the upper launder, there was no dominant *actio* by the plaintiff, nor servient *patientia* by the defendant, on the defendant's land in respect of the stream while on that land; and so there was no presumption of a grant by the defendant, no evidence of a right in the plaintiff. For the law relating to natural streams on the surface, we refer to *Mason v. Hill* (15); for the law relating to subterranean water, to *Chasemore v. Richards* (16); for the law relating to artificial streams we refer to *Arkwright v. Gell* (9), *Magor v. Chadwick* (13) and *Wood v. Waud* (11). And for a clear exposition of the whole law on this class of easements and servitudes, we refer to *Gale on Easements*, 262, 3rd edit. In *Arkwright v. Gell* (9) the law relating to artificial streams is expounded with clearness and vigour. The important and extensive rights and interests connected with mining are protected in their relation to the rights of surface owners. In that case the question arose between the surface owner and the mining owner; and it was held that the mining owner who had brought the water to the surface on the plaintiff's land for draining a mine might divert it when deeper draining was required, and all the mines of the district that might be unwatered by the drain were properly

treated as one interest. In *Magor v. Chadwick* (13) no law is expounded, but doubts upon the law are created by dissent from some governing propositions laid down in *Arkwright v. Gell* (9). The Judge at the trial had not recognized any distinction between natural and artificial streams; and the Court refused a new trial for misdirection, on the ground that the blame of any miscarriage, if miscarriage there was, ought to be laid on the counsel who argued at the trial. The result of that case would have been pernicious to all miners and all proprietors improving land by draining; but it was followed by *Wood v. Waud* (11), in which the propositions laid down in *Arkwright v. Gell* (9), relating to the difference between artificial and natural streams, are re-affirmed. In this case the question arose between two proprietors of the surface, over whose land the artificial stream flowed, in its way to the natural stream; and it was held, that as between them the law relating to natural streams did not govern. This case was followed by *Greatrex v. Hayward* (10), in which it was decided that a drain on the surface made for the purpose of draining the land of the maker thereof is an artificial stream, and is not subject to the law relating to natural streams, and might be diverted after twenty years' flow into the plaintiff's land, for the purpose of improving the drainage of the defendant's land. These cases have been followed by others collected in the treatise above mentioned; and we consider that the distinction between natural and artificial streams is established in our law, and that the flow from the upper launder was not such an artificial stream that an easement could be acquired therein by twenty years' user. For these reasons, we consider that the plaintiff's case as to the upper launder failed, and that the rule for entering the verdict on the count relating thereto for the defendant must be made absolute.

The plaintiff's rule discharged; the defendant's rule made absolute to enter the verdict for the defendant on the count in the declaration relating to the upper launder, and discharged as to the remainder.

(15) 5 B. & Ad. 1.

(16) 2 Hurl. & N. 168; s. c. 26 Law J. Rep. (N.S.) Exch. 398: affirmed in the House of Lords, 7 H.L. Cas. 349; 29 Law J. Rep. (N.S.) Exch. 81.

1865. }
May 26. } M'CALL v. TAYLOR.

*Bill of Exchange — Promissory Note,
Requisites of—Inchoate Instrument.*

An instrument in the form of a bill of exchange, addressed to and accepted by the defendant, but without the names of either a payee or drawer, is neither a bill of exchange nor a promissory note, but only an inchoate instrument.

The first count was against the defendant, as the acceptor of a bill of exchange for 300*l.* The second count was on the same instrument as a promissory note, of which the defendant was alleged to be the maker. There were counts also for goods sold and delivered and on accounts stated.

Pleas, to the first count—A traverse of the acceptance; to the second count, a traverse of the making; and to the residue of the declaration, never indebted.

At the trial, before Byles, J., at the London Sittings after Hilary Term last, it appeared that the instrument declared on in the first and second counts was in the following form:
“£300.

“Four months after date, pay to my order the sum of three hundred pounds for value received.

“To Captain Taylor,
“Ship *Jasper*.”

There was no date to this instrument, nor the signature of any drawer; but there was written across it by the defendant these words, “Accepted, William Taylor.”

This instrument was given to the plaintiff by one Milne, the broker of the ship *Jasper*, on account of goods supplied to such ship by the plaintiff. The defendant was the captain of the *Jasper*; but the jury found that the goods had not been supplied on his credit, and that there was no debt due from the defendant.

The learned Judge was of opinion that the instrument could not be declared on either as a bill of exchange or promissory note, and a verdict was accordingly entered for the defendant; but leave was reserved to the plaintiff to move to enter a verdict on either the first or second counts, if the

instrument could be declared on as either a bill or note.

A rule nisi to that effect having been subsequently obtained by *Hannen*, for the plaintiff,—

Day now shewed cause.—The instrument is neither a promissory note nor bill of exchange. It contains no promise by the defendant to pay any one, and it wants a drawer and payee to make it a bill of exchange; it is altogether an incomplete and imperfect instrument, and the case is not distinguishable from that of *Stoessiger v. the South-Eastern Railway Company* (1). There one Cruttenden, being indebted to a Mr. Gould in more than 10*l.*, framed a document directed to himself, ordering himself three months after date to “pay to my order” the amount. The document had the stamp proper for a bill of exchange of that amount, and was in all respects like a bill of exchange, except that there was no drawer’s name. Cruttenden wrote on it his acceptance, and caused it to be forwarded in a parcel directed to Gould, by a common carrier, in order that Gould might add his name as drawer. On an action against the carrier for the loss, the Court of Queen’s Bench held that it was not a bill, order, note or security for money, within the meaning of the Carriers’ Act, 11 Geo. 4. & 1 Will. 4. c. 68. s. 1.

Hannen and *Lord*, in support of the rule.—The document may be treated as a promissory note. The case of *Cruckley v. Clarence* (2) shews that where a bill of exchange is issued in blank for the name of the payee, a *bond fide* holder may insert his own name as the payee, and the drawer will be liable. In *Miller v. Thompson* (3), an instrument in the form of a bill of exchange drawn upon a joint-stock bank by the manager of one of its branch banks, by the order of the directors, was held to be properly declared upon as a promissory note. In *Fielder v. Marshall* (4) the in-

(1) 3 El. & B. 549; s. c. 23 Law J. Rep. (N.S.) Q.B. 293.

(2) 2 M. & S. 90.

(3) 3 Man. & G. 576; s. c. 11 Law J. Rep. (N.S.) C.P. 21.

(4) 9 Com. B. Rep. N.S. 606; s. c. 30 Law J. Rep. (N.S.) C.P. 158.

strument, which was in the form of a bill of exchange, was drawn by one A. Langstaff, and accepted by the defendant for a debt due from Langstaff to the plaintiff. The plaintiff's name was in the body of the instrument as payee, and in the corner at the foot of it the plaintiff's name and address were written; but the Court considered the instrument as not addressed to any one, and treated it as a promissory note. The case of *Peto v. Reynolds* (5) also furnishes an example of an instrument which was not good as a bill of exchange for want of a drawee, being considered good as a promissory note.

[SMITH, J.—There was there the name of a payee.]

The case of *Armfield v. Allport* (6) strongly resembles the present case. There it was held that an instrument drawn in the form of a bill of exchange, payable to bearer, even if accepted in blank, and afterwards filled up by the drawer, may be declared upon by the indorsee as a promissory note made by the drawer and indorsed by the drawee.

[WILLES, J.—That case would seem to have been an application of the doctrine in *Penny v. Innes* (7), that a person who puts his name on the back of a bill may be treated as a new drawer; but that doctrine is inapplicable to notes by reason of the Stamp Act.]

That case of *Armfield v. Allport* (6) is certainly rather obscure; but the Court there seemed to have considered that they were justified in treating the instrument as a promissory note. Where a payee is a fictitious person, the bill may be declared on as payable to bearer—*Byles on Bills*, 8th edit. 73; *Minet v. Gibson* (8).

ERLE, C.J.—I am of opinion that this rule should be discharged. The declaration is on a bill of exchange, and also on the same instrument described as a promissory note. The instrument in ques-

tion was in this form—[The learned Judge read it].—It has no date and no drawer's name; but the defendant wrote his acceptance across it; and the question is, has the holder of such an instrument a right to declare on it either as a bill of exchange or promissory note? It certainly is not a bill of exchange, nor is it a promissory note; and there has been no case cited as an authority for its being considered as either a bill or a note. It is, in fact, only an inchoate instrument, though capable of being completed. Let the party who has the authority to make it a complete instrument do so; but if he will not do this, he cannot sue on it. The case of *Stoessiger v. the South-Eastern Railway Company* (1) is directly in point. In the other cases which have been referred to, where effect was given to the instrument, nothing more had to be done to make the instrument complete; and so those cases are distinguishable from the present. The captain may possibly have given his acceptance for the necessaries supplied to the ship, and the plaintiff may have had authority to put his name as drawer; but that should have been shewn by his doing so. As it is, he seeks to sue on it without putting his name to it as drawer; and it may be that the reason is, because he never had authority to insert a drawer's name. It is, however, sufficient for us to say that the instrument is inchoate and imperfect; and therefore there is no ground for making this rule absolute.

WILLES, J., BYLES, J. and SMITH, J. concurred.

Rule discharged.

1865. } BIRD v. THE GREAT EASTERN
June 13. } RAILWAY COMPANY.

Lands Clauses Consolidation Act (8 & 9 Vict. c.18. s. 68.)—*Compensation for Injury to Right of Shooting—Equitable Interest.*

A party who has a right of shooting over land by an agreement, not under seal, with the owner, has not such an interest as to entitle him to compensation from a railway company under section 68. of the Lands Clauses Consolidation Act, 1845, in respect of the shooting being diminished in value by

(5) 9 Exch. Rep. 410; s.c. 23 Law J. Rep. (N.S.) Exch. 98.

(6) 27 Law J. Rep. (N.S.) Exch. 42.

(7) 1 Cr. M. & R. 439; s.c. 4 Law J. Rep. (N.S.) Exch. 12.

(8) 3 Term Rep. 481.

the company constructing a railway over part of such land.

This is a SPECIAL CASE, stated for the opinion of the Court, without pleadings, pursuant to the order of Byles, J., dated the 20th of January 1865. The action was brought under the 68th section of the Railways Clauses Consolidation Act, 1845.

The plaintiff, claiming to be entitled to compensation under the circumstances hereinafter stated, gave the company a notice under that section, requiring the defendants to issue their warrant to the sheriff to summon a jury. The defendants disputing the plaintiff's title to any such compensation, did not issue their warrant within the twenty-one days, and thereupon the action was brought for the amount of compensation specified in the notice. The real point in dispute between the plaintiff and the defendants, not being as to the amount of compensation, but as to the plaintiff's title to any compensation at all, it has been agreed between them that in the event of the point being decided in the plaintiff's favour, he shall waive the right to the particular sum claimed in his notice, and that the amount of compensation shall be ascertained in the mode prescribed by the said order. The opinion of the Court upon the real points in dispute is, therefore, respectfully requested on the following special case: The Eastern Counties Railway Company were, by the Eastern Counties Railway Act, 1861, which incorporated the Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845, authorized to make a railway, being (No. 4.) in section 7. of that act. By the Great Eastern Railway Act, 1862, the Eastern Counties Railway Company has been amalgamated with other companies, and has become the Great Eastern Railway Company (the defendants), on which latter company it is to be assumed, for the purposes of this case, that all the rights and liabilities of the former company have devolved.

John Elton Hervey Elwes being seised in fee of all the lands and hereditaments hereinafter mentioned, a document in writing, not under seal, was, on the 3rd of March 1862, signed by him and the plaintiff, of which the following is a copy:

"Memorandum of agreement made this 3rd day of March 1862, between John Elton Hervey Elwes, of Furze Hill, Brighton, in the county of Sussex, esquire, hereinafter called landlord, of the one part, and Robert Wilberforce Bird, of Green End House, Ware, in the county of Hertford, hereinafter called the tenant, of the other part, whereby the said landlord agrees to let all that mansion-house known as Stoke College, in the county of Suffolk, with the offices, buildings, coach-house and stables, lawn, pleasure-ground and garden, and 18 acres of meadow land or grass land thereto attached, be the same more or less, as late in the occupation of William Waling Winch, esquire, together with the fixtures, furniture, china, glass and effects, as more particularly described in an inventory to be made or signed by or for either of the said parties, on or before taking possession, *together with the sole right of shooting and fishing over the whole estate of Stoke College and the lands belonging to the said landlord, the same consisting of 3,000 acres, more or less, from the 25th day of March instant, for the full space or period of three years, at and for the clear yearly rental or sum of 275*l.*, payable half-yearly, on the 25th day of March and the 29th day of September, the first of such half-yearly payments to become due and to be made on the 29th day of September next.* And the said tenant agrees to take the house on the terms aforesaid, and to pay the rent as the same shall become due, to use the said premises solely as a private residence, and not underlet or part with possession of the same without the consent in writing of the said landlord for that purpose first had and obtained, and not to remove or suffer to be removed therefrom, under any pretence whatever, the whole or any part of the said furniture and effects, to keep, and at the expiration of the said tenancy to quit and deliver up possession of the said residence, premises and furniture as per inventory aforesaid, in as good order, state and condition as the same now are, fair wear and tear and accidental damage by fire in the mean time excepted; and in the event of any loss, damage, or breakage other than hereinbefore provided for, to make good the same, or allow a fair compensation; the amount thereof, if in dispute, to be settled

by two valuers or their umpire in the usual manner, and should either party neglect or fail to appoint a valuer within seven days after notice given by the other party, or should such valuer, when appointed, neglect or refuse to act within the time appointed, or object to the appointment of an umpire, then the valuer already appointed may proceed alone, and his decision shall be final and binding on all parties. The said tenant further agrees, at his own expense, to keep and leave the said gardens properly stocked and cropped according to the season of the year, and to keep the roofs and gutters of the premises clear from leaves and snow; not to alter the present arrangement of the garden-grounds, lawns or shrubberies, nor without the consent in writing of the said landlord to lop, cut, or remove any timber or timber-like trees, shrubs or fences, which may be growing or standing on the said premises, except the necessary pruning in garden arrangements; not to mow any of the grass land twice in any one year; to keep down the rabbits on the estate so as to prevent their becoming so numerous as to be a nuisance to or cause of fair complaint from the tenants of the farms, or failing this, after due notice from the landlord to allow the said landlord, his servants or keepers, to enter in and upon the said lands, and to kill and destroy the said rabbits. The said landlord agrees to keep the said mansion-house and premises, and the water-pipes and pumps in good and substantial repair, and to pay and discharge all rates, taxes, tithes, and other charges payable in respect of the said premises, during the said tenancy. It is hereby further agreed, that the said tenant shall have the option of giving six months' notice, viz., on or before the 29th day of September 1864, in writing, to the said landlord, prior to the expiration of the tenancy hereby granted, renewing the said tenancy for a further period of two years upon the terms and conditions of the present agreement; and should he exercise such option, he shall have a further power of extending the tenancy on the terms aforesaid for a second period of two years, making seven years in all, by giving notice to the said landlord, in writing, on or before the 29th day of September 1866; and should the said tenant during the said

tenancy decorate, or cause to be decorated and painted the ball-room on the said premises, the said landlord agrees to allow the sum of 25*l.* from the half-year's rent during which such decorations are effected, provided the said tenant should produce vouchers and receipts to prove that a sum of not less than 25*l.* has been expended in such decorations and paintings. Provided always, that in case the said rent or any part thereof shall remain due or unpaid for the space of twenty-one days after the day upon which it shall have become due, or if the said tenant shall commit a breach of the conditions of this agreement, then and in such case it shall and may be lawful for the said landlord, or his duly authorized agent, to re-enter and take possession of the said premises, and thereout to remove the said tenant or any other person or persons therein, without the necessity of bringing an ejectment, or taking any legal or equitable proceedings for the recovery thereof. Lastly, it is mutually agreed that the charge for two fair copies of this agreement shall be paid by the said landlord and the said tenant, in equal moieties of 2*s.* each. The defendants being empowered by the before-mentioned acts, for the purpose of constructing the said railway, to purchase and take the land which they are herein stated to have purchased, gave to the said John Elton Hervey Elwes a notice under the 18th section of the Lands Clauses Consolidation Act, 1845, stating therein that they required to purchase and take the said land, and demanded from the said John Elton Hervey Elwes the particulars of his estate and interest therein, and of the claims made by him in respect thereof; and the said notice stated the particulars of the land so required, and that the defendants were willing to treat for the purchase thereof, and as to compensation to be made by all parties for the damage that might be sustained by reason of the execution of the works. In pursuance of that notice, and by virtue of the powers of their acts of parliament, the defendants purchased of the said John Elton Hervey Elwes part of the land over which the document before set forth purported to agree to let to the plaintiff such right of shooting as aforesaid; and the said purchased land was conveyed to the

defendants in fee by the said John Elton Hervey Elwes, and the defendants constructed part of the said railway thereon. The said part of the said railway is on the whole about 2 m. 1 f. 83 y. long, and contains in area 23 a. 2 r. 13½ p., and it intersects the land over which it was agreed as aforesaid that the plaintiff should have the said right of shooting so as to leave a considerable part of the said land on each side of the said railway. It is admitted that the shooting on that part of the said land which was not purchased as aforesaid was and is, in fact, prejudiced and diminished in value by the construction of the said part of the said railway. It is also admitted that the shooting on the said purchased land is, in fact, prejudiced and diminished in value by the construction of the said part of the said railway. From the time of making the said agreement with the plaintiff to the time of conveyance to the defendants, the said John Elton Hervey Elwes continued to be seised in fee of all the lands and hereditaments mentioned in the said agreement, and from the time of the conveyance to the said defendants hitherto, he has continued so seised thereof, except the part so conveyed. If the plaintiff ever was or is entitled in equity to a legal grant of the right of shooting referred to in the said document, nothing, except so far, if at all, as herein appears, has occurred to destroy his right to such grant. It is not admitted by the defendants that the plaintiff was interested in lands, or that the damage and diminution of value herein stated is an injurious affecting within the meaning of the Lands Clauses Consolidation Act, 1845. These are questions on which the parties differ, and are matters for the consideration of the Court. The Court is to have the power of drawing such conclusions of fact as they think that a jury ought to draw.

The question for the Court is, whether, under the circumstances herein stated, the plaintiff is entitled to any compensation, and if to any, in respect of what he is so entitled.

Mellish (Mayd with him) for the plaintiff.—The question is, whether the plaintiff is entitled to compensation under the Lands Clauses Consolidation Act, 1845, (8 & 9 Vict. c. 18)? and that raises the questions, first, whether a right of shooting is such a right, in

the nature of a profit *à prendre*, as to entitle the landowner to receive compensation in respect of it; secondly, whether the person to whom the landowner has granted that right can claim such compensation; and, thirdly, whether it makes any difference to such person's title to compensation that the agreement giving him the right to shoot is not under seal.

Now, as to the first of these questions, it is clear that if the railway went over the land, the landowner would be entitled to compensation in respect of the injury to his shooting, as part of the value of the land. Then, if he has parted with the right of shooting, surely the person to whom he has so parted with it would be entitled to such compensation. The mere fact of its being an incorporeal hereditament would not prevent its being such an interest in land within the meaning of section 68. of the act for which compensation may be claimed. Then is it not injuriously affected by the execution of the defendants' works?

[WILLES, J.—The difficulty is this: must not the person who has granted the right of shooting, and who is trustee for the plaintiff, be the person who is to convey to the railway company? Surely the company have only to deal with the legal ownership of the land.]

Section 7. of the statute, which empowers trustees to sell and convey, is applicable only to express trusts, and not to such a case as this, which is that of an implied trust.

[WILLES, J.—If there be no trust, the plaintiff has no equitable interest.]

A Court of equity, considering that to be done which has been agreed to be done, would consider that the plaintiff in this case had got the grant—*Moreland v. Richardson* (1). Then assuming, therefore, that the plaintiff had a right to shoot by a grant under seal, the case of *Wickham v. Hawker* (2) shews that it would give the plaintiff an interest in land, for that case decides that the grant to a person, his heirs and assigns, of "free liberty, with servants or otherwise, to come into and upon lands, and there to hawk, fish and fowl," is a grant of a licence of profit and not of a mere per-

(1) 22 Beav. 596; s. c. 25 Law J. Rep. (N.S.) Chanc. 883.

(2) 7 Mee. & W. 63; s. c. 10 Law J. Rep. (N.S.) Exch. 153.

sonal licence of pleasure, and that such a liberty is therefore a profit *à prendre* within the Prescription Act, 2 & 3 Will. 4. c. 71. s. 2. The right was intended, here, to be appurtenant to land, for by the agreement there is a demise of the land with the right of shooting over other lands. Section 109. of the statute, and the following sections, to section 114, deal with the cases of compensation with respect to rights of common and mortgages, and they shew that the company have to deal with mortgagors as well as mortgagees; and by the interpretation clause (sect. 3.) the word "lands" is to extend to "hereditaments of any tenure." In *Sweetman v. the Metropolitan Railway Company* (3), Wood, V.C. held, that a written agreement, void at law, but equivalent in equity to a lease, was an interest greater than a yearly tenancy within the meaning of the Lands Clauses Consolidation Act.

Bidder, contra.—It is submitted, in the first place, that what the plaintiff claims to be entitled to under the agreement is not an interest in land within the meaning of section 68. of the Lands Clauses Consolidation Act; secondly, that it has not been injuriously affected by the defendants' works; and, thirdly, the plaintiff's claim being derived under a parol agreement, it gives him no right which will entitle him to compensation. It is submitted that what was given to the plaintiff by the agreement was a mere licence to pass over the land, and assuming such a grant to amount to a profit *à prendre*, it is still not such an interest in land as would come within section 68. of the statute. The definition of "lands," given by the 3rd section, is "lands, tenements and hereditaments of any tenure," but "piscary does not lie in tenure, for the soil may be to one and the piscary to another, and then the lord cannot distrain"—20 *Vin. Abr.* tit. 'Tenure,' B. Such a right as that of shooting, which the plaintiff claims, was certainly not a right which the legislature contemplated under this act as a right to be dealt with. The case of *King v. the Commissioners of the Nene Outfall* (4) was a decision on a statute which for settling differences between certain Commissioners authorized to acquire land for improving

a navigation, and the several persons interested in any lands, tenements or hereditaments which should or might be taken or affected or prejudiced for any of the purposes of the act, provided a mode of assessing compensation to such persons, and in that case it was held that the Commissioners having taken, for the purpose of the navigation, tithable land, the tithe-owner was not entitled to compensation. The Lands Clauses Consolidation Act having expressly provided for such cases as commonable rights, the inference to be drawn from the absence of any express provision respecting such a right as that of shooting is that the legislature did not intend to make it the subject of compensation. Secondly, the plaintiff's interest was not injuriously affected. The cases of *The Caledonian Railway Company v. Ogilvy* (5), *In re Penny and the South-Eastern Railway Company* (6) and *The New River Company v. Johnson* (7) shew that where no action would have lain, independently of the act under which the works were done, there is no right to compensation. Suppose the owner of the estate who had granted this privilege to the plaintiff had made a road or railway across his land, would he have been liable to an action at the suit of the plaintiff for doing so? Would it be more than a reasonable use of the surface of the land? The only cases in which an action has been maintained for an invasion of such a right as this have been those in which the invasion has been by a trespass, as in *Alderman de Londres v. Hastings* (8). The authorities are to be found collected in *Holford v. Bailey* (9). Thirdly, as the plaintiff had no legal grant he was not entitled to compensation. The contract was a mere licence to the plaintiff; there cannot be a demise of an incorporeal hereditament except by deed—*Bird v. Higginson* (10).

Mayd replied.

(5) 2 Macqueen, 229.

(6) 7 El. & Bl. 660; s. c. 26 Law J. Rep. (N.S.) Q.B. 225.

(7) 2 El. & Bl. 435; s. c. 29 Law J. Rep. (N.S.) M.C. 93.

(8) 2 Sid. 8.

(9) 8 Q.B. Rep. 1000; s. c. 16 Law J. Rep. (N.S.) Q.B. 68.

(10) 2 Ad. & E. 696; s. c. 4 Law J. Rep. (N.S.) R.B. 124; and in error 6 Ad. & E. 824; s. c. 6 Law J. Rep. (N.S.) Exch. 282.

(3) 1 H. & M. 543.

(4) 9 B. & C. 875.

ERLE, C.J.—I am of opinion that our judgment should be for the defendants. The question raised is upon the Lands Clauses Consolidation Act, 1845, and it is whether the plaintiff can shew that he is a person entitled to compensation in respect of any lands, or any interest therein, injuriously affected by the execution of the defendants' works. It appears that the plaintiff had taken, for a term, a mansion-house, and certain lands adjoining (as to which we are not now dealing, because they were not injuriously affected by the defendants' works), and, with these, the right of shooting and fishing over other lands of the same landlord. The defendants have taken a portion of these last-mentioned lands for their railway, and the plaintiff says that his right of shooting has been interrupted and injuriously affected by the railway. Now the right which the plaintiff has is a mere licence, by an instrument not under seal. The plaintiff's right lies only in agreement, and he has no land, or interest in any land which has been taken by the defendants. The argument on the part of the plaintiff is that he has a right, in respect of this agreement with Elwes, to maintain a suit in equity, and have it made into an instrument under seal. Whatever may be the right of the plaintiff as between him and Elwes, as to which I do not pretend to give any opinion, the right in equity is a right only between the parties to the contract. That distinction was taken by Lord Cottenham, in *Tasker v. Small* (11). "It was argued at the bar," says his Lordship, "that the plaintiff was in equity invested with all the rights of Mrs. Small, upon the principle that by a contract of purchase the purchaser becomes in equity the owner of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property." Therefore, I say, whatever may be the rights between the plain-

tiff and Elwes, the defendants are strangers thereto; they have settled as to compensation with the party who was the owner of the land, and have taken such land with all the rights and incidents belonging to it, whether on the surface or in the air. That is the ground on which I rest my judgment, and it is sufficient to support it in the present case. But even if the plaintiff had a grant under seal, I think Mr. Bidder's argument strongly shews that it would not be such a right as would be available for compensation. The plaintiff takes the right of shooting, but there is no contract by Elwes to keep up the quantity of birds. It is true that if Elwes interfered with the right which he had granted an action would lie against him, but it is unnecessary now to discuss that question.

WILLES, J.—I, also, am of opinion that our judgment ought to be for the defendants. It appears that the plaintiff contracted with the owner of the soil for the exclusive right of shooting and fishing on the land, and I assume that he did so by an effectual contract. Then, in what relation does a person who is so entitled stand with regard to the owner of the land? The latter is under no engagement that he, the owner, is not to enjoy the land in the ordinary way. Cases which have arisen on the subject of the right of sporting are to be found in the books. Mr. Bidder, in his able argument, referred to several of them; but I have, in my mind, gone back to the time of the forest laws, and to the cases to be found in *Com. Dig.* tit. 'Chase,' (K.) No doubt certain rights existed in all these cases, but I apprehend that the books are entirely silent on the subject of a person, who has merely the grant of a right of sporting over land, having, as an incident thereto the right to restrain the ordinary and reasonable enjoyment of the soil by the owner thereof, always supposing that the latter does nothing for the purpose of effecting the destruction of the game. I am at a loss to see how a railroad across the land can, more than an ordinary road, affect the right of shooting, or how the damage produced by it is necessarily an injury which would give a right of action. I am far from saying that it may not do what the law would call an injury, but not to a person who has merely a grant of the right

(11) 3 Myl. & Cr. 63; s.c. 7 Law J. Rep. (N.S.) Chanc. 19.

of shooting without a covenant by the owner of the land, express or implied, not to do anything which would interfere with the exercise of such right. Assuming, therefore, that the difficulty suggested by my Lord did not exist, it does not follow that the plaintiff would be entitled to compensation.

BYLES, J.—I am of the same opinion. I rest my judgment on the meaning of the words "any interest in any lands" in the 68th section of the act. Is, then, this right of shooting, which the plaintiff has, an interest in land? In the first place, the plaintiff has, by virtue of such right, no estate in the land, and I cannot see that he has any interest in the land at law; but it is said that he can, by going into equity, perfect his title. I am not sure that he can do so in such a matter as this, but I own to being incompetent to give an opinion on that point. It, however, lies on the plaintiff to shew that he could do so, before he can make out that he is entitled to compensation either at law or in equity. If we were to decide in favour of the plaintiff in this case, the same right to compensation might be claimed by three or more licensees. The more convenient course for us is, to say that he must shew an interest consistent with the words of the statute in order to entitle him to a remedy under that act, without our saying whether he can claim compensation by any other mode.

SMITH, J. concurred.

Judgment for the defendants.

1865. { HERRING, appellant, v. THE
June 27. { METROPOLITAN BOARD OF
WORKS, respondents.

Lands Clauses Consolidation Act—Metropolis Local Management Act (18 & 19 Vict. c. 120.)—Damage by obstructing Access to House—Compensation.

Section 135. of the *Metropolis Local Management Act (18 & 19 Vict. c. 120.)* authorizes the Metropolitan Board of Works to repair and maintain certain sewers, with full power to carry such sewers through or under any lands, "making compensation for any damage done thereby," and the

Lands Clauses Consolidation Act is incorporated with such act. In exercise of the powers conferred on them by their act, and for the purpose of enabling them to reconstruct a sewer running under a street, the board erected a hoarding in such street, which rendered the access to the plaintiff's premises less convenient than it had been before; but no part of such premises was taken, nor did it appear that the hoarding was kept up beyond a reasonable time :—Held, that the plaintiff was not entitled to compensation under the statute for the damage he had sustained by the erection of such hoarding.

[For the report of the above case, see 34 Law J. Rep. (N.S.) M.C. p. 224.]

[IN THE HOUSE OF LORDS.]

1864.	{	JONES v. THE MERSEY
Feb. 18, 19, 22, 23;		DOCKS AND HARBOUR
July 7.		BOARD.
1865.		THE MERSEY DOCKS
June 22.		AND HARBOUR BOARD
		v. CAMERON.

Poor-Rate—Rateable Occupation—Beneficial Occupation—Exemption on Ground of Public Purposes—Trustees of Public Works, &c., Crown Property—43 Eliz. c. 2.—6 & 7 Will. 4. c. 96.

The occupation of property which is liable to be rated under the 1st section of the 43 Eliz. c. 2. is an occupation yielding or capable of yielding a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain the property in a state to command such rent, and it is not necessary that the occupation should be beneficial to the occupier, so that trustees, who are, in law, the tenants and occupiers of valuable property upon trust for charitable purposes, such as hospitals or lunatic asylums, are rateable, notwithstanding that the buildings are actually occupied by paupers who are sick or insane.

The only occupiers exempt from the operation of the act are the Sovereign, because he is not named in the statute, and the direct and immediate servants of the Crown, whose

occupation is the occupation of the Crown itself; and the only ground of exemption from the statute is that which is furnished by the above rule. And, consequently, when property yielding a rent above what is required for its maintenance is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the

public purposes must be such as are required and created by the Government of the country, and are, therefore, to be deemed part of the use and service of the country.

[For the report of the above case, see the volume for 1866, 35 Law J. Rep.(n.s.) M.C. p. 1.]

The following cases will be published in the Volume for 1866 :

HENDERSON *v.* BAMBER.
JOHNSON *v.* CHAPMAN.
THOMPSON *v.* HAKEWELL.

END OF TRINITY TERM, 1865.

CASES
ARGUED AND DETERMINED

IN THE

Court of Exchequer,

REPORTED BY

HENRY HOLROYD, Esq.

AND

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BARRISTERS-AT-LAW.

AND IN THE

Exchequer Chamber,

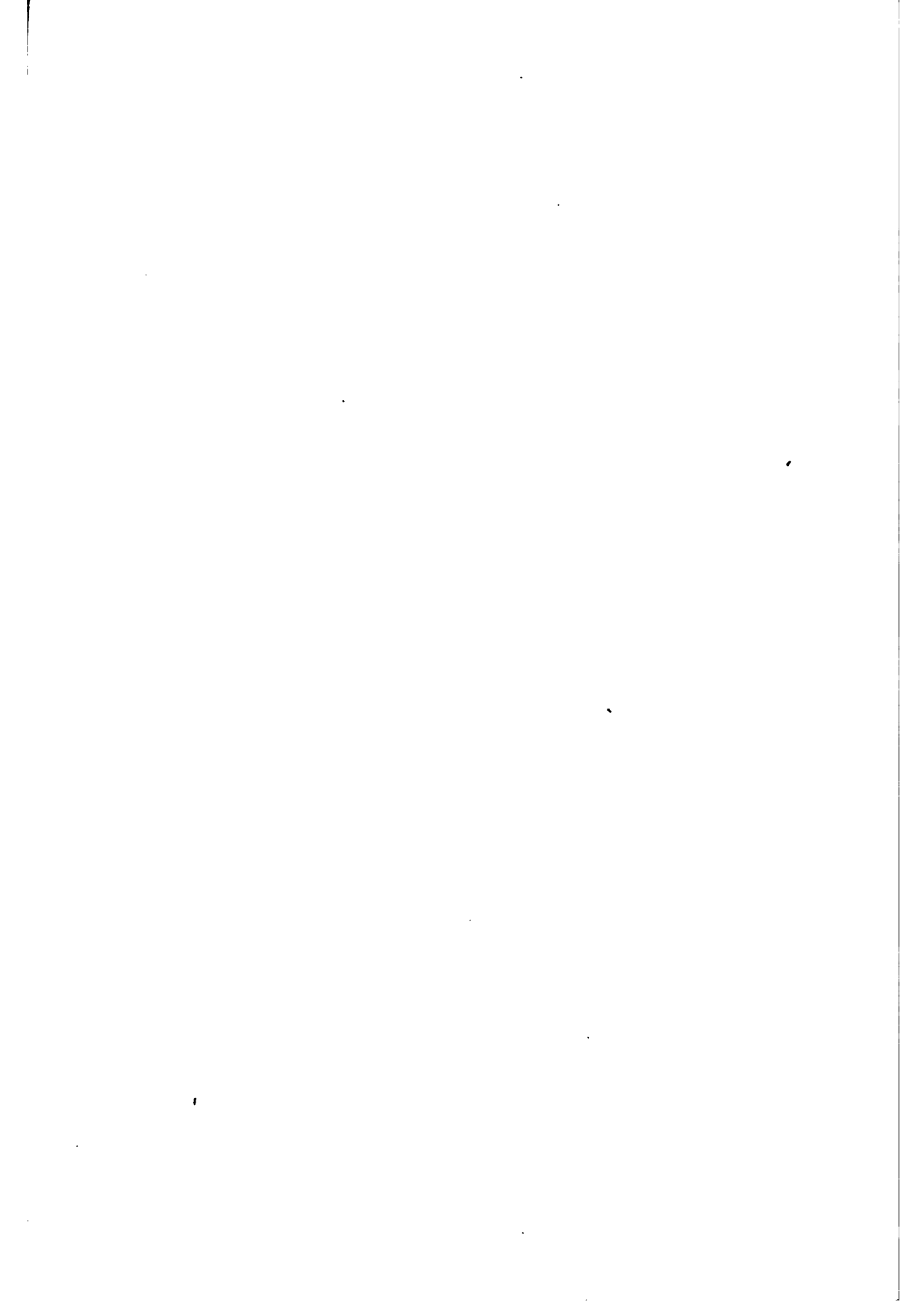
ON ERROR AND ON APPEAL FROM THE EXCHEQUER.

REPORTED BY

FRANCIS RUSSELL, Esq. BARRISTER-AT-LAW.

28 & 29 VICTORIÆ.

MICHAELMAS TERM	1
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CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER.

MICHAELMAS TERM, 28 VICTORIÆ.

1864. }
Nov. 3. } TAYLOR v. HOLT.

Interest by Statute—3 & 4 Will. 4. c. 42.
s. 28 (1).

A letter of application for a loan until a day named therein, which does not shew an obligation to pay on the face of it, is not "an instrument by virtue of which the debt is payable at a certain time," within the meaning of the 3 & 4 Will. 4. c. 42. s. 28.

This was an action brought to recover 10*l.* for money lent, and 4*l.* 14*s.* 9*d.* for interest, tried, without a jury, in the Leeds County Court. The Judge gave a verdict for the plaintiff on the interest count only for 2*l.* 5*s.*, not being satisfied that the plaintiff had lent the defendant more money than the latter had, including 1*l.* paid into court, repaid to the plaintiff.

To entitle himself to interest, the plaintiff produced the following letter in the defendant's handwriting :

"Sept. 19, 1854.

"Dear Sir,—Could you do me the favour to lend me 10*l.* until Monday the 2nd of

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October? I am afraid I shall never be out of your debt for the favours you have done me.—I am yours truly,

"Wm. Holt."

It was admitted by the plaintiff that he had previously lent the defendant various sums of money of 5*l.* and under, but not to the amount of the loan in question, which various sums had been shortly afterwards repaid to him by the defendant *without interest*, and that the plaintiff had neither asked nor expected interest on these loans, being on terms of intimacy with the defendant. It was also admitted by the plaintiff that neither at the time of the loan in question nor at any subsequent time until the commencement of this action, had he given the defendant either verbal or written notice of his claiming interest on the loan in question. It was also proved that the defendant paid 5*l.* on account in 1854, and that he subsequently revived the debt by payment of 4*l.* on account of the balance, which he admitted to be due. The letter set out above was admitted by the defendant, but his counsel contended that it was not an "instrument" within the 3 & 4

Will 4. c. 42. s. 28 (1), entitling the plaintiff to recover interest.

The Judge gave the plaintiff a verdict for the interest which he considered due, giving the defendant leave to move to set the verdict aside if this Court should think that the letter was not an instrument within the meaning of the act (2).

Quain having obtained a rule to set aside the verdict or for a nonsuit, on the ground that the letter of the 19th of September was not an "instrument" within the meaning of 3 & 4 Will 4. c. 42. s. 28,—

Thrupp now shewed cause.—The words in this statute, "by virtue of some written instrument," &c., refer to the words in the commencement of the section, and it is only necessary that there should be some writing in order to evidence that the money was payable at a time certain. The legislature in passing the statute had in view the words of Lord Tenterden, C.J., in *Page v. Newman* (3), who said that the then rule was that interest was not due on money secured by a written instrument unless it appeared on the face of the instrument that interest was intended to be paid, &c. This money was sent in reply to the letter, and must be taken to have been lent on the terms of the letter. The plaintiff could not have sued for it before the 2nd of October.

Quain, contra.—The letter was not an instrument by virtue of which the money was payable, and *Page v. Newman* (3) and *Higgins v. Sargent* (4) shew that the intention of the statute was to put other

instruments, on which it is usual to declare, upon the same footing, with regard to interest, as promissory notes, &c. were before the act.

POLLOCK, C.B.—I am of opinion that this rule should be made absolute. The language of the statute is "the jury may, if they shall think fit, allow interest . . . if such debts or sums be payable by virtue of some written instrument at a certain time." Now I do not think that this debt was payable on the 2nd of October 1854 by virtue of the letter; it was payable at that time by virtue of the letter, and of what took place afterwards. And if a question arose whether, coupling the two together, interest was due, I should say certainly not. The parties have very properly put in the case a statement of fact (2), which is in substance this: that they were in the habit of applying the one to the other for a loan, and obtaining it for a short time, and of repaying it without interest. It was admitted by the plaintiff that neither at the time of the loan in question nor at any subsequent time until the commencement of the action did he give the defendant a written notice or claim interest on the loan in question, and it is plain that neither one party nor the other ever contemplated or dreamt of interest.

BRAMWELL, B.—I am of the same opinion. I think the statute, where it speaks of money payable by virtue of a written instrument, means a written instrument which sets forth an obligation to pay at a certain time. This does not do so; because, though it is an application for a loan till a certain day, the plaintiff might have said, "I cannot lend it on those terms; I prefer lending it for a longer period." Then the obligation would not depend on the written instrument, but on the words and what else took place. No doubt, though the plaintiff simply lends the money for a time, he must be taken to lend it on the terms asked for; but that does not make the instrument what it was not originally: it would still be a mere engagement on the part of the defendant to return the loan, but not with interest. One way of testing the question is to see whether a stamp would be required; if it would not, it must be because the letter is not an agreement

(1) This section enacts, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquiry of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment: provided that interest shall be payable in all cases in which it is now payable at law."

(2) The county court Judge not having furnished the Court with any notes of the trial, this statement of the facts, which was agreed to by the parties and certified by the Judge, was accepted by the Court in lieu of the Judge's notes.

(3) 9 B. & C. 378, 381, before the statute.

(4) 2 Ibid. 848.

upon the face of it. Another way is to suppose the defendant had given evidence to shew the money was not lent upon the terms of this instrument, but a week earlier or a week later; he would then have shewn that this instrument was never a binding one between the parties, because in truth it is not a thing which purports to shew an obligation to pay upon the face of it.

CHANNELL, B.—I also think that in this case a nonsuit ought to be entered. Looking at the document put in, the plaintiff could not have succeeded upon it alone in obtaining a verdict against the defendant. The request is to lend money; it was the plaintiff's compliance with the request that created the cause of action.

FIGOTT, B.—As the plaintiff lent the money until the 2nd of October, and the letter fixed the day on which the money was repayable, I was at first disposed to think the letter was an "instrument" sufficiently within the meaning of the statute to carry interest if the money was kept beyond that day. In the result, however, I agree with the rest of the Court that a nonsuit should be entered.

Rule absolute for a nonsuit.

1864. }
Nov. 15. } BAERSELMAN v. LANGLANDS.

Debtor and Creditor—Bankruptcy Act, 1861, ss. 192, 197, 198.—Arrest of Debtor after executing Deed—Discharge on Registration of Deed.

A debtor, arrested on a ca. sa., after executing a good deed of arrangement under section 192. of the Bankruptcy Act, 1861, is, according to section 198, entitled to his discharge from custody on the deed being duly registered.

This was an action brought to recover the sum of 21l. 2s. upon a bill of exchange accepted by the defendant.

Judgment was signed on the 6th of October 1864, and on the same day the defendant executed a deed of arrangement with his creditors. On the 17th of October a writ of ca. sa. was issued, and the defendant was arrested on the 18th. Notice was

received by the plaintiff's attorney on the 31st of October that the deed of assignment had been duly registered pursuant to the 192nd section of the Bankruptcy Act, 1861.

Section 197. of the Bankruptcy Act, 1861, enacts that from and after the registration of every such deed the debtor and creditors, &c. shall in all matters relating to the estate and effects of the debtor be subject to the jurisdiction of the Court of Bankruptcy; and section 198. enacts that "after notice of the filing and registration of such deed has been given as aforesaid (referring to the advertisement in the *Gazette*) no process against the debtor's person (other than such as may be had against a debtor about to leave England) shall be available to any creditor without leave of the Court; and the certificate of the filing and registration shall be available to the debtor for all purposes as a protection in bankruptcy."

A summons was taken out at chambers, calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriff, on the ground that the deed executed on the 6th of October before the arrest, had been since duly registered pursuant to the 192nd section, and that the same was valid and binding on the plaintiff as one of the creditors. The summons was heard before Martin, B., who made no order, but gave the defendant leave to apply to the Court.

Grantham having obtained a rule,—

Philbrick (Nov. 7) shewed cause—As the execution could not have issued if the deed had been registered before the writ, so, on the other hand, the defendant cannot now get out of custody, unless there is a statute discharging him—*Ex parte Chaundy* (1), per Holroyd, Comm., and *Edwards v. Scarbrook* (2). Protection in bankruptcy is a creation of the Bankrupt Law Consolidation Act, 1849, section 112, and to the Court of Bankruptcy, therefore, the prisoner should apply—*Ex parte Windsor* (3). It is entirely a question for the discretion of the Commissioner. "From and after the registration" are the important words of the 197th section, and this deed was not registered when the arrest took place; "available"

(1) 5 Law Times, N.S. 526.

(2) 32 Law J. Rep. (N.S.) Q.B. 45.

(3) 7 Law Times, N.S. 535.

in the 198th section means available for the purposes of arrest, not of detention.

Grantham, contra.—Both the 197th and the 198th sections are in the defendant's favour, and the remarks in *Ex parte Chaundy* (1) apply to an execution issuing before the deed was executed, the gist of the deed being its own validity and execution, not its registration—*Ilderton v. Jewell* (4). The law allows twenty-eight days for registration, therefore there could be no *laches* within that period. Where the bulk of the creditors have determined for an arrangement, and a deed has been executed, such proceedings as these are a fraud on the law. The registration is merely an advertisement of the deed, and dates back to the time of its execution. In *Ex parte Brooks* (5) Lord Westbury said, that the Court of Bankruptcy ought not to aid the creditor in a case like this. The plaintiff has proved his debt, and has no right to be heard here in opposition to the defendant's release—*Re Eaton* (6). Process is not the mere issuing of the writ, but the doing everything necessary to carry out the object of the writ; therefore detention is part of the process.

Cur. adv. vult.

The judgment of the Court (7) was now delivered by—

POLLOCK, C.B.—In this case the defendant was arrested on a *ca. sa.* after he had executed a creditors' deed; and then, after he had been so arrested, and while he was in custody, the deed was registered. It was not disputed that, had the deed been registered as well as executed, the writ could not have issued. It was conceded that the deed was a good deed, and that everything had occurred to make it available to protect him from arrest, if it had been executed and registered before the issue of the writ. The 198th section of the act says that, "after notice of the filing and registration of such deed, no process against the debtor's person in respect of any debt shall be available to any creditor or claimant

without leave of the Court, and that a certificate of the filing and registration shall be available for the debtor's protection." Now, if this defendant is detained in custody, process will be available against him; and as the clause in the act says process shall not be available, we think that the defendant is entitled to his discharge. The rule, therefore, will be made absolute.

Rule absolute.

1864. }
Nov. 14. } HOW v. GREEK.

Lessor and Lessee—Reversioner—Lease, Non-Execution of, by Reversioner.

Declaration for breach of covenants contained in a farming lease dated the 24th of December 1851, and made between the plaintiff of the first part, the defendant of the second part, and one Y. of the third part, whereby the plaintiff and Y. (so far only as they legally could or might, according only to their respective estates and interests) demised to the defendant a farm for a term of fourteen years from the 25th of March 1851. Plea, that at the time of the execution of the deed the plaintiff was possessed of the premises for the residue of a term of years in case the plaintiff should so long live, and the reversion of the premises after the expiration of the estate of the plaintiff then was vested in Y, and that the indenture was never executed by Y. as his deed, and that there never was any demise by the plaintiff and Y. to the defendant of the premises, and that there never was any consideration for the execution of the indenture or of the defendant's part of the same:—Held, on demurrer, that the plea was bad, as it was expressly stated in the lease that the plaintiff and Y. demised so far only as they legally could or might, according only to their respective estates and interest, and that therefore the defendant had received the consideration for which he stipulated, viz., a lease for fourteen years, if the plaintiff should so long live.

Declaration—for not farming according to the express terms of a demise contained in an indenture dated on the 24th of De-

(4) 32 Law J. Rep. (N.S.) C.P. 256.

(5) 33 Law J. Rep. (N.S.) Bankr. 41.

(6) 12 Weekly Rep. 640.

(7) Pollock, C.B., Bramwell, B., Channell, B. and Pigott, B.

ember 1851, and expressed to be made between the plaintiff of the first part, W. A. Yeo of the second part, and the defendant of the third part; whereby it was witnessed that the plaintiff and the said W. A. Yeo (so far only as they legally could or might according only to their respective estates and interests) demised to the defendant a messuage, tenement, farm and lands therein described, for a term of fourteen years, computed from the 25th of March then last past. The covenants declared on were entered into with the plaintiff and his assigns.

Plea—that, at the time of the execution of the deed, the plaintiff was possessed of the premises for the residue of a term of years, in case the plaintiff should so long live, and was not seised or possessed of or entitled to any other estate or interest therein, and the reversion of the premises after the expiration of the estate of the plaintiff then was and has since been vested in W. A. Yeo; and that the indenture was never signed, sealed or delivered by W. A. Yeo as his deed or otherwise, or by any agent or agents of W. A. Yeo lawfully authorized, and, save as aforesaid, there never was any demise by the plaintiff and W. A. Yeo to the defendant of the premises, and that there never was any consideration or value for the signing, sealing and delivery of the indenture, or of the defendant's part of the same, and that the defendant's alleged covenants were void and of no effect.

Demurrer and joinder in demurrer.

The plaintiff's points were, first, that it appears by the lease declared on that the demise by the plaintiff and the covenants applicable to the estate granted by him are quite distinct from the demise by Yeo and its covenants. Secondly, the defendant's covenants apply to the estate granted by the plaintiff, although it is defeasible by the plaintiff's death, and the defendant is not entitled to hold the land during that estate free from any obligation.

The defendant's points were, that the lease of the 24th of December 1851 is not and never has been a valid lease of the lands demised for the term of fourteen years from the 25th of March 1851. Secondly, that the plaintiff is only a tenant for a term of years of the said lands, that estate being defeasible in case of his death, and

the reversioner, W. A. Yeo, never executed the lease. Thirdly, that there was a failure of consideration for the execution of the deed, and the defendant's covenants therein contained were void.

Mathew, in support of the demurrer.—When the facts of this case, as they appear on the record, are ascertained, it is clear that the plea is no answer to the declaration. The plaintiff executes the deed; the defendant also executes it, but the reversioner does not, and the plea is that because the reversioner has not executed the deed it is void *ab initio*. If this was a case in which the lessor did not execute, it might be contended that the cases of *Pitman v. Woodbury* (1) and *Swatman v. Ambler* (2) applied, but the present is distinguishable from those cases. Here the demise is according to the respective interests of the tenant for life and the reversioner, and the covenants are distinct covenants with the plaintiff. The lease is a demise of two several interests as distinct as Blackacre and Whiteacre. In respect of the plaintiff's interest, the plaintiff is entitled to sue the defendant on his covenant. It is possible that the reversioner might bring ejectment against the defendant at the expiration of the tenant for life's interest, but the plaintiff could not do so during the continuance of the term.

Wills, in support of the plea.—This case is not distinguishable from *Swatman v. Ambler* (2). In that case the lessors had not executed the lease, and the lessee in reality only occupied and enjoyed the premises under a licence revocable at any moment. Here, the term of fourteen years would come to an end by the death of the tenant for life, and the interest of the lessee is therefore defeasible at any moment. The reversioner not having executed the lease, the defendant is not possessed of the interest it was intended he should have; and where the term is not granted the covenants do not attach, because the term is the consideration for the defendant entering into the covenants.

[POLLOCK, C.B.—The lease expressly states that the plaintiff and Yeo demise, so far only as they legally can or might according only to their respective estates and

(1) 3 Exch. Rep. 4.

(2) 8 Ibid. 72; s. c. 22 Law J. Rep. (N.S.) Exch. 81.

interests; that is, the plaintiff grants the lease for fourteen years only so far as he can.—**CHANNELL, B.**—*Swatman v. Ambler* (2) was a very different case. In that case there was only one lessor, and when he did not execute the lease the whole consideration failed; that is not so here, the plaintiff has entered into possession of the premises under a lease for fourteen years, which he still enjoys: how can he say there is no consideration for his covenants?—**POLLOCK, C.B.**—There he got nothing; here he gets not a lease for fourteen years, but a lease for fourteen years if the lessor should so long live. If it could be said that How and Yeo had agreed to grant a lease for fourteen years and had not done so, it might be different.]

The estate granted to the defendant is defeasible at any moment by the plaintiff's death: it would be otherwise if the reversioner had executed the lease.

Mathew was not called upon to reply.

POLLOCK, C.B.—We are all of opinion that our judgment ought to be for the plaintiff. I do not think I can add anything to what has been said during the argument. The plaintiff has done all he could do to give the defendant a lease for fourteen years; he enters into no bargain with the defendant as to what the reversioner should do. The result is this, that the tenant for life and reversioner specially agree to grant a lease, and the instrument is prepared, and it expressly states that the lease is to be according to their respective estates and interests. The defendant has all that he agreed for. He is fully entitled by law to everything he can claim from the plaintiff, but he has all that he is entitled to.

BRAMWELL, B.—I am of the same opinion. It might be that the defendant might refuse to take any interest under the indenture without Yeo's signature and execution of the deed, but he has not done so.

CHANNELL, B.—The estate granted by the plaintiff is still continuing: how then can the defendant say that there is no consideration for his covenant?

PIGOTT, B. concurred.

Judgment for the plaintiff.

1864. } **POWELL AND ANOTHER v.**
Nov. 15. } **FRANTER AND OTHERS.**

Lease—How determinable.

A lease for twenty-one years, expressed to be "determinable, nevertheless, in seven or fourteen years, if the said parties hereto shall so think fit," is determinable only by consent of both the parties, although it may have been their intention to give the option to either alone.

This was an action of ejectment, tried at the Warwickshire Summer Assizes, 1864. The only question at issue was, whether the expression in a lease—"for the term of twenty-one years, determinable, nevertheless, in seven or fourteen years, if the said parties hereto shall so think fit," was equivalent to "if either of the said parties shall so think fit." The plaintiffs, the lessors, had determined the lease.

The Judge directed a nonsuit to be entered, with leave to the plaintiffs to move to enter a verdict for them.

Mellish having obtained a rule accordingly, on the ground that, according to the true construction of the lease, the lessors were entitled to determine it at the end of fourteen years,—

Hayes, Serj. now shewed cause.—The words are not "the said parties, or either of them," and they must therefore mean both, and not one without the consent of the other. Unless it be specified who is to have the election, the lessee is to have the election—*Dann v. Spurrier* (1), and *Goodright v. Richardson* (2), there cited. Every doubtful grant is to be construed in favour of the grantee—*Doe d. Webb v. Dixon* (3). The words are not doubtful here; the lessees are included. Why, then, are they to be construed in favour of the lessors?

Mellish and *Wills*, contra, contended that the rule in *Dann v. Spurrier* (1)—that where neither party was expressed to have the option, the lessee was to have it—was in the plaintiffs' favour. How would the rule have applied here if the lessee had given notice? The words must mean the

(1) 3 Bos. & P. 399.

(2) 3 Term Rep. 462.

(3) 9 East, 15.

consent of both or the option of either. If the defendants be right, the words mean nothing; for without them the parties might determine the lease at any moment. They evidently intended that the lease should come to an end otherwise than it would naturally. If the word "respectively" had been added, there could have been no doubt of their meaning. Though the plaintiffs' interpretation is not strictly the grammatical one, yet, if the defendants' construction be right, the words have only a scintilla of meaning, and are mere surplusage.

POLLOCK, C.B.—We are all of opinion that this rule must be discharged. I think it is likely that the parties meant that the option should be with either. Certainly the language is more significant if that were their intention. But it is not without meaning, if we give to it merely the literal construction; and I think we are not at liberty, whatever we may think was the intention of the parties, as they have not expressed it, to put a different construction upon the words than what belongs to them according to their natural meaning. No doubt, it has been decided that if a lease is merely for seven, fourteen, or twenty-one years, giving an option to somebody, but not saying to whom, the option is with the lessee, and the lessee alone. If both parties are mentioned, not saying whether both are required to consent, but at the same time not saying that either shall have the option, it certainly may be argued that they are both mentioned, in order that the landlord may have an option as well as the tenant. But the imperfection of language makes doubtful many an expression. "As well as" may mean "along with," or it may mean "in conjunction with" the lessee. Certainly, if there had been a usage which we could trace, so to frame leases intended to give an option to both, that is, to either; or if there were any decision which tended to shew that the Courts give that interpretation to the words, I should willingly go along with the authority. But there exists neither the one nor the other; we are, therefore, not called upon to give a meaning different from the plain construction of the words, those words not being senseless in the way in which I read them.

BRAMWELL, B.—When it is once admitted that the words, in their grammatical and natural meaning, have that which the defendants contend for, an immense difficulty was thrown on the other side; and, no doubt, the golden rule is, that they must receive their natural meaning, unless there be something to shew that they are senseless or are opposed to the general scope and intent of the instrument, if naturally interpreted; or, at all events, unless there be some great reason of convenience why they should be otherwise interpreted than according to their natural meaning. I see none here. I think it is very possible the parties intended that either might give the notice. But I have great difficulty in understanding how that can be, because here there is a solemn instrument: its terms must have been discussed; it must have been prepared by an attorney; in all probability, engrossed upon parchment; and it is difficult to see how, if the intention were that which is attributed to it by the plaintiffs, it should have been expressed as it is. I have great difficulty in coming to the conclusion that the parties did not mean that which the words naturally import, namely, that the joint assent of the lessors and the lessees shall be necessary for the determination of the lease. It is enough to say that the words are sensible when interpreted according to their natural meaning; and I think we ought so to interpret them, unless any reasons, such as I have mentioned, exist to the contrary; and there are none here that I am aware of.

CHANNELL, B.—I am of the same opinion, for the same reasons.

PIGOTT, B.—I think we have no right arbitrarily to speculate about the intention or meaning of the parties. Our plain duty is to carry out their contract where they have expressed it. If we do not give effect to the construction contended for by the defendants, we must introduce the word "respectively," and read the clause—"if the parties respectively shall think fit." They have left out that word, and we are not at liberty to insert it.

Rule discharged.

1864. } BARTLETT v. BAKER AND
May 4. } OTHERS.*

Negligence—Leaving Piles in Navigable River.

The defendants contracted with the Lords of the Admiralty for the erection of docks and works in Plymouth harbour, and for that purpose sunk piles in the navigable part of the channel. After the completion of the works, and after a reasonable time for the removal of the piles, the defendants sold the piles to J, who undertook to remove them by a certain date, or sooner if required by the Lords of the Admiralty. The Admiralty subsequently required J. not to draw the piles, and J, acting under those orders, cut the piles off on a level with the bed of the channel. The soil was subsequently washed from around the stumps, and the plaintiff's vessel struck against them and was injured. In the position in which the piles existed at the time the defendants delivered them up to J, the damage could not have been done without the plaintiff's gross negligence:—Held, that there was no cause of action against the defendants.

Declaration,—for that the plaintiff was possessed of a vessel, and of a cargo on board of the same, and which said vessel was being lawfully navigated by the plaintiff's servant in a public navigable channel and river, such channel and river being a public highway for all persons to navigate, pass and repass with their ships and vessels, at their free will and pleasure, and the defendants had, before the happening of the damage hereinafter mentioned, placed, sunk, driven in and erected certain piles in the bed and soil of the said channel and river, the same being then, and ever since, such navigable river and highway as aforesaid, for the purpose of performing certain works by them performed, and which said works, before the happening of the damage and causes of action hereinafter mentioned had been and were fully performed and executed, and the necessity for the said piles remaining and being in the bed of the said channel had wholly ceased.

Averments, that the defendants wrongfully, carelessly, negligently and improperly

omitted and neglected to remove and draw the said piles from and out of the bed of the said channel and river, and wrongfully, carelessly, negligently and improperly left parts of the said piles remaining in the said bed of the channel and in a part over which vessels would and might necessarily and lawfully pass, and the defendants wrongfully, negligently carelessly and improperly omitted to take any precautions for preventing the soil of the said river surrounding the said piles and touching the same from being washed away next to the same; and the defendants negligently, carelessly and improperly left the said parts of the said piles in such a position that the same were liable to be and become, and were by reason of the premises exposed and protruding above the level of the said river and channel; and that the said piles became and were so exposed and protruding above the level of the bed of the said river and channel in a navigable part of the same, and the said parts of the said piles were so left by the defendants and remained in the said bed of the said channel, and were obstructing the same unlawfully and without any lawful cause or excuse; and that the said parts of the said piles were under water and concealed from and out of view, in such a position and at such depth that vessels navigating the said channel and river would and might necessarily and lawfully be and were in danger of striking and grounding upon the same, and thereby of being damaged and injured, and that the defendants had notice of the premises; and that the defendants wrongfully and negligently omitted to take any proper care or precaution to prevent or guard against the said danger, or whereby the said danger might be prevented or guarded against, to vessels navigating in and along the said part of the said river, and did not put and place in the said part any proper or sufficient buoy or other proper and sufficient mark or signal to give due notice and warning of the said danger; and that after the said works had been fully performed and the necessity for the piles remaining in the bed of the said channel had ceased, a reasonable time for removing and drawing the said piles and doing all other acts which it was the defendants' duty to do or necessary to be done

* Decided in Easter Term.

for removing the said piles or guarding against danger therefrom had ceased; and that whilst the said parts of the said piles were continued so sunk and driven in as aforesaid, without any lawful cause or excuse, or any proper or sufficient buoy or other proper or sufficient signal, or any other due or proper means being used to give notice or warning of the said danger as aforesaid, the plaintiff's said servants not having any knowledge or sufficient means of knowledge of the said danger, and then having lawful occasion to navigate and direct his said vessel in, along and over the said place where the said parts of the said piles so then were sunk, driven in and erected, did then accordingly navigate and direct his said vessel in and along and over the said place; and thereby and by means of the premises and of the said misconduct of the defendants in the premises aforesaid, the said vessel of the plaintiff was then driven and struck and grounded with great force and violence upon and against the said piles and was thereby then greatly injured, and the plaintiff was put to great expense in repairing the same and in removing the said cargo, and otherwise in reference to the same.

Seventh plea, that the said channel and river were a tidal channel and river, and part of the Hamoaze, in the harbour of Plymouth, and that, just before the placing, &c. of the piles, the Commissioners for executing the office of Lord High Admiral of the United Kingdom, for the protection of the realm, and enlarging the naval arsenals of the kingdom, and for other public purposes, resolved to erect certain docks and other works close to the place in the declaration mentioned, and employed and contracted with the defendants to execute the same and certain necessary works relating thereto, and to do all necessary things for the execution thereof, and thereupon it became and was necessary for the defendants, in order to the execution of the said docks and works, to place, &c. the said piles as in the declaration mentioned; and that the defendants afterwards, and in order for such execution, with the consent and authority of the Commissioners, lawfully placed, &c. the said piles as in the declaration mentioned; that at and after the time when the said piles were so placed, &c., and

thence until long after the defendants delivered up the same and ceased to have any possession of or right or title to the same as hereinafter mentioned, the tops or highest parts of the said piles protruded and were far, to wit, five feet above the surface of the waters of the said river and channel at all times, and clearly and plainly visible, and if the same had so remained, and the same had not been cut as hereinafter mentioned, the said damage never could or would have happened without the gross negligence of the plaintiff in the navigation of his ship; and that long before the said time when the ship was so navigated as in the declaration mentioned the defendants delivered up the said piles to one J. Joll, who became and was the owner and possessor thereof, and thereupon took possession and the sole control thereof, and the defendants ceased to have any possession of or right or title thereto, and never after such delivery interfered or dealt with the same; and that afterwards and before the time when the said ship was so navigated as aforesaid, some persons to the defendants unknown, without the privity or knowledge of the defendants, cut off and removed parts of the said piles, so that the parts remaining as in the declaration mentioned became and were under water and concealed from and out of view, as in the declaration mentioned, whereby and by reason whereof the said damage occurred, and not otherwise, and that after the said piles were so cut the defendants had not notice that they had been so cut or changed.

Eighth plea, in the same terms as the seventh plea, with the additional averments that the said piles were so cut and the said parts thereof were so left, and the same were not drawn from and out of the bed of the river in order to prevent the land and soil of the shore of the said channel or river, and a wharf thereon lawfully formed and being, from slipping and falling into and choking and blocking up the said channel and river, and interfering with the navigation thereof; and that if the piles had been drawn and the said parts of them had not been left as in the declaration mentioned, the said land and soil of the said shore and the said wharf would have fallen out and blocked up, obstructed and choked the said channel and river, and

interfered with and injured the navigation thereof, and that the said parts of the said piles so left and remaining were necessary and indispensable for the support of the shore of the said river or channel, and to prevent the same from being obstructed and hindered.

Demurrer to the pleas, and joinder in demurrer.

The plaintiff also replied to the pleas, that the piles were delivered up under and by virtue of the following agreement: "Devonport, November 30th, 1853. It is mutually agreed this day, between J. Joll, of, &c., and G. Baker & Son, of, &c., that in consideration of G. Baker & Son giving up possession of the wharf now held by them from J. Joll at Christmas Day next, and giving him the row of piles in Moon Cove, and the iron attached thereto, which piles are guaranteed by G. Baker & Son to be an average length of forty feet, or an allowance to be made for any deficiency, also those piles driven for the crane stage, the traveller frame on the south side of the lower wharf and the wooden fence that separates the portion of the wharf rented by G. Baker & Son from the other portion, also the fittings in stable and the lead pipe leading from the company's main to the wharf, the chain fastenings on the wharf, and all the broken limestone, except any quoins or blocks that may be found upon the removal of the rubbish, the whole to become the property of J. Joll at Christmas Day next, in the state and position in which they stand; that J. Joll shall pay at Christmas next to G. Baker & Son 125*l.* with a receipt in full of all demands of rental and for all dilapidations or damages that may be done to the property; and J. Joll agrees to remove at his own cost the whole of the before-mentioned piles in Moon Cove and those driven for the crane stage, on or before Midsummer Day, 1854, or at an earlier period if required by the Lords of the Admiralty, and Messrs. G. Baker & Son agree to remove, on or before Lady Day, 1854, the rubble deposited from the river frontage of the wharf to the slip leading to the yard in which the blacksmith's shop is situated, so as to leave the same depth of water alongside the wharf as there was at the commencement of their tenancy."

Averment, that between the time when it had become and was no longer necessary to continue the said piles in the bed and soil of the said channel and river and the time when the piles were delivered up to J. Joll under the said agreement, a reasonable time for drawing and removing the piles and doing all other acts which it was the defendants' duty to do or necessary to be done for removing the said piles or guarding against danger therefrom had elapsed.

Further replication to the pleas, that before and at the time when the defendants delivered up the piles to the said J. Joll, the parts of the docks and works in order to the execution of which it became and was necessary to place, &c. the said piles, had been and were finished and executed, and it had become and was no longer necessary for the purposes of such execution to continue the said piles so placed, &c. in the bed and soil of the said channel and river.

Demurrer to the further replication, and joinder in demurrer.

Rejoinder to the first-mentioned replication, that after the making of the said agreement, and before the cutting of the said piles as in the declaration mentioned, it was the fact, and it was made known to and found by the said lords that the drawing of the piles from and out of the bed of the river would cause great danger to the said wharf and the adjacent lands, and the said navigation of the river; and that if the piles were so drawn the wharf and lands would slip and fall into and choke up the navigation, wherefore the said lords required that the piles should not be drawn, but the same should be cut off on a level with the then bed of the channel and river.

Averment, that the piles were not drawn, but the same were cut off on a level with the then bed of the river by the persons in the seventh plea mentioned, in order to prevent the wharf and lands from slipping and falling into and choking and blocking up the channel and river, and interfering with and destroying the navigation thereof, and to save and prevent the said persons from being guilty of and subject to an indictment for a nuisance by reason of such choking and blocking up the channel and river and interfering with and destroying

the said navigation, and that the said cutting off the piles was indispensable for that purpose, and no other means of protecting the navigation could be safely adopted.

Demurrer to the rejoinder, and joinder in demurrer.

The plaintiff also surrejoined, that long before the passing of the act, 54 Geo. 3. c. 159, and during all the time in the rejoinder mentioned or referred to, and thence hitherto, the property in the bed and soil of the channel and river, and the jurisdiction, privileges and powers of conservancy in and over the said channel and river, did not belong to the said lords in the seventh and eighth pleas and the rejoinder mentioned, but to certain other persons.

Demurrer to the surrejoinder, and joinder in demurrer.

Field (F. M. White with him), for the plaintiff.—The first proposition is, that the placing wooden piles in the bed of a navigable river is a nuisance, unless a justification be made out under the Lords of the Admiralty—*White v. Phillips* (1). Secondly, assuming there was authority to place the piles in the Hamoaze, in the first instance, that authority had ceased. The works had been completed, and a reasonable time had elapsed for removing the piles, therefore the defendants ought to have removed them instead of selling them to a third person. The principles laid down in *Rosewell v. Prior* (2) apply, and this case is distinguishable from *White v. Crisp* (3) and *Brown v. Mullett* (4).

[*MARTIN, B.*—If I sell a house with a nuisance, and two years afterwards an injury arises from it, am I liable?]

Yes.—*Gandy v. Jubber* (5).

[*MARTIN, B.*—*Gandy v. Jubber* (5) was decided on the ground of the interest that existed between the reversioner and the tenant, and the Court said, what I doubt, that there was a fresh letting from year to year. My Brother Blackburn was evidently not entirely satisfied with the judgment on that point.]

(1) 15 Com. B. Rep. N.S. 245; s. c. 33 Law J. Rep. (N.S.) C.P. 33.

(2) 2 Salk. 460.

(3) 10 Exch. Rep. 312; s. c. 23 Law J. Rep. (N.S.) Exch. 317.

(4) 5 Com. B. Rep. 599; s. c. 17 Law J. Rep. (N.S.) C.P. 227.

(5) 23 Law J. Rep. (N.S.) Q.B. 151.

If I put a log of wood in a highway and then sell the log, and an accident happens the next day, should I not be liable? This case is distinguishable from *Hancock v. the York, Newcastle and Berwick Railway Company* (6); for there the judgment proceeded on the ground that the position of things was changed; and in *Brown v. Mullett* (4) Maule, J. expressly guards against saying what would be the effect of an unlawful divesting of possession, and points to such a case as the present as distinguishable.

[*MARTIN, B.*—There was nothing unlawful in selling for the purpose of the vendee doing that which the vendor ought to have done.]

[*BRAMWELL, B.*—The character of the structure was altered after the defendants' possession terminated. As they left it, no injury would have resulted unless by the plaintiffs' own gross negligence.]

Montagu Smith (Dowdewell with him), for the defendants, was not heard.

Per Curiam (7)—

Judgment for the defendants.

1864. }
June 9. } STONE v. JELlicoe.*

Debtor and Creditor—Bankruptcy Act, 1861—Deed of Arrangement—Setting aside Execution.

It is not essential to the validity of a deed of composition under the Bankruptcy Act, 1861, that it should contain a schedule of creditors.

A deed of composition may be valid although the only effect of non-payment of the composition-money be to remit the creditors to their original demand.

If a valid deed of composition be executed and registered as required by the Bankruptcy Act, a writ of fi. fa. issued by a non-assenting creditor after notice of the deed will be set aside.

Rule to set aside a writ of fi. fa., issued in this cause, and all proceedings thereon. The rule was obtained on affidavits, that,

(6) 10 Com. B. Rep. 348.

(7) Pollock, C.B., Martin, B., Bramwell, B. and Pigott, B.

* Decided in Trinity Term.

on the 25th of January the following deed of arrangement was executed by the defendant and assented to by a majority in number, representing three-fourths in value, of his creditors of the amount of 10*l.* and upwards, and was duly registered and certified:—

“This indenture, made the 25th of January 1864, between E. Jellicoe for, &c., of the first part, F. Moojen of the second part, and the said F. Moojen and other the creditors of the said E. Jellicoe of the third part; whereas the said E. Jellicoe being unable immediately to discharge his debts and liabilities, has proposed to make provision for the discharge thereof by quarterly payments of 10*l.* each, to be made to the said F. Moojen for distribution amongst the said F. Moojen and others, the creditors of the said E. Jellicoe, as in case of bankruptcy, until the debts and liabilities of the said E. Jellicoe shall have been discharged, and to enter into the covenants hereinafter contained with the said F. Moojen for that purpose; and whereas the said undersigned creditors of the said E. Jellicoe have agreed that the said proposal shall be accepted, and that such release as is hereinafter contained shall be given to the said E. Jellicoe. Now this indenture witnesseth that, in consideration of the premises, and in pursuance of the said agreement, the said E. Jellicoe doth hereby, for himself, &c., covenant, promise and agree with and to the said F. Moojen, his executors, &c., that he the said E. Jellicoe, his heirs, &c., shall and will well and truly pay or cause to be paid unto the said F. Moojen, his executors or administrators, the sum of 10*l.*, on the 4th of May, the 4th of August, the 4th of November and the 4th of February, in each and every year, until all the present debts and liabilities of the said E. Jellicoe shall have been paid and discharged; the first of such payments to be made on the 4th day of May now next ensuing; and it is hereby declared and agreed that the monies to be received by the said F. Moojen, his executors and administrators, under or by virtue of the covenant of the said E. Jellicoe hereinbefore contained, shall be applied and administered for the benefit of the creditors of the said E. Jellicoe in like manner as if the said E. Jellicoe had been at the date hereof duly adjudged bankrupt,

and such monies had constituted or formed part of his estate and effects; and this indenture further witnesseth, that, in consideration of the premises and in pursuance of the agreement hereinbefore expressed, the creditors of the said E. Jellicoe do, and each and every of them doth, discharge and release the said E. Jellicoe, his heirs, &c., from the several sums of money which the said E. Jellicoe is indebted or liable to the said creditors respectively, &c.; nevertheless saving to the said creditors and their respective executors, &c., all claims, &c. against third parties, &c., provided, &c., that if the said quarterly sums of 10*l.* each, or any or either of them, or any part of any such quarterly sum, shall not be paid to the said F. Moojen, his executors, &c., at or before the respective times hereinbefore mentioned and appointed for the payment thereof respectively, according to the covenant of the said E. Jellicoe in that behalf hereinbefore contained, or within seven days after such respective times as aforesaid, then and in such case these presents shall thereupon become absolutely void and of no effect with respect to the said creditors of the said E. Jellicoe, and the said creditors respectively, &c., shall thereupon be restored to their original rights as if these presents had not been made. In witness whereof the said parties to these presents have hereunto set their hands and seals, the day and year first hereinbefore written.” [Then followed the names and addresses, amounts and signatures of ten creditors.]

The defendant deposed, that the first quarterly payment had been duly paid to his trustee, and that no further payment had become due. This action was brought before the execution of the deed, and on the 26th of January the defendant withdrew his pleas and suffered judgment by default. Notice of the execution of the deed was given to the plaintiff's attorney on the 30th of January. It was alleged that the execution was issued on the 23rd of May without leave of the Court having been obtained.

The matter had been before Mr. Baron Pigott at chambers, on an interpleader summons taken out by the sheriff who had notice of the deed; but the learned Judge held that it was not a case for interpleader,

the goods not being claimed by the trustee. A summons was then taken out on the part of the trustee to set aside the writ of *fi. fa.* on the ground that it had been issued without leave of the Court of Bankruptcy. The matter was referred by the Judge to the full Court.

It appeared from an affidavit of the plaintiff's attorney that issue had been joined and notice of trial given before the execution of the deed, and the plaintiff deposed that he had never received notice or any information of the defendant having executed the deed, or notice that the deed had been registered.

Macnamara shewed cause.—The deed is void as against non-assenting creditors: first, on the ground that the deed was unreasonable, there being no covenant by the debtor with the creditors nor any covenant by the trustee, although the creditors release their debts; if the money agreed to be paid was not paid, the only effect was to make the deed void, leaving no remedy on the deed against the debtor or his estate. *Leigh v. Penderbury* (1) is an authority that execution will not be set aside unless the deed be reasonable; secondly, the deed was void in consequence of there being no schedule of all the debts. As regards the creditors executing, no doubt there would be evidence that the debtor assented to the sums opposite their names as being the debts due by him, but as regards the non-executing creditors the debtor did not admit any particular sum to any one, so that he would be at liberty to dispute the existence of the debt and refuse to place the creditor on the same footing as the others, and therefore making the deed unequal—*Ex parte Cockburn* (2). The form given in Schedule D. of the Bankruptcy Act, 1861, evidently contemplates a schedule. Thirdly, the affidavits are defective in not shewing that the three-fourths of the creditors had assented before the *fi. fa.* was issued.

Joyce, in support of the rule, was directed to confine his argument to the question of the validity of the deed. The objection that the deed contained no covenant by the debtor is not tenable, for if there had been a covenant with the creditors signing, it would have been objected that such a covenant

excluded the non-assenting creditors—*Ex parte Cockburn* (2). It is better to have a trustee to act for all parties. In the event of a breach of the agreement by the debtor, the creditors are remitted to all their rights, so that it cannot be said they have no remedy. As to the objection that there is no schedule of all the creditors, no schedule at all is necessary except where the debtor seeks to avail himself of the provisions of section 200. of the Bankruptcy Act, 1861, but even if the statute contemplates a schedule in every case, it must mean a schedule of the creditors actually assenting.

[CHANNELL, B.—It seems to be impossible that the debtor should be required to put all his creditors in the same schedule, for section 200. contemplates that some of his creditors are unknown. The statute may mean either all the creditors executing, or all the creditors known to the debtor. MARTIN, B.—It seems as if the deed were required to be in the form provided in Schedule D, in those particular circumstances only referred to in section 200.]

Yes. This is a vexatious proceeding, and the plaintiff ought to pay the costs, for he should have ascertained the existence of the deed.

Quain appeared for the sheriff.

POLLOCK, C.B.—In this case the debtor covenants to pay everybody 20s. in the pound; that in reality is the effect of the deed, for the composition is not for so much in the pound, but has reference to the defendants requiring time for payment, and paying the debt without interest, and probably it is a matter of comparative indifference to many creditors whether they get 10s. in the pound at once, or get the whole debt without interest at distant intervals of payment, the delay makes it equivalent only to 10s. in the pound. At first I thought the deed was unreasonable, but when I come to examine it and consider that the times of payment are extended, instead of the debt being paid by less than 20s. in the pound, I cannot say that I think it is unreasonable. If the creditors are competent to say "we will take half-a-crown in the pound," I think they are also competent to bind the dissenting creditors, or all the non-executing creditors to the extension of time, which may be equivalent to a composition of 15s. in

(1) 33 Law J. Rep. (N.S.) C.P. 172.

(2) 33 Law J. Rep. (N.S.) Bankr. 17.

the pound. There being nothing unreasonable about the deed, I think the rule should be made absolute to set aside the proceedings.

MARTIN, B.—I have given as much consideration to the Bankruptcy Act, 1861, as I have given to anything, to try to arrive at a satisfactory conclusion; but it is my duty to acquiesce in what has been done by other Courts of concurrent jurisdiction. I assume the judgment of my Brothers Blackburn and Mellor in *Dingwell v. Edwards* (3) to be correct. I cannot say this deed is unreasonable. The true test of reasonableness is whether three-fourths of the creditors whose debts amount to 10s. considered it reasonable. If that be the test they have done so in this case. I therefore think the rule ought to be that the sheriff do withdraw: and if he wants protection he ought to get it. I do not think that the costs should be paid by the plaintiff. It is an extremely hard thing on a man who lends money to another that he should be deprived of getting his debt by means of a transaction entered into with others, but to which he is not privy in any way whatever.

CHANNELL, B.—This case comes before us on an application by the sheriff for an interpleader order. It seems to me that the deed, in substance, shews a compliance with the 192nd section, and that the two points that have been urged with a view to shew non-compliance have failed. One is that the deed is unreasonable. That this is not an unreasonable deed has, I think, been already determined. Then the other point is as to the schedule. The deed is in the form of various deeds that have been before the Court and which the Court have upheld. I think the *fi. fa.* was improperly issued, and that the rule should be absolute, that the sheriff do withdraw, the judgment debtor, who makes the application, undertaking to bring no action.

Rule absolute to set aside the writ of fi. fa. and all proceedings thereon without costs. The sheriff to withdraw, and no action to be brought against him.

1864.
Nov. 22. }

MURPHY v. CARALL.

Negligence—Master and Servant.

Some bales of cotton, sent by the defendant to a warehouse and packed there carelessly by his servants under the direction of the warehouse-keeper, afterwards fell on the plaintiff, a servant of the owner of the warehouse, who was passing by in the course of his duty:—Held, that the defendant was not responsible.

Randelson v. Murray (1) *impugned.*

The declaration stated that the defendant so negligently, &c. placed a pile of cotton bales in a certain cotton shed or warehouse, that by and through the mere negligence, &c. of the defendant in that behalf the same fell upon the plaintiff, who was then lawfully engaged and working in the said cotton shed or warehouse, and inflicted upon him bodily injuries; and the plaintiff thereby became ill and disabled from working at his calling of a cotton porter, &c.

Second count—that the defendant was the possessor or part occupier of a certain cotton shed or warehouse and premises, with the appurtenances, and the plaintiff was lawfully engaged and working in the said cotton shed, warehouse and premises; yet the defendant, well knowing the premises, whilst he was so the possessor or part occupier of the said cotton shed, warehouse and premises, so negligently, &c., and contrary to his duty in that behalf, placed a pile of cotton bales in the said cotton shed, warehouse and premises, that by and through the mere negligence, &c. of the defendant in that behalf, the same fell upon the plaintiff, who was then lawfully engaged and working in the said cotton shed, warehouse and premises, and inflicted on him internal and bodily injuries, whereby &c.

Plea—not guilty, and (to the second count) that the defendant was not the possessor or part occupier of the said cotton shed or warehouse as alleged.

The action was tried, before Edward

(3) 33 Law J. Rep. (N.S.) Q.B. 161.

(1) 8 Ad. & E. 109; s.c. 7 Law J. Rep. (N.S.) Q.B. 132.

James, Esq., in the Liverpool Passage Court, where it was proved that some of the defendant's cotton bales had been sent to the warehouse where the accident occurred, and had been there insecurely piled by his men under the directions of the warehouse-keeper, whose duty it was (according to his own evidence) to see that all bales were properly piled. The bales in question subsequently fell upon the plaintiff, who was a servant of the owner of the warehouse, while he was passing by in the course of his duty.

The Judge having directed that a nonsuit should be entered,—

Little obtained a rule to set it aside; and

Charles Russell now shewed cause, contending that, as the damage was done by a person not under the defendant's control, and the defendant was not the owner of the warehouse or any part of it, but only of some bales which were stowed there, the nonsuit was right.

Little, being called on by the Court to support his rule, cited the case of *The Mobile* (2), where it was held that the owners of a vessel in charge of a licensed pilot are not exempted by the Merchant Shipping Act from liability for damage caused by the vessel, unless the pilot was exclusively to blame, and there was no blame attributable to the master and crew; and contended that the porters who packed the cotton were the defendant's servants, and that there was negligence on their part as well as on that of the warehouse-keeper.

[*BRAMWELL*, B.—Is the master responsible for the negligence of his servants when they act under another person who is not his servant, but whom they are bound to obey?]

Yes. The plaintiff here never touched the bales that fell, and there was no contributory negligence on his part. Had they fallen while being piled, the defendant would clearly have been liable. The warehouse-keeper was for this particular service the servant of the owner of the cotton; and if the bales had fallen on one of the defendant's men while engaged in piling, it would have

been said that he and the warehouse-keeper were fellow-servants. It was no part of the warehouse-keeper's duty to direct where the passers-by were to go. He had only to direct where the bales were to be stowed. He cited *Martin v. Temperley* (3) and *Randelson v. Murray* (4), in which latter case a warehouseman who had engaged a master-porter to move a barrel was held liable for injury arising from the negligence of the men employed, and the failing of the tackle used by the master-porter.

POLLOCK, C.B.—I am of opinion that, upon the evidence before him, the conclusion arrived at by the learned Judge was perfectly correct. The warehouse-keeper said, in substance, that the goods were stowed entirely under his direction—where he pleased, and how he pleased; and that he should not allow the owner of the goods to stow them as he thought fit, but should direct him how to stow them. Under these circumstances, it appears to me that the defendant is no more responsible to the plaintiff than any stranger would be. The stowage was entirely with this warehouse-keeper, and he and his master are the only persons responsible. The cases cited do not support the plaintiff's case. *Randelson v. Murray* (4) is opposed to the general current of decisions on this subject. The rule must, therefore, be discharged.

BRAMWELL, B.—This nonsuit was quite right. I think that the men who were packing the bales were the servants of the defendant, so as to make him responsible for what they did. If they had negligently piled these bales, and one of them had fallen on a passer-by while the men were piling them, the defendant would have been liable: for, although the men were acting under the control of the warehouse-keeper, they were the defendant's servants, acting in the defendant's service; and it appears to me, therefore, that the question is to be treated as if he had piled the goods in the way in which they were piled. But would he therefore be liable under the circum-

(3) 4 Q. B. Rep. 298; s. c. 12 Law J. Rep. (N.S.) Q.B. 129.

(4) 8 Ad. & E. 109; s. c. 7 Law J. Rep. (N.S.) Q.B. 132.

(2) Swa. Adm. Rep. 127.

stances of this case? I think not, and for this reason : that there would have been no danger to anybody but for a subsequent act, namely, the suffering people to come near the bales. Suppose the defendant to have been present when the bales were piled, and to have said, "It is dangerous to pile them in that way; they will fall." The warehouse-keeper might have replied, "That is my affair; I will put a barricade or prevent any one coming near them. I will take care that no subsequent event which will cause mischief to arise shall happen, for no one shall come near them, and no one can then be hurt." I think it would then be impossible to say, if any mischief had afterwards happened, owing to the warehouse-keeper letting a person go and get hurt by the falling of a bale, that the defendant would be liable. Take this case : a man delivers an article at another's door—an article that cannot be carried in at once, and the owner of the house says : "Put it down in the highway and I will move it directly, and I will take care to prevent people running against it"; and the owner puts it down there; and it is allowed to remain all night; there is no light, and some one runs against it, and is injured. Who is responsible? The owner of the house, not the man who puts the thing there, for the depositing the article was not dangerous without some subsequent wrongful and negligent act. Therefore, it seems to me this defendant is not responsible for this act, which only produced mischief by a further amount of negligence on the part of the warehouse-keeper. I can very well imagine that if the negligence had been of what may be called a covert kind, not as obvious to the warehouse-keeper as to the people who did it, the case might have been different; for mischief might be produced without any subsequent wrong on the part of the warehouse-keeper. But here the wrong, if any, was as patent to the warehouse-keeper as to any one, nay, more so; and inasmuch as it was done subject to the control of the warehouse-keeper, he is the person of whom to complain, and not the defendant, who did an act which by itself would not have caused the mischief.

CHANNELL, B.—I am also of opinion that this rule should be discharged, and

I come to that conclusion upon the ground that the act complained of must be taken to have been done under the direction of the warehouse-keeper. There is no negligence to be imputed to the defendant personally. If there be any, it must be in this way,—that the persons who were doing the act were his servants. Now, it is quite clear that the warehouse-keeper had a right to control the packing of the bales in question. We must take it that he was attentive to his duties, and saw what was going on, and that what was done was done with his assent and approval. I take it, therefore, that it was done by his direction, and that being so, though the cotton porters acted for the owner of the cotton, and were his servants for certain purposes, and their duties did not cease with taking the cotton to the warehouse and leaving it there, but continued to the packing, they were, in that proceeding and in respect of the negligence that took place, not acting as the servants of the defendant, but as the servants of the warehouse-keeper, and of the owners of the warehouse who employed him.

PIGOTT, B.—I think the nonsuit was right, for the reasons just stated. I will only add, that it would have been a different thing altogether, if the warehouse-keeper, instead of controlling the mode in which the goods were packed in the warehouse, had let a space to the defendant, and had allowed the defendant, either to throw the goods on the floor, or stack them, or do what he liked with the space. Then the person who was sent by the defendant to deposit those goods would have had to deposit them carefully; and if the defendant appointed a person who did that duty negligently, there would then be some reason and justice in holding him responsible. But when he sends a man who is entirely subject to the control of the warehouse-keeper, and who is not allowed to exercise any discretion as to the manner of stowing the goods, it seems to me most unjust and unreasonable to hold the defendant responsible, for he has not been guilty of any neglect of duty.

Rule discharged.

1864. } SCOTT v. THE LONDON DOCK
Nov. 11. } COMPANY.

Negligence—Inference of Negligence from mere happening of Accident—Onus of rebutting Inference.

The plaintiff, a custom-house officer, was injured while on the defendants' premises in the course of his duty, by goods falling on him from a crane fixed over a doorway under which he was passing. No explanation was given of the cause of the goods falling:—Held, by Channell, B. and Pigott, B. (following Byrne v. Boadle) that it was for the defendants to shew that there was no negligence on their part causing the accident, and not for the plaintiff to make out that there was.

Contrà, by Martin, B. (following Hammack v. White).

The declaration alleged that the defendants were possessed of a warehouse and of a certain crane for lowering goods therefrom, and by their servants in that behalf were lowering by the said crane from the said warehouse certain bags of sugar on to the ground and stone pavement in the docks of the defendants, on and along which the plaintiff was then lawfully passing, and the defendants by their servants so negligently, &c. lowered the said bags of sugar that the same fell upon the plaintiff, whereby he was greatly injured, &c.

Plea, not guilty. Issue thereon.

At the trial, before Martin, B., during the London Sittings after Trinity Term, 1864, the only evidence was that of the plaintiff himself, who stated that as he was passing under a doorway on the defendants' premises, in the course of his duty as a custom-house officer, on his way from one warehouse to another, some bags of sugar fell on him from a crane which was fixed over the doorway; and that there was nothing to prevent people passing that way, nor was there any intimation of its being dangerous to do so. No explanation was given of the cause of the bags falling.

The learned Judge directed a verdict to be entered for the defendants, on the ground that there was no evidence of negligence.

The Solicitor General having subsequently obtained a rule to set this verdict aside, and

for a new trial, on the ground that there was evidence for the jury of negligence by the defendants' servants,—

Murphy (with him *Bovill*) now shewed cause.—This rule was obtained on the authority of *Byrne v. Boadle*(1), which, if in point in other respects, is distinguished from the present case in this, that there the accident took place on a public highway, while the plaintiff here was in the docks as a mere licensee, his only rights being that he should not be treated as a trespasser, and that no trap should be laid for him—*Bolch v. Smith* (2).

[*POLLOCK, C.B.*—At a railway station people may not lawfully go on the rails or under cranes, &c. where there is danger.]

And that is so in the case of a dock, to which the principles on which *Cornman v. the Eastern Counties Railway Company* (3) was decided apply, as well as to a railway. The degrees of negligence for which defendants are liable differ on public and private highways—*Hounsell v. Smyth* (4), per *Williams, J.* A passenger uses the latter at his peril, provided there be no trap for him; whereas, in using the former, he is entitled to absolute immunity from danger. There is nothing in the Dock Acts putting an officer of the Customs while in the docks on the same footing as a passenger on a public highway. Every hole is not to be fenced for him, merely because he is there in the execution of his duty. The danger here was more apparent than in *Bolch v. Smith* (2).

[*MARTIN, B.*—That case is not in point; for here all we know is that the bags fell from some cause or other.]

But it shews that it is for the plaintiff to make out that the defendants were doing something wrong. He is in the same dilemma as the plaintiff in *Wilkinson v. Fairrie* (5) was, and that case has been followed by this Court in *Rogers v. Laing* (6). *Byrne v. Boadle* (1) goes to this only, that there may be circumstances under which

(1) 2 H. & C. 722; s. c. 33 Law J. Rep. (N.S.) Exch. 13.

(2) 7 Hurl. & N. 736; s. c. 31 Law J. Rep. (N.S.) Exch. 201.

(3) 4 Ibid. 181; s. c. 29 Law J. Rep. (N.S.) Exch. 94.

(4) 7 Com. B. Rep. N.S. 781; s. c. 29 Law J. Rep. (N.S.) C.P. 203.

(5) 32 Law J. Rep. (N.S.) Exch. 73.

(6) Not reported; argued in Trinity Term, 1864.

the mere happening of an accident is evidence of negligence, whereas *Hammack v. White* (7) shows that a mere accident is *not necessarily* evidence of negligence; and in *Cotton v. Wood* (8), Erle, C.J. said that, "to warrant a case being left to the jury, a mere scintilla of evidence is not sufficient; there must be proof of well-defined negligence."

The Solicitor General and T. Jones, *contra*.—The case is governed by *Byrne v. Boadle* (1). First, supposing the plaintiff to have been merely a passer-by, the mere happening of the accident is evidence of negligence against the defendants—*Carpue v. the London and Brighton Railway Company* (9).

[MARTIN, B.—No one now acts on that case.—His Lordship referred to *Fawcett v. the Great Western Railway of Canada* (10).]

It is not reasonable to call on the plaintiff to prove negligence. How can he tell under what circumstances the bags fell? This is a case where *res ipsa loquitur*, and negligence may be presumed. *Byrne v. Boadle* (1) shews that, where damage results from the doing of an act which does not ordinarily cause damage, the inference is that there has been negligence: The *onus* of rebutting this inference lies on the defendants—*Christie v. Griggs* (11).

[CHANNELL, B.—That was a case of contract.]

There is no case in conflict with *Byrne v. Boadle* (1). In *Hammack v. White* (7) there was affirmative evidence of care on the part of the defendant, while in *Cotton v. Wood* (8) the question of contributory negligence was raised, with which we are not concerned here. Secondly, the plaintiff's rights were different from those of a mere passer-by. He was in the docks in pursuance of his duty, as a sentry might be. There might perhaps have been a difference in the case of a mere licensee.

[POLLOCK, C.B.—The plaintiff here was like a man in a large factory, where there

are safe as well as dangerous places. The defendants did not intend this place to be a way, and the plaintiff was there at his own risk, though lawfully.]

That point did not arise at the trial; the case is to be decided on the question of negligence or no negligence only.

[MARTIN, B.—There was no evidence of negligence on the part of the defendants.]

Proof of negligence need not necessarily be positive or affirmative, but may, by inference from facts, be as clear as if it were direct. The reasonable conclusion here is, that the defendants must be called on to explain how the bags fell; and if *Byrne v. Boadle* (1) be law, the plaintiff is entitled to judgment.

MARTIN, B.—In my judgment this rule should be discharged. The true doctrine is laid down in the case of *Hammack v. White* (7), viz., that there must be evidence of negligence. If there were any evidence of negligence upon this point, the plaintiff would be entitled to a new trial. In my opinion the evidence came to nothing more than this,—that the plaintiff sustained damage by bags of sugar falling upon him; and if my ruling was wrong, the judgment of the Court of Common Pleas in *Hammack v. White* (7) was wrong.

CHANNELL, B.—I am unable to distinguish this case, substantially, from *Byrne v. Boadle* (1), which I consider to be good law. In giving my judgment, I assume that the plaintiff when he met with this accident was on the defendants' premises rightfully and in the lawful discharge of his duty.

PIGOTT, B.—I also assume that the plaintiff was rightly and lawfully in the docks, not as a mere licensee, but having a right to be there, and having a duty to discharge there. The sugar fell on him either out of a window or from a crane; how it came to fall is left in doubt. Then the question is, was there any evidence of negligence on the part of those who were dealing with the sugar? That is the way I view the case. To use the words of the Lord Chief Baron in *Byrne v. Boadle* (1), this is a case where *res ipsa loquitur*, so as to call on the defendants to explain how the thing happened. It may have been the result of inevitable accident; but, as it

(7) 11 Com. B. Rep. N.S. 676; s.c. 31 Law J. Rep. (N.S.) C.P. 129.

(8) 8 Com. B. Rep. N.S. 568; s.c. 29 Law J. Rep. (N.S.) C.P. 333.

(9) 5 Q.B. Rep. 747; s.c. 13 Law J. Rep. (N.S.) Q.B. 133.

(10) 1 Moo. P.C.C. N.S. 101.

(11) 2 Camp. 79.

stands, there is evidence calling upon them for an explanation. As I understand the case of *Hammack v. White* (7), it only lays down the same principle: Williams, J. says there, that he thinks that "where the evidence is equally balanced, the benefit of the doubt must in such a case as this be given to the defendant." So here, if the facts were such as to leave the evidence evenly balanced, whether the injury was the result of mere accident or of negligence, I should say that it was not a case where the defendants should be called on for an answer. Looking at the case as it stands, however, and understanding the ordinary transactions of life, the event here is not one which does, in the ordinary course of business, usually and ordinarily happen. It is *prima facie* the result of some negligence; and for these reasons I think that it was a question for the jury, and that the defendants should be called upon to explain how the injury happened to be inflicted. In the absence of that explanation, the rule should be made absolute.

Rule absolute (12).

1864. } CORNISH AND OTHERS v.
Nov. 22. } CLEIFE AND OTHERS.

Covenant to repair—Liability to repair Buildings erected during the Term.

A lease contained a demise of three houses and a field to B. for a term of ninety-nine years, who covenanted "well and sufficiently to repair, sustain and keep the said tenements or dwelling-houses, field or plot of ground and premises, and every part thereof, as well in houses, buildings, walls, hedges, ditches, fences and gates, as in all other needful and necessary reparations whatsoever, when and so often as occasion shall require during the said term, and at the end or other determination thereof the said premises, so well and sufficiently repaired, into the hands and possession of the said lessors peaceably to leave and yield up." B. granted an underlease of the field to one C, who granted underleases to several persons who

erected houses in the field:—Held, that the covenant to repair contained in the lease to B, did not extend to the houses erected during the term in the field.

Ejectment to recover a certain dwelling-house and garden in the occupation of Thomas Andrews, also a dwelling-house, No. 8, Hampton Buildings, with the garden adjoining, also a dwelling-house adjoining thereto unoccupied, also a dwelling-house and small garden thereto in the occupation of James Boyce, also a small courtlage or yard adjoining, also a small dwelling-house with small garden adjoining, in the occupation of Abraham James, situate in the parish of St. Sidwell, in the county of the city of Exeter.

The plaintiffs were feoffees of the lands belonging to the parish of St. Sidwell, Exeter, and they sought to recover possession of the premises by reason of their being out of repair, contrary to the covenant contained in the lease hereinafter mentioned.

On the 29th of September 1803, the then feoffees of the parish lands granted a lease to one Thomas Binford, in consideration of 106*l.*, for the term of ninety-nine years, determinable on three lives (one of whom was at the time of bringing the ejectment still living), of all those three tenements or dwelling-houses and a field or plot of ground (formerly an orchard) adjoining thereto, with the appurtenances, containing one acre or thereabouts, situate in the parish of St. Sidwell (except all trees, &c., with liberty for the lessors to enter and fell the same and to view the husbandry used on the said field), under the yearly rent of 10*l.* The deed contained a covenant on the part of the lessee to let up all trees and saplings, and also "well and sufficiently to repair, sustain and keep the said tenements or dwelling-houses, field or plot of ground and premises and every part thereof, as well in houses, buildings, walls, hedges, ditches, fences and gates, as in all other needful and necessary reparations whatsoever, when and as often as occasion shall require during the said term, and at the end or other sooner determination thereof the said premises, so well and sufficiently repaired, into the hands and possession of the said lessors, peaceably to leave

(12) Pollock, C.B. intimated that he was inclined to agree with the opinion given by Martin, B.; but, in order to avoid any obstacle in the way of an appeal, he took no part in the judgment.

and yield up": provided always, that if the said Binford, his executors, administrators and assigns, shall not well and truly observe, fulfil and keep all and singular the covenants, articles, clauses and agreements hereinbefore contained on his or their parts to be paid, done and performed, it shall be lawful for the said lessors, their heirs and assigns, into the said premises and every part thereof to re-enter, and the same to have again, repossess and enjoy, as in their first and former estate.

On the 26th of October 1819, Binford granted an underlease of the field only, to one Chesterman, for seventy years—if the lives so long continued in being—subject to the payment of 6*l.* rent, and a covenant to repair hedges, fences, gates, bars, rails, stiles and posts. On the 21st of September Chesterman assigned the field to Messrs. Radford, who, in December 1821, sold the easternmost part of it to one Summons, and in June 1822 sold the westernmost part to Hopping & Steer. Eventually, fourteen houses were built on the field by different persons holding title under the sub-lease. The houses mentioned in the writ of ejectment, and which were part of the fourteen houses, were mortgaged to one Wilcocks, who transferred the mortgage to one Duchemin, who transferred it to the defendants, who entered and took possession.

At the trial, before Byles, J., at the Exeter Lammas Assizes, 1864, the above facts were proved, and it was admitted by the defendants that the houses in question were out of repair, but it was contended that the covenant to repair contained in the deed of 1803 did not extend to buildings erected after the lease was granted, and that it applied only to the three houses then standing and to the hedges, gates and fences of the field.

The learned Judge directed a verdict to be entered for the plaintiffs, reserving leave to the defendants to move to set aside the verdict and enter it for them, on the ground that the covenant to repair did not apply to the newly-created houses.

Montague Smith having obtained a rule accordingly,—

Karslake and *Stock* shewed cause (Nov. 14).—The covenant extends to all houses which shall be built after the covenant was

entered into. The words are, to repair "the said tenements and dwelling-houses, field or plot of ground, as well in houses, buildings, walls, hedges, ditches, fences and gates as in all other needful and necessary reparation."

[POLLOCK, C.B.—Do you contend that if an underlease were granted and houses were built in the field, that the covenant would be enlarged?]

Yes. Because it is a general covenant to repair. In *Woodfall's Landlord and Tenant*, p. 464, 8th edit. it is laid down that a general covenant to repair and to deliver up in repair has been held to extend to all buildings erected during the term; thus, if a man upon taking a lease of a house and land covenant to leave the demised premises in good repair at the end of the term, and erect a messuage upon part of the land besides that which was there before, he must keep and leave the last in good repair also. This statement is supported by a reference to *Bac. Abr.* tit 'Covenant,' F. In *Doune v. Cale* (1) an action was brought upon a covenant by the plaintiff, as assignee, against John Cale, executor of Richard Cale, for non-repair of certain houses. The plaintiff set forth a lease made by Lord Clare to Richard Cale of three messuages, to hold from Christmas-day then next for forty-one years, and Richard Cale covenanted with the said Earl to pull down the said three houses, and in the same place to build three as good and substantial houses in all respects as he had some short time before built for himself in Fleet Street; *ac etiam* that he would during the same term well and sufficiently repair all the houses so agreed to be built, *ac etiam omnia et singula canal, &c. facta vel fienda in pr' et cum omnibus requisitis et necessariis reparationibus . . . ac dicta dimissa premissa ac domus et edificia superinde fore erect' et edificat' et eorum quodlibet bene et sufficienter reparat', supportat' et manutent' in fine vel citiori determinatione dicti termini pacifice et quiete relinqueret, et sursum redderet dicto comiti hered' et assign' suis prout per indentur' pced'.* The sole question was, upon this covenant, whether, the defendant being obliged only

(1) 2 Vent. 126; a. c. 3 Lev. 264.

to build three houses and having built one more, the covenant did not bind him to repair and build and deliver up that house well repaired as well as those which were agreed to be built? And the Court were of opinion that the covenant did extend to the other house as well as to the three which were agreed to be built; for in the last covenant, which is to deliver up well repaired, it is, *dicta præmissa ac domus et ædificia superinde fore erecta*, which is general; and it is the rather so to be taken because in the first covenant, for keeping in repair during the term, it is the houses agreed to be built; which words "agreed to be built" are left out in the last covenant, which the Court took to be a distinct covenant. This case is a direct authority for the plaintiff.

Montague Smith (Kingdon with him), in support of the rule.—When the lease in question was granted there were only three houses built; but since then, fourteen houses have been built in a field adjoining, which was demised together with the three houses to one Bingford. The defendant has become mortgagee of six of the houses. The houses are now out of repair, and the question is, whether the assignees of the lessors can bring ejectment against the mortgagee? In construing the covenant, it must not be lost sight of that the trees in the field are excepted in the lease, and that the lessors are at liberty to enter to fell the same and to view the husbandry used on the field. Then comes the covenant which is to be construed *reddendo singula singulis*. The covenant is to repair the tenements and dwelling-houses and field, as well in houses, buildings, walls, hedges, that is, so far as concerns houses to keep the houses in repair, and so far as concerns the field to keep the field in repair. In *Doune v. Cale* (1) the Court were of opinion that the covenant extended to all the premises, but Rokeby, J. doubted, on the construction of the covenant. That learned Judge said, it seemed to him to be all as one covenant, and so all the subsequent matter concerning leaving the houses well repaired should be restrained and understood of those agreed to be built. The case is reported in two places, but neither of the reports can be considered as satisfactory. There is not a single word in the present deed to shew

that it was ever contemplated that the field was to be built upon. *Doe v. Rowlands* (2), as far as it goes, is an authority for the defendant.

Cur. adv. vult.

Judgment was now (Nov. 22) delivered as follows—

POLLOCK, C.B.—In the case of *Cornish v. Cleife*, in which a rule was obtained by the defendants to set aside the verdict entered for the plaintiffs, and to enter it for the defendants, we are all of opinion that the covenant does not extend to the newly-erected houses; therefore that there was no breach so as to justify the claim of forfeiture. The verdict ought to be entered for the defendants.

BRAMWELL, B.—I am of the same opinion. I should be very glad, if possible, to lay down some general rule by which cases of this sort may be governed; but I do not see how it is possible to do so, because each particular case must depend on the terms of the particular covenant into which the parties have entered. I cannot see in this case that the covenant to repair applies to the newly-erected houses. I emphasize the word "houses," because I think that if an addition had been made to an old house, by putting up a lean-to, a barn or a stable, it would have been a part of the house within the meaning of the covenant; but I cannot see that the covenant applies to that which is a separate, new and independent dwelling-house. The words are these: "will well and sufficiently repair, sustain and keep the said tenement or dwelling-house." The word "tenement" there is obviously equivalent to "dwelling-house"; so that one may read it thus: "will well and sufficiently repair, sustain and keep the said dwelling-house, field, plot of ground and premises and every part thereof." There it only speaks of the existing houses and field, plot of ground and premises. It goes on, "as well"; but that does not extend it at all. It might shew what has gone before applies to something more than one would suppose it to do, without these following words. But the natural object of the words "as well" is to merely explain what had gone before. "As well in houses, buildings, walls, hedges, ditches, fences and

gates, as in all other needful and necessary reparation whatsoever," when "and so often as the same shall be necessary." These words do not extend the covenant at all. It means simply this : "to repair as well the houses and buildings, walls, hedges, ditches, fences and gates." It seems to me, therefore, it gives no extension of the former words.

I wish to add, that a doubt occurred to me in this way: it struck me it would be difficult to say that a new building would not be the subject of the covenant. I think so still, in the sense I have explained, namely, if it was a building made part of one of the houses; if a stable or lean-to was added, then I think the covenant would extend to it. But I should not think it would extend to an entirely new barn, for instance, erected in the field separate from the house, and having nothing to do with the house; because, in my judgment, the covenant to repair buildings means the house and that which, in popular parlance, might be said to be a part of it. It seems to me, therefore, that on the merits of this case we ought to decide it in favour of the defendants.

CHANNELL, B.—I am also of opinion that the rule obtained for entering the verdict for the defendants should be made absolute. I agree in thinking it is necessary in every case to attend to the language of a singular covenant, and one can hardly expect cases to be directly in point so as to relieve the Court from the necessity of considering what is the effect of the particular language used. My Brother Bramwell has read the covenant, and I need not repeat it. I agree with the authorities that are cited in the text-books, because they establish the fact that where there is a general covenant to repair and keep and leave in repair, the proper inference from that is, that the party undertakes to repair newly-erected buildings; on the other hand, where there is a particular covenant to repair demised buildings, then no such liability arises. The present case does not appear to me to fall exactly within either of the rules to be gathered from the cases to which I have referred. As far as I can see, it appears to me to fall more within the last rule applicable to a particular covenant; and referring to the particular lan-

guage of the covenant, and for the reasons given by my Brother Bramwell, I am of opinion the rule should be made absolute.

PIGOTT, B.—I am of the same opinion. I was at one time disposed to think the latter words were an extension of the former words of the covenant; but, on the whole, I have come to the conclusion expressed by my Brother Bramwell.

Rule absolute.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Exchequer.)

1864.

June 20.

} PILLOT v. WILKINSON.*

Action—Trove—Conversion.

Wine, the property of the plaintiff, being in the warehouse of the defendant, a wharfinger, notice from the Lord Mayor's Court was served on the defendant, attaching in his hands all the goods of H, from whom the plaintiff had purchased the wine, and at the same time the defendant was informed that the attachment had reference to the wine. The plaintiff demanded the wine from the defendant's clerk, producing the delivery warrant which had been issued by the defendant to B, a former owner, and indorsed by him to H, and by H. to the plaintiff. The defendant's clerk said that there was a difficulty in consequence of the attachment, and referred the plaintiff to the defendant, whom he could not find. The plaintiff's attorney thereupon wrote, demanding the wine before eleven o'clock the next morning. The defendant's attorney replied, asking for time for inquiry; but a writ was issued before that answer was received:—Held, that there was some evidence of a conversion; that the conduct and position of the defendant was evidence from which the jury might infer whether or not he had been guilty of a conversion of the wine, and that before arriving at a conclusion it was proper for the jury to consider whether the defendant had a bonâ fide doubt as to the plaintiff's title to the wine, and whether a reasonable time for clearing up that doubt

* Decided in the Sittings after Trinity Term, coram Williams, J., Crompton, J., Wiles, J., Byles, J., Blackburn, J. and Shée, J.

had elapsed before the action was commenced.

This was an appeal by the defendant to review the judgment of the Court of Exchequer discharging a rule to enter a verdict for him (1).

The action was trover for some cases of champagne. The wine had been deposited in the possession of the defendant, who was a wharfinger, and had been bought by the plaintiff of Henry & Co. The plaintiff had received a warrant for the wine signed by the defendant's warehouse-keeper deliverable to B, indorsed by B. to Henry & Co., and indorsed generally by Henry & Co. On the 7th of July the plaintiff sent the warrant to the defendant's warehouse with a sample order, and on the production of these documents, obtained samples of the wine. On the 24th of July, the plaintiff went with his attorney to the defendant's warehouse, presented the warrant to the defendant's warehouseman G, and demanded the wine. G. said that there was a difficulty; that the goods had been stopped by an attachment from the Lord Mayor's Court; and he referred the plaintiff to the defendant, who, however, could not be found.

The same day the plaintiff's attorney wrote demanding the wine, threatening immediate proceedings unless a satisfactory answer was given by eleven o'clock A.M. next day.

The next day (July 25) the defendant's attorneys wrote in answer, saying that they had been instructed by the defendant to communicate with the plaintiff's attorneys, and said that the matter appeared complicated, that they were not fully acquainted with the circumstances, and begged for time for inquiry. The writ was issued on the 25th of July, at 12 at noon, and before the receipt of this letter.

For the defendant it was proved that he had on the 22nd of July been served with a notice of attachment from the Lord Mayor's Court on all goods belonging to Henry & Co. which might be in his power or which might hereafter come to his hand, and the attorney for the plaintiff in the action against Henry

& Co. in the Lord Mayor's Court came with the serjeant-of-mace, who served the notice of attachment and indorsed on the notice the particulars of the goods, being the wine in question.

On these facts it was contended by the defendant, on the authority of *Verrall v. Robinson* (2), that there was no evidence of a conversion.

A verdict was taken for the plaintiff with liberty to the defendant to move to set it aside and enter a verdict for himself.

On the motion the Court of Exchequer (Bramwell, B. *dissentiente*) held that there was evidence of a conversion, and discharged the rule.

Montague Smith (*H. Matthews* with him) for the defendant, urged, on the authority of *Verrall v. Robinson* (2), that after the attachment from the Lord Mayor's Court the goods were *in custodia legis*, and that the holding them by the defendant after such attachment had been served was no evidence of a conversion, and he distinguished *Catterall v. Kenyon* (3) on the ground that there the bailiff took goods which he had no right to seize; and he further contended that, as no reasonable time had been allowed to the defendant to inquire into the circumstances, and as he had not absolutely refused to deliver them up, there was no conversion; and he cited *Clark v. Chamberlain* (4), *Gunston v. Nurse* (5), *Alexander v. Southey* (6) and *Vaughan v. Watt* (7).

Prentice, for the plaintiff, the respondent, was not called upon.

WILLIAMS, J.—We are of opinion that the judgment of the Court of Exchequer must be affirmed. The point for our consideration arises in the following way: In the case before us, it is stated that on the trial the counsel for the defendant objected

(2) 2 Cr. M. & R. 495.

(3) 3 Q.B. Rep. 810; a. c. 11 Law J. Rep. (N.S.) Q.B. 260.

(4) 2 Mee. & W. 78; s. c. 6 Law J. Rep. (N.S.) Exch. 2.

(5) 2 B. & B. 449.

(6) 5 B. & Ald. 247.

(7) 6 Mee. & W. 492; s. c. 9 Law J. Rep. (N.S.) Exch. 272.

(1) See the report, 32 Law J. Rep. (N.S.) Exch. 201.

that the goods were *in custodia legis*, and that there was no evidence of a conversion. The first point is, whether the fact of an attachment having issued was of itself sufficient to prevent there being a conversion; secondly, if not, whether, it being a fact in the case, there was, on the whole, any evidence of a conversion; not a mere scintilla of evidence, but evidence upon which a jury might reasonably act. We think that there was some evidence for the consideration of the jury. As to the first point, we are pressed by the case of *Verrall v. Robinson* (2). In that case, goods having been seized by the officer of the sheriff of London, the Court considered that such goods were *in custodia legis*, and that this prevented the refusal of the defendant to give them up from being a conversion. But when that case was adverted to in *Catterall v. Kenyon* (3), not only do the expressions of the Court throw some doubt whether they agree in opinion with the Court in *Verrall v. Robinson* (2), but Lord Denman, C.J. says: "The learned Judges who decided that case thought that the chattel was in the custody of the law, and that the defendant was not at liberty to give it up, the particular article having been attached by process." There is therefore a plain distinction between the case of *Verrall v. Robinson* (2) and the case now before us. There the Court considered that the officer of the Court had got the goods in his possession, and that the defendant had no power to give them up; at all events, not without the risk of coming into collision with the officer, and so giving rise to a breach of the peace. But here there was no seizure by the officer of the Court; there was nothing to prevent the defendant from giving up the wine. All that appears is, that there was a general notice that the goods belonging to Henry & Co. in the hands of the defendant were attached. *Verrall v. Robinson* (2) therefore does not, to my mind, govern this case. The fact of the attachment having been thus put in seems to me to be but one of the circumstances to be considered by the jury in forming their conclusion whether there has been a conversion. Then, looking to all the facts, is there any evidence of a conversion? I think that the law is correctly laid down by

Parke, B. in *Vaughan v. Watt* (9), where he says: "It ought therefore to have been left to the jury whether the defendant had a *bond fide* doubt as to the title to the goods, and, if so, whether a reasonable time for clearing up that doubt had elapsed." Assuming that the defendant here had a *bond fide* doubt existing as to the title, still the question remains whether a reasonable time for clearing up the doubt had elapsed. This view of the law was also taken by the Court of Common Pleas in *Towne v. Lewis* (10). The marginal abstract to that case is rather calculated to mislead. It appears from the report that Wilde, C.J. there left it to the jury to say whether the defendant meant to dispute the plaintiff's title to the bill, or whether he meant to send it to the plaintiff when he could obtain it. It appears, when the case came before the Court, that Wilde, C.J. said: "No doubt, the conduct of the defendant was evidence whence the jury might infer whether or not the defendant had been guilty of a conversion." The law, therefore, having been, in my opinion, properly established by the authorities which I have cited, it remains to apply it to the present case. Here the defendant is not in the position of an ordinary person. He is a wharfinger, and is bound to act with promptitude in his business, otherwise he may do great injury to the property of those who deposit their goods with him. Certainly, a very short time had elapsed between the coming in of the attachment and the commencement of the action; but a considerable time had passed since the defendant had known that Henry & Co. had parted with all their property in the wine. The jury were bound to take all these facts into their consideration.

Without giving any opinion whether the verdict could have been satisfactory if it had been found for the defendant, it is sufficient for us to say that there was evidence of a conversion proper to be submitted to the jury.

The other JUDGES concurred.

Judgment affirmed.

(9) 6 Mees. & W. 497; a. c. 9 Law J. Rep. (N.S.) Exch. 272.

(10) 7 Com. B. Rep. 608.

1864. } EVANS AND OTHERS v. JONES
Nov. 16. } AND OTHERS.

Debtor and Creditor—Assignment for Benefit of Creditors—Void and Fraudulent Deed—13 Eliz. c. 5.

W. B., on the 3rd of December 1862, in pursuance of a resolution passed, on the 25th of November 1862, at a meeting of his creditors, executed an assignment of the whole of his property to the plaintiffs, as trustees, to pay and discharge rateably all the debts due and owing from W. B. to his creditors (being such persons as would have been entitled to rank as creditors in bankruptcy if the said W. B. had been adjudged bankrupt upon a petition for that purpose filed on the 25th of November 1862):—Held, that the deed was not void and fraudulent as against creditors within 13 Eliz. c. 5.

This was a SPECIAL CASE, without pleadings, stated by order of Bramwell, B. under the Common Law Procedure Act, 1862—

On the 19th of November 1862 a writ of summons was issued, under the Bills of Exchange Act, at the suit of the defendants, against one William Buss, as the holder of a bill of exchange, accepted by the said Buss for 78*l.* 19*s.* 4*d.*

On the same day another writ of summons under the same act was issued against Buss, at the suit of one of the defendants, as the holder of a bill of exchange for 22*l.* 17*s.* 5*d.*, accepted by Buss.

Judgment was signed in both actions on the morning of the 3rd of December 1862 at 11:30 o'clock.

On the same morning at 10 o'clock Buss, in pursuance of a resolution passed at a meeting of his creditors, held on the 25th of November 1862, made an assignment by deed, for the considerations therein mentioned, to the plaintiffs as trustees for the benefit of creditors.

The deed was executed by Buss and the trustees and one Humphreys (party to the said deed of the third part) at the hour of 10 in the morning of the 3rd of December; but it had previously been assented to, and was afterwards executed, by a majority in number, representing three-fourths in value of the creditors of Buss whose debts amounted to 10*l.* and upwards, but not by

the plaintiffs (the present defendants) in either of the above actions, and all the requirements of the Bankruptcy Act 1861, with respect to trust-deeds for the benefit of creditors have been fulfilled with respect to the said deed within the time limited by the statute, the deed being registered on the 24th of December 1862.

One Charles Hilton had been, on the 25th of November, sent to take possession of the stock-in-trade, articles and effects of Buss, by and on behalf of the proposed trustees under the assignment, in contemplation of the said assignment being executed. Hilton accordingly took possession of the said stock-in-trade, articles and effects on behalf of the trustees; and on the morning of the 3rd of December, after the execution of the assignment by the several parties thereto, and before the judgment was signed, was instructed to hold possession on behalf of the trustees.

On the same morning of the 3rd of December execution was issued in both actions against Buss, and at 12 o'clock at noon on that day writs of *fi. fa.* were delivered to the sheriff to be executed, and immediately afterwards the sheriff's officer went to the warehouse of Buss and produced his warrant to him. Hilton then informed the sheriff's officer that he was in possession of the goods and effects of Buss on behalf of the trustees, but he did not produce any authority or any deed or copy of deed when asked to produce the same.

Hilton had never left the premises since he had taken possession.

The sheriff's officer then left a man on the premises on his behalf under these executions and went away. Hilton told the sheriff that if he removed the goods he would do so at his peril, but later in the same day the sheriff removed the goods to other premises for sale.

Written notice of the assignment was, after the seizure and in the course of the same day, sent on behalf of the trustees, by post, to the attornies of the plaintiffs in both the actions, and was received by them the next day, the 4th of December, and a like notice was also, after the seizure and removal, sent to the sheriff, who was required to withdraw from possession of the said goods, but he refused to do so, and insisted on retaining possession. Previously

to this, neither the defendants nor their attorneys had any notice of any deed having been executed by Buss.

The goods were afterwards, on the morning of the 4th of December, returned to Buss's premises in pursuance of an arrangement that this should be done, and that the trustees should deposit the amount of the levies with bankers in the joint names of the trustees and of the attorneys for the plaintiffs in both the above actions to abide the event of this case. This arrangement was carried out.

Some of the creditors of Buss held bills of exchange, as securities for their debts, at the time of the execution of the deed by Buss, which became due between the 25th of November and the 3rd of December 1862. The amounts of the debts for which such bills of exchange were held were taken into account in estimating the three-fourths of the creditors of Buss, as hereinbefore mentioned.

The Court was to have the power of drawing inferences of fact.

The question for the opinion of the Court was, whether the execution creditors were entitled as against the trustees to the proceeds of the goods so seized by the sheriff, and which are comprised in the deed of assignment hereinbefore mentioned. If the Court should be of opinion in the negative, then judgment was to be entered up for the plaintiffs, with costs of suit, and the sum of 125*l.* was to be given up to the plaintiffs, less the dividend due to the defendants as creditors under the deed. If the Court should be of opinion in the affirmative, then judgment of *non pros.*, with costs of defence, was to be entered up for the defendants, and the sum of 125*l.* was to be given up to the defendants. If the Court should be of opinion that the execution creditors were entitled, as against the trustees, to part of the proceeds of the goods so seized by the sheriff, then judgment of *non pros.*, with costs of defence, was to be entered up for the defendants, and a corresponding part of the sum of 125*l.* was to be given up to the defendants, the residue thereof being given up to the plaintiffs.

The deed mentioned in the case was an indenture, made on the 3rd of December 1862, between William Buss, of 109, Upper Thames Street, in the city of Lon-

don, provision-merchant, of the first part, and George William Evans, of Lower Thames Street, broker, Thomas William Keogh, of Upper Thames Street, provision-merchant, and Edmund Phillips, of London Street, provision-merchant, of the second part; Nathaniel Humphreys of the third part; and the several persons, companies and partnership firms whose names and seals are set and affixed in the schedule hereto (being respectively creditors of the said William Buss), and all other the creditors of the said William Buss of the fourth part. And it recited that, "whereas the said William Buss has for some time past carried on the business of a provision-merchant at 109, Upper Thames Street, under the style or firm of Buss & Leadham; and whereas the said William Buss being indebted to divers persons in divers sums of money, he, on the 25th of November 1862, called a meeting of his creditors, at which meeting it was resolved by all the creditors of the said William Buss who were present or represented at such meeting, that the said William Buss should execute an assignment of all his estate and effects, to be wound up and administered in like manner (as far as the difference in circumstances would admit) as the same would be wound up and administered in bankruptcy if a petition for adjudication were filed against him on the day of the date of the resolution now in recital, and that the said G. W. Evans, T. W. Keogh and E. Phillips should be the trustees of such assignment, and Messrs. Honey, Son & Humphreys the managers; and that the said assignment should contain a release to the said W. Buss, and should give the trustees (to be used at their discretion absolutely) all such rights, powers and authorities as under the bankrupt laws they or the creditors could or might, with the authority, approbation or consent of the Court or otherwise, obtain or exercise in bankruptcy, or such of them as would be obtained or exercised under an assignment for the benefit of creditors, including power to grant or make such allowances to the said William Buss as might be made in bankruptcy, and that the said assignment should be registered in bankruptcy, and that in the mean time the resolution now in recital should be deemed to be an instrument within the meaning of section 192.

of the Bankruptcy Act, 1861, and should be registered under the same if considered expedient by the trustees, and that the signatures of the creditors to the said resolution, or to the deed to be prepared in pursuance thereof, should be without prejudice to their rights against third parties, or to any securities they might hold or be entitled to the benefit of." And it granted and assigned the whole of W. Buss's property, except his wearing apparel, to the above-named trustees, upon trust to collect and convert the same into money, and then upon trust thereout in the first place to pay all costs and expenses of such collection, &c. and all expenses incidental to any meeting of creditors held as preliminary to the deed; and in the second place to pay all costs and expenses incidental to the execution of the trusts and provisions of the deed; and in the third place to pay and discharge rateably and without any preference or priority all the debts due and owing from the said W. Buss to the said creditors (being such persons as would have been entitled to rank as creditors in bankruptcy if the said W. Buss had been adjudicated bankrupt upon a petition for that purpose filed on the 25th of November 1862); and it was thereby agreed and declared that if, after making the several payments aforesaid, there should remain any surplus of the said estate and effects, monies and premises, the said trustees or trustee should stand possessed of such surplus upon trust for the said W. Buss, his heirs, executors, administrators and assigns absolutely. And it contained a release and discharge to W. Buss from all demands, claims and debts of all his creditors.

Hannen (Lord with him), for the plaintiffs.—The question is, whether or not the execution creditor is entitled to hold the goods seized under the writ of *fi. fa.* against the trustees of the deed. Judgment was signed at 11:30 A.M. on the 3rd of December 1862. On the same 3rd of December, at 10 o'clock, the execution debtor executed the deed in pursuance of a resolution of the 25th of November 1862. Now the deed contains an absolute assignment of all the debtor's property; therefore at common law such property under the deed passes to the trustees; it lies on the other side to displace

the common-law operation of the deed. It may perhaps be argued that inasmuch as judgment was signed on the same day that the deed was executed, the judgment will take priority over the deed, on the authority of the cases of *The Queen v. Edwards* (1) and *Wright v. Mills* (2). The first was the case of an extent at the suit of the Crown, and no doubt in such cases the goods are bound from the date of the judgment; but the same rule does not hold with regard to writs of *fi. fa.*, for, by the provisions of the Mercantile Law Amendment Act, (19 & 20 Vict. c. 97.) the goods are not bound until actual seizure. Again, if the property passed to the trustees under the deed, the sheriff had no right to seize. The only restraint upon the property passing is that imposed by the act which requires that bills of sale shall be registered—the 17 & 18 Vict. c. 36. Then either the act must be complied with or the case does not fall within the act. It does not come within the act, for by the 7th section "assignments for the benefit of the creditors of the person making or giving the same" are excluded from the operation of the act. The Court then called on—

Hayes, Serj. (*Thrupp* with him), for the defendants.—The deed is fraudulent under 13 Eliz. c. 5. The defendants are judgment creditors, and as such are defeated and delayed in obtaining the costs of their judgment. If the defendants can come in under this deed and claim an equal benefit with other creditors, then the deed would not be void within the statute 13 Eliz. c. 5; for *Pickstock v. Lyster* (3) is an authority to shew that the deed would not be void under that statute, though made to delay the defendants of their execution. *Owen v. Body* (4) and *James v. Whitbread* (5) shew that if a deed excludes any creditor it is void under the statute 13 Eliz. c. 5. It must be a deed for the benefit of all creditors. Now, to entitle the defendants to the costs of their judgment, it is essential that the judgment

(1) 9 Exch. Rep. 32; s. c. 23 Law J. Rep. (N.S.) Exch. 42: in error, 9 Exch. Rep. 628; s. c. 23 Law J. Rep. (N.S.) Exch. 165.

(2) 4 Hurl. & N. 488; s. c. 28 Law J. Rep. (N.S.) Exch. 223.

(3) 3 M. & S. 371.

(4) 5 Ad. & E. 28; s. c. 5 Law J. Rep. (N.S.) K.B. 191.

(5) 11 Com. B. Rep. 406; s. c. 20 Law J. Rep. (N.S.) C.P. 217.

should be obtained before the bankruptcy of Buss. The 181st section of the Bankruptcy Law Consolidation Act, 1849, is express on this point: it enacts "that if any plaintiff in any action at law or suit in equity, or petitioner in bankruptcy or lunacy, shall have obtained any judgment, decree or order against any person who shall *thereafter* become bankrupt for any debt or demand, in respect of which such plaintiff or petitioner shall prove under the bankruptcy, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy." Here the judgment was signed on the 3rd of December. The same day the deed was executed; but the signing of the judgment, being a judicial act, relates to the first moment of the day when it was signed; and, if there was nothing in the deed to prevent it, the defendants would be entitled to prove for the costs, because the judgment was obtained before the bankruptcy. But the trust contained in the deed is limited only to those persons who would have been entitled to rank as creditors in bankruptcy if the said William Buss had been adjudged bankrupt on the 25th of November 1862. By this clause of the deed the defendants are precluded from proving for the costs of their judgment, because, if the debtor is to be treated as having been adjudged bankrupt on the 25th of November, the adjudication would be prior to the judgment.

Hannen, in reply.—In order to avoid a deed under the statute of Elizabeth there must be fraud, and fraud is a question for the jury—*Twyne's case* (6). A mere mistake in the deed will not avoid it. There is no suggestion here that there is fraud, or any fraudulent intention of excluding any creditor; nor is it a voluntary deed, because the assignment is made for a valuable consideration: it is made in consideration of the creditors releasing their rights. Then, does the deed exclude any creditor? It recites that Buss, the debtor, on the 25th of November 1862, called a meeting of his creditors, at which it was resolved that he should execute an assignment of all his estate and effects, to be wound up and ad-

ministered in like manner as the same would be wound up and administered in bankruptcy, if a petition for adjudication in bankruptcy were filed against him on the day of the date of the resolution; and then the deed conveys the property to trustees for such as would have been entitled to rank as creditors in bankruptcy: not, as has been suggested; as if Buss had been adjudged bankrupt on the 25th of November 1862, but as if he had been adjudged bankrupt on a petition filed on the 25th of November 1862. The defendants were creditors on the 3rd of December; then, by virtue of the 181st section of the Bankruptcy Law Consolidation Act, 1849, they may be entitled to the costs *de sacramento*; but whatever the defendants' rights may be under that section, they are in no way deprived of them by the deed.

POLLOCK, C.B.—The question is, whether the execution creditor is entitled to retain the fruits of his judgment and execution, or whether the trustees under the deed are entitled to the proceeds of the goods. We are all of opinion that the execution creditor is not entitled to retain the goods as against the trustees. It is perfectly clear that the deed is not void under the statute of Elizabeth. All the requirements of the Bankruptcy Act, 1861, having been complied with, I think that this is a good deed within the meaning of that act. There is no foundation for the argument that there is any intention, as gathered from the deed, to exclude any creditor from executing it.

BRAMWELL, B.—I am of the same opinion. The deed is effectual to pass the property to the trustees, unless it be void under the statute of Elizabeth. Now, in order that a deed should be a void deed under that statute, there must be some real fraud; for instance, something amounting to an absolute untruth. This deed is perfectly honest; and, to my mind, not a void deed under the statute of Elizabeth.

CHANNELL, B.—I am also of opinion that the deed is not void under the statute of Elizabeth. It is argued that the judgment creditor could not prove for his costs: the deed does not take away any right the creditor had. Whatever rights he may have as to proving for his costs, he still retains them.

PIGOTT, B.—It is quite clear that the effect of the deed with regard to the execution creditor proving his debt is the same as if the defendant had been made a bankrupt and the execution creditor had then proved. This deed does not at all remove him from that position.

Judgment for the plaintiffs.

1864. { THE ATTORNEY GENERAL v.
Nov. 21. { THE COUNT AND COUNTESS
BLUCHER DE WAHLSTATT.

Legacy and Succession Duties—Domicil.

Testatrix, an unmarried Englishwoman, in 1849 went to reside abroad at the house of her married sister at B, in Germany. She resided there, contributing towards the expenses of housekeeping, until 1863, in which year she died. Her property consisted of money invested in English securities, but she also possessed a valuable library, which she caused to be transported to B. She occasionally came over to England with her married sister to visit her friends, and while in England in May 1854 she made her will, describing herself as now on a visit to my sister C, bequeathing her property to trustees to pay the annual income to her sister for life for her separate use, without power of anticipation, and with a power of appointment to her sister by deed or will. The female defendant, as sole executrix, proved the will in the Probate Court. The testatrix told her sister that if she survived her she should continue to live in Germany, and that nothing would induce her to return to England, except on an occasional visit. She also named the churchyard where she wished to be buried, and where she was afterwards buried:—Held, that her acts and declarations did not shew a sufficient intention to change her domicil; and, assuming she intended to give up her English domicil, that until she acquired a new domicil, her English domicil continued; and that the Crown was entitled to legacy duty.

Held, also, on the authority of *Re Capdevielle* (1) and *Wallop's Trusts* (2), that

the Succession Duty Act (16 & 17 Vict. c. 51.) applies to all persons wherever domiciled.

This was an information by the Attorney General, to obtain from the defendant Madeline Countess Blucher, who is the sole executrix of the will of Justina Davidson Dallas, spinster, deceased (hereinafter referred to as the testatrix), payment of the legacy duty which had become due to Her Majesty, in respect of the personal estate of the testatrix in case she were at the time of her death domiciled in England, or payment of the succession duty which had become due in respect of the same estate, or some part thereof, in case the domicil of the testatrix at the time of her death were not English.

The questions for the decision of the Court are, whether the testatrix was at the time of her death domiciled in England, and if not, whether succession duty is payable in respect of such part of her personal estate as was at the time of her death situate in this country.

The testatrix was the sister of the defendant Madeline Countess Blucher, and died at Count Blucher's house, in Baden-Baden, some time in or shortly before the month of September 1863. She was the daughter of English parents (her father, Sir Robert Dallas, having formerly been Chief Justice of the Court of Common Pleas) and was born in the year 1804, at Brighton, in the county of Sussex, and she continued to reside in some part of the United Kingdom till 1849; when, in consequence of the death of her mother and sole surviving parent Lady Dallas, she left England and went to reside with her sister, the defendant Madeline Countess Blucher and the Count her husband, and continued to reside with them, sometimes at Baden-Baden and at other times at Berlin (paying occasional visits to this country), down to the time of her death as before mentioned.

On the occasion of one of these visits, which took place in the year 1854, and whilst she was staying at the house of her sister, the wife of Lieut.-Col. Passy, No. 1, Cumberland Terrace, Regent's Park, London, the testatrix made and executed in the manner and with the formalities required by the laws of this country with

(1) 33 Law J. Rep. (N.S.) Exch. 306; s.c. 2 H. & C. 985.

(2) 33 Law J. Rep. (N.S.) Chanc. 351.

respect to wills, her last will and testament in writing, which, so far as it is material here to state the same, was in the following terms: "I Justina Davidson Dallas, now on a visit to my sister Catherine, the wife of Lieut.-Col. Passy, at her residence, No. 1, Cumberland Terrace, Regent's Park, in the county of Middlesex, spinster, do hereby make my last will, and I appoint and request my cousin Henry Davidson, of Lime Street Square, in the city of London, and my nephew Robert William Dallas, of Manor House, Kington, in the county of Warwick, Esquires, to be trustees in carrying the same into execution; and I do hereby give to them, their heirs, executors and administrators, all estates which may be vested in me as trustee or mortgagee, subject nevertheless to the trusts and equities affecting the same; and I also give to them all my real and personal estate which may belong to me or be subject to my disposal at my death, and I direct that the annual income thereof shall be paid to my sister Madeline Countess Blucher for her life, for her own sole and separate use without power of anticipation, and that after her death as well the capital as the income of all my said property, shall be paid and applied in such manner as she shall by any deed or writing or by her last will duly executed appoint." And the testatrix appointed her said sister Madeline Countess Blucher to be sole executrix of her will, as by production of the said will or the probate, or an office copy thereof will appear.

The defendant Madeline Countess Blucher, with the assent of the count her husband, duly proved the said will in the principal registry of Her Majesty's Court of Probate on the 26th of September 1863, and thereby became and is now the sole personal legal representative of the said testatrix, and she has possessed herself of all the personal estate of the said testatrix, which was of very large amount, and much more than enough for payment of her debts and funeral and testamentary expenses, all of which have in fact been some time since paid. The personal property in this country belonging to the testatrix at the time of her death consisted (as is alleged by or on behalf of her said executrix) of a cash balance of 298*l.* 1*s.* 9*d.* in the hands of her bankers,

a sum of 908*l.* 5*s.* 3*d.* due to her for principal and interest from Messrs. Davidson & Co., and also a sum of 400*l.* stock in the Bank of England, a sum of 600*l.* East India Stock, a sum of 8,765*l.* 0*s.* 11*d.* consolidated 3*l.* per cent. Bank annuities, a sum of 1,356*l.* 14*s.* 6*d.* reduced 3*l.* per cent. Bank annuities, and a sum of 9,473*l.* 13*s.* 5*d.* new 3*l.* per cent. Bank annuities, all respectively standing in her name in the proper books kept for that purpose. The testatrix was also owner of other personal estate which was situate abroad, but the Attorney General is ignorant as to the particulars thereof.

The defendant Madeline Countess Blucher has not paid any legacy or succession duty in respect of any part of the personal estate of the said testatrix, notwithstanding that application has been made to her requiring her to do so, and she declines to pay any duty whatever in respect thereof, alleging that she is advised that the testatrix was not at the time of her death domiciled in England, but was domiciled in Baden-Baden, and that consequently no duty whatever is payable in this country in respect of her personal estate.

The Attorney General insists, on the contrary, that the testatrix retained her original English domicile down to and at the time of her death, and that therefore all her personal property wherever situate is liable to payment of legacy duty. And that even if it should appear that the testatrix has acquired a foreign domicile, succession duty is payable to the Crown in respect of all the part at least of her personal property which was at the time of her death actually situate in this country, and that in either case the defendant Madeline Countess Blucher, as such executrix as aforesaid, is liable to pay such legacy or succession duty as may be found to be payable accordingly.

The answer to the information, so far as is material to the present case, was as follows:

Justina Davidson Dallas, spinster, in the said information mentioned, was the sister of me Madeline Countess Blucher de Wahlstatt.

The said J. D. Dallas was the daughter of English parents. Her father, Sir Robert Dallas, was formerly Chief Justice of the Court of Common Pleas.

The said J. D. Dallas was born in the year 1804, at Brighton, in the county of

Sussex, and she continued to reside with her parents in some part of the United Kingdom until the year 1849, where her mother, who had survived her father, died.

Shortly after the death of the said Lady Dallas, the said J. D. Dallas left England and came to reside with us at Baden-Baden aforesaid, and from the time of her so leaving England as aforesaid, until her death, the said J. D. Dallas always resided with us, and during that period she had no other home or place of residence.

On leaving England the said J. D. Dallas discharged her English maid and took a German maid into her service, and she caused a large and valuable library of books (which was the only movable property belonging to her in the United Kingdom, with the exception of her money invested there) to be sent, and the same were accordingly sent, to her abroad, and she thenceforward kept the same in our house. She had no real estate of any kind, nor any other property whatever, except her clothes, trinkets, and the like, and the said invested money. She never returned to this country or left Baden-Baden, except for a few occasional visits, which she always made in my company, and which took place in the years 1850, 1854, 1857 and 1859, and since which last-named year she never left Baden-Baden to the time of her death.

From the year 1849, she always contributed her share towards the expenses of our housekeeping. She often told me, the said Countess Blucher de Wahlstatt, that if she were to survive me she should still continue to live in Germany, thereby meaning, as I believe, in Baden-Baden or the neighbourhood, and that nothing would induce her to return to England, except on an occasional visit to one of her sisters.

In the year 1854, she named to me the churchyard at Lichtenthal, near Baden-Baden, as the place where she wished to be buried. We believe she never altered that wish, and in compliance therewith we have buried her there.

About two years before her death an additional room was built, solely for her accommodation, to the house in which we were then living and still live at Baden-Baden, and which house is the property of

me, the said Gustave Count Blucher de Wahlstatt.

On the 1st day of March 1854 the said J. D. Dallas made a holograph will at Baden-Baden, by which she bequeathed all her property to me Countess Blucher, independent of my husband, and requested her cousin H. Davidson and her nephew R. Dallas to become trustees for the execution of the same, and she appointed me Countess Blucher sole executrix of her now stating will. And the now stating will was, we believe, duly executed so as to be a proper formal will in Baden-Baden aforesaid.

Shortly after making the last-stated will, J. D. Dallas came to England on a visit to her sister Catherine, wife of Lieut.-Col. Passy, who resided at 1, Cumberland Terrace, Regent's Park, and whilst there she made a will, dated the 6th of May 1854, which was, we believe, her last will and testament, and which is, we believe, accurately stated in the information.

We believe that such last-mentioned will was duly executed and attested, so as to be a proper, formal and effectual testamentary instrument both in Baden-Baden and in this country.

On the 15th of June 1863 J. D. Dallas died at our house at Baden-Baden, and, as we believe, without having revoked or altered the last-stated will. No legacy or succession duty has been paid in this country in respect of any part of the property, and I, Countess Blucher, submit that none is payable.

We submit that J. D. Dallas was for some years prior to the time of her death domiciled at Baden-Baden, and that her personal property can only be affected by the law of her domicile, and that the revenue laws and fiscal regulations of any country in which such personal property or any part thereof happened to be locally situate at the time of her death ought not to apply and do not apply to such personal property, otherwise it would follow that the same might be doubly taxed, viz., both by the country in which the deceased was domiciled, and also by that in which such property was locally situate; and that the personal property of a natural-born subject of England domiciled here might, if locally situate in

another country, be subject to a like double tax.

The Attorney General, The Solicitor General, Locke, and Hanson (of the Chancery bar), for the Crown.—The questions for the Court are, whether the Crown is entitled to legacy duty, and if not, whether it is entitled to succession duty. If the testatrix was domiciled in England, it is clear that legacy duty attaches; if, however, the Court should be of opinion that she is not domiciled in England, then the Crown will claim succession duty, on the authority of the cases *Re Capdevielle* (1) and *Re Wallop's Trusts* (2). Was the testatrix then domiciled in England? Her domicile of origin was clearly English. She lived in England until 1849, and then, on the death of her surviving parent, went to live with her sister abroad. If the facts and her conduct be looked at, instead of her declarations, they all tend to shew an English domicile. Her property is in England. She from time to time revisits England, and makes her will in England—which is an English will, admitted to probate in England, and has to be administered according to the peculiar principles and doctrines of the English Court of Chancery. She never had a house of her own abroad, but lived with her sister, and contributed to the expenses of the housekeeping. Then what is her declaration? It is that if she survived her sister, she would continue to reside in Germany—she does not say Baden-Baden, but Germany generally. There is no evidence of the testatrix having any settled preference for Baden-Baden. If then she has changed her domicile, in what part of Germany is her new domicile? There is also a declaration that she wished to be buried in a particular churchyard, but that could only mean if she died at Baden-Baden. Suppose she had died while on a visit to her sister in London, surely it could not have been her intention that in such case she should have been buried at Lichtenthal. Neither of these declarations are sufficiently definite. The definition of domicile, laid down by *Mr. Justice Story*, c. 3. s. 56, and to be found in the old authorities—*Aikman v. Aikman* (3)—is narrowed by the definition

given, by Lord Cranworth, in *Whicker v. Hume* (4) and *Moorhouse v. Lord* (5). In the last case he says, "In order to acquire a new domicile a man must intend *quatenus in illo exere patriam*. It was not enough that a man merely meant to take another house or to go to some other place, and that on account of his health or for some other reason he thought it tolerably certain that he had better remain there all the days of his life. A man did not lose his domicile of origin or his presumed domicile merely because he went to some other place that suited his health better, unless he meant, either on account of his health or from some other motive, to cease to be a Scotchman and become an Englishman, a Frenchman, or a German." That definition, though thought to be too extensive, was substantially adopted by this Court in *Re Capdevielle* (1), and is applicable to the present case. The sole reason the testatrix went to Baden-Baden was because her sister resided there. It is not contended that it is necessary, to obtain a foreign domicile, that the testatrix should take an oath of allegiance to a foreign prince, nor that she should obtain a municipal domicile; but there must be on her part an intention to renounce the character of an Englishwoman as far as she can. She has not done so. Her acts negative any such intention, and her declarations when examined are not inconsistent with her acts. With regard to the question whether succession duty is payable, that point has been decided in favour of the Crown in *Re Capdevielle* (1), following the case of *Wallop's Trusts* (2). Turner, L.J. in that case says, "Not only is the act, in the 2nd section, which defines what shall be deemed a succession, wide and general in its terms, but the definition there given extends to and embraces not only testamentary dispositions, but dispositions of every description, by way of settlement or otherwise, and dispositions not only of personal but of real property also. The act, therefore, was clearly intended to extend to cases which can in no way be affected by the rule that *mobilia sequuntur personam*."

(1) 33 Law J. Rep. (N.S.) Exch. 306; s.c. 2 H. & C. 985.

(2) 33 Law J. Rep. (N.S.) Chanc. 351.

(3) 2 Macq. Scotch Appeals, 854.

(4) 7 H.L. Cas. 124; s.c. 28 Law J. Rep. (N.S.) Chanc. 396.

(5) 32 Law J. Rep. (N.S.) Chanc. 395, 398; s.c. 10 H.L. Cas. 272, 283.

They also cited *Thomson v. the Advocate General* (6).

J. D. Coleridge and *E. E. Kay*, for the defendant.—First, as to the legacy duty. Did the testatrix acquire a foreign domicile? Taking the law with respect to a change of domicile to be as decided in *Re Capdevielle* (1), and the definition of domicile in *Moorhouse v. Lord* (5) to be correct, and that a person to acquire a new domicile must intend *quatenus in illo exuere patriam*, what more could the testatrix do, short of naturalization—which, it is admitted, is not necessary—than she has done to shew such an intention? At her mother's death she goes to Baden-Baden, to her sister. She discharges her English maid and engages a foreign maid; lives with her sister, not as a visitor, but paying her share of the expenses of the establishment. She takes with her a valuable library of books, which is all the movable property she has; she therefore takes everything with her that she can take, and she never returns to this country, except with her sister, and then only to visit her friends. Apart from the fact that the Countess Blucher is married, the testatrix is in the same position. Then, there is her declaration that after her sister's death she should continue to live in Germany, by which it is believed she meant Baden-Baden, and that nothing could induce her to return to England, except on an occasional visit; and that declaration is uncontradicted. There is also her declaration as to the place where she wished to be buried; and in her will she describes herself as on a visit to her sister.

[POLLOCK, C.B. — She does not style herself of Baden-Baden. Is not the will just as if she had said, by this act I retain my English domicile?]

No, because she makes a will at Baden-Baden, and for fear that there should be a doubt as to the validity of that will, she makes another one in England, about which there can be no doubt. What more could an unmarried lady do to acquire a new domicile than to go abroad, live and die abroad, and express her intention never again to return to live in England? As to whether she intended to acquire a Prussian

domicil or one at Baden-Baden, it is sufficient for the defendant to shew that the testatrix intended to acquire a foreign domicile. It is immaterial what other she did acquire. It is incumbent on the defendant, in order to shew that the testatrix intended to acquire a foreign domicile, to make out two things: first, the *factum* of residence abroad; secondly, the *animus manendi*. The first is clear and indisputable; and it is submitted that there is sufficient evidence on the other point to constitute a foreign domicile. With regard to the second point, as to whether succession duty is chargeable against the defendant, it is admitted that the cases of *Re Capdevielle* (1) and *Wallop's Trusts* (2) are decisive on the point, and cannot be questioned in this court.

The Attorney General was not called upon to reply.

POLLOCK, C.B.—There can be no doubt, adhering to the doctrine laid down in the recent case of *Capdevielle* (1), that the judgment of this Court must be for the Crown, on the ground that, at any rate, succession duty will be payable. I believe we are all prepared to give judgment upon the other point, namely, that there is no sufficient evidence that this lady had changed her domicile. Probably if you had asked the lady herself she would have said, I know nothing about domicile; I know nothing about the law of domicile; I had no intention of becoming a German instead of an English lady. It is very true that as long as my sister lives, I certainly mean to live with her; but I cannot exactly say whether, if I should survive her, and should have some surviving relatives in England, I may possibly not go back to my own country; but I shall go back with very great reluctance, for I prefer living in the same country with my sister. But that is a totally different thing from a change of domicile; and when Mr. Coleridge asked the question, "in what way is an English lady to change her domicile?" the answer is, that this does not change her domicile. It is very difficult to say how a change in the domicile of an English lady, who has property in England, and who has no occupation anywhere, can be effected. With respect to some of the matters which have

(6) 12 Cl. & F. 1.

been alluded to, such as dismissing her English maid, and taking into her service a German maid, and desiring to be buried in a particular churchyard—which can only mean, I think, if she was then or about that time to die—I cannot agree with the argument that, to an unprejudiced mind, that would be considered satisfactory evidence of change of domicile; and it is not calculated, in my opinion, to produce the least impression upon an unprejudiced mind, especially with reference to an English lady who retains all her property in this country. If she was likely to stay for some time in Germany—and she probably intended to stay some time there—that she may have taken her books with her is an exceedingly likely matter. She, however, left all her English property to English trustees, and, as the Attorney General has very justly observed, subject to the English law. Under these circumstances, I am distinctly of opinion that there is no sufficient evidence to justify the Court in coming to the conclusion that she did, in point of fact, mean to change, or had, in point of fact, changed her domicile. The judgment, therefore, is for the Crown upon both the points raised by the Attorney General.

BRAMWELL, B.—I am of the same opinion. I think that there is no distinct evidence of change of domicile, and there cannot be a change of domicile unless a new domicile is acquired—the original domicile remains until a new one is acquired. There seems to have been some doubt entertained by my Brother Martin in *Capdevielle's case* (1); whether the law as to what is necessary to shew a change of domicile has been altered; whether the rule is to be taken to the extent of the language used, that is to say, that a man must give up his country as far as it is in his power; whatever may be the law as to that part of the case, and assuming for a moment that there was evidence that this lady intended to give up her domicile in England, if she has not done so, she cannot acquire a new domicile somewhere else,—and there is not sufficient evidence of that. Without making any captious criticism upon the word “Germany,” supposing that she did not intend to live in England any longer, and that the only place where she did intend to live was

wherever her sister might live for the time being, after her death there would be, I think, some new abode to be looked for, possibly somewhere in Germany; but as she was, to adopt an expression used during the argument, personally attached to her sister and not locally attached to any place, I think that there was no acquisition of a new domicile, and, consequently, no loss of the domicile of origin.

CHANNELL, B.—Considering the arguments which have been addressed to the Court in this case, I am of opinion that the decision in *Re Wallop's Trusts* (2), for the reasons given by my Brother Martin, and which the other members of the Court adopted in the case of *Re Capdevielle* (1) was a right decision, and, assuming that to be so, the judgment of the Court should be for the Crown. But inasmuch as it is not improbable if we decide this case upon that ground only, that our decision might be reviewed elsewhere, it is manifestly convenient that each member of the Court should express his opinion upon the other question—the question of domicile. I agree with the views expressed by Lord Cranworth, Lord Chelmsford and Lord Kingsdown, in the case of *Moorhouse v. Lord* (5), adopted as they were by two members of this Court in the case of *Re Capdevielle* (1). Upon the question of domicile, I think that our decision should be that the testatrix was domiciled in England. I consider it unnecessary to go through the facts, or to repeat the explanation of those facts which has been given by the Lord Chief Baron; I adopt the views which have been already expressed by my Lord and by my learned Brother, because I do not see my way in this case sufficiently clearly to come to the conclusion that she had acquired a new domicile, so as to have divested herself of her domicile of origin. Upon these grounds I concur in thinking that the judgment must be for the Crown.

PIGOTT, B.—I agree with my learned Brethren. I entirely adopt Lord Wensleydale's definition of domicile as given in *Aikman v. Aikman* (3). The proof lies upon the party who asserts the change of domicile. Then comes the question, whether we are satisfied with the proof given to us by the defendant. There is no doubt that

some of the facts would go to shew that there was an intention to change the domicile, for instance, the removal of the books; but then, again, that is an equivocal act, because a person might do so after balancing the question of expense to be incurred in taking them over to Germany for a time, or by depositing them in some warehouse in this country. Again, we have to consider whether the use of the books might not have been another consideration for taking them with her. And, again, the expression that she wished to be buried in a particular churchyard. At that time she may have been ill, and expected soon to die. We know nothing about that but what may be derived from those bare words which are attributed to her. Then there is a third matter, which has been pressed upon us by Mr. Coleridge, viz., the declaration that if she survived her sister she would continue to live in Germany, and that nothing would induce her to return to England. We know nothing of that conversation but that part of it; and it may be that if we knew the whole of what was being discussed between these two sisters, as to whether she would, supposing the countess died, return and live with her sister in England; she may have said, "Nothing will induce me to go to England, I shall live in Germany." Any little addition to that conversation might give a very different complexion to the language used, and to the construction to be put on the points which have been urged. On the other side, the circumstance of her coming to England and taking the pains to make an English will, describing herself as a visitor to her sister in Cumberland Terrace, and not at all going on to say whether permanently resident or having a domicile abroad, tended rather to shew me that she looked upon herself as subject to the English law, and that she found it requisite to make an English will in order to pass her property. I rather draw an inference unfavourable to Mr. Coleridge from the description given of herself in that will. It is enough, however, to say, that I am by no means satisfied that she had an intention to change her domicile.

Judgment for the Crown, with costs.

1864. } PRICE AND ANOTHER v. KIRK-
Nov. 11. } HAM AND ANOTHER.

Surety—Equitable Plea—Rules of Loan Society.

P. borrowed a sum of money from a loan society of which he was a member, and the defendants, who were not members of the society, joined him in a bond and promissory note for the amount. By the terms of the loan P. was to repay the money by weekly instalments. One of the society's rules directed the managing committee to inform the sureties when the instalments were four weeks in arrear, and empowered them to commence legal proceedings against the sureties. P. died in 1859, after having repaid a portion of the loan, but being at the time of his death more than four weeks in arrear. The defendants were not informed of this till an action was brought in 1862 on the bond and note:—Held, that the rules of the society formed no part of the defendants' contract so as to afford them any ground of equitable defence to the action.

Declaration on a bond conditioned for the payment of 50*l.* on the 1st of January 1857, and on a promissory note for the same sum payable on demand.

Second plea to the first count (on equitable grounds), that the bond was made and entered into by the defendants solely as sureties of and for one William Poole, now deceased, to secure the due payment by the said W. Poole to a certain loan society, whereof the plaintiffs were then respectively the treasurer and secretary, of a certain sum of money, to wit, 50*l.*, by instalments of 5*s.* per week, and the bond was made and entered into by the defendants upon the terms and conditions that the defendants should only be liable upon or in respect of such bond to the extent of any deficiency in the amount of the payments to be so made by the said W. Poole, and that in the event of the said W. Poole becoming more than four weeks' payments in arrear, the committee (whereof the plaintiffs were then and during all the time herein mentioned members) should immediately inform the defendants of the same; and it was always material and important to the defendants that the said terms and conditions should be ob-

served and performed by the plaintiffs, of all which the plaintiffs at the time of the making of the bond had always had notice; and the said W. Poole afterwards became and remained more than four weeks' payments in arrear, yet the committee did not, nor did the plaintiffs, nor did any person or persons whosoever, inform the defendant of the same immediately nor until after the expiration of a very great and unreasonable time, nor until after the death of the said W. Poole, and after the death of one William Appleby, a co-surety with the defendants to the plaintiffs in respect of the matters aforesaid; and the defendants during all that time remained and were wholly uninformed and ignorant of the said W. Poole having become in arrear, whereby not only was the risk of the defendants as such sureties materially, unduly and improperly increased, but also thereby the defendants were precluded from enforcing or procuring the payment of the said respective moneys by the said W. Poole, and were and are otherwise damnified.

Third plea (on equitable grounds), that the defendants made the bond solely as sureties for the said W. Poole and for the purpose of securing the payment by him of the money in the second plea mentioned, in the manner therein mentioned, and upon the terms and conditions that the defendants should only be liable to the extent therein mentioned, whereof the plaintiffs always had notice; and the plaintiffs afterwards and without the consent of the defendants, for a good and sufficient consideration in that behalf, agreed to and did forbear and give time to the said W. Poole for payment of the said respective instalments for divers long spaces of time, beyond the time when the same respectively became due, to wit, until the death of the said W. Poole; and by means of the premises the defendants have been greatly prejudiced and damnified.

There were also similar pleas to the count on the promissory note. Issue on all the pleas.

At the trial, before Martin, B., during the London Sittings after Trinity Term, 1864, it appeared that the plaintiffs, who were respectively treasurer and secretary of a loan society at Derby, sought to

recover the sum of 22*l.* 1*s.* 2*d.*, being the balance of a loan of 50*l.* advanced by the society to one of its members, W. Poole, on the security of the joint bond and promissory note of Poole, the defendants and one Appleby.

According to the conditions on which the money was lent, Poole was to repay the money by weekly instalments of 5*s.* each. He died in September 1859, after having repaid 27*l.* 18*s.* 10*d.*; but at the time of his death he was more than four weeks' instalments in arrear. The defendants were not informed of his being in arrear till the writ was served on them in May 1862, their co-surety Appleby being then dead. They were not members of the society, but they sought to avail themselves of one of the society's rules, which contained, *inter alia*, the following direction for the committee of management: "If any member who has had his loan advanced become more than four weeks' payments in arrear, the committee are immediately to inform the sureties of the same, and have power to institute legal proceedings against them."

Martin, B. directed a verdict for the plaintiffs, on the ground that the evidence did not disclose any equitable defence; with leave to move to enter the verdict for the defendants; and

Field, having obtained a rule accordingly,—

Hayes, Serj. (J. W. Mellor with him) shewed cause, contending that the sureties had nothing to do with the rules of the society, which formed only a private agreement of the members *inter se*, and that there was nothing in the rules to prevent the society from suing the sureties at once if the principal were to run away. The rule defining the duties of the committee, and directing them to give notice to the sureties, afforded the sureties no ground of complaint for that not being done which was a mere voluntary direction by the society to its own officers. The case is distinguished from *Watts v. Shuttleworth* (1), which was cited at the trial; for in that case there was a breach of a contract that the plaintiff should insure, and the discharge of the surety was effected by reason of his position being

(1) 7 Hurl. & N. 353; s.c. 29 Law J. Rep. (N.S.) Exch. 229.

deteriorated by the default of the creditor, whereas there was no breach of contract here, unless it were open to the defendants to qualify their bond by the rules of the society, with which the sureties had nothing to do—*Brown v. Langley* (2). *Watts v. Shuttleworth* (1) shews that if sureties are to be discharged at all, it must be because they have been prejudiced in some way by the acts of the creditor and the principal debtor; and there was no prejudice here, for it was through the indulgence of the plaintiffs that the defendants had not been called on to pay the whole amount of the loan.

L. Kelly (Field with him), *contra*.—The rule is for the protection of the sureties, and it was proved that they contracted on the faith of it. It formed part of their contract, and they are entitled to every portion of that contract which is for their benefit. That the defendants have an equitable answer appears from *Pooley v. Harradine* (3) (which was affirmed in the Exchequer Chamber by *Greenough v. McClelland*) (4), where it was held that a defendant, who is apparently a principal, may shew, by way of equitable defence, that he is only a surety. If the defendants had been sued on the bond *instanter*, an equitable plea might have been pleaded, that the principal had, up to that time, performed his part of the contract. They have been greatly prejudiced by not receiving the notice to which they were entitled, their principal and their co-surety having died in the mean time.

[*Pigott, B.* referred to *Gordon v. Rae* (5).]

Pollock, C.B.—I believe that we are all of opinion that this rule ought to be discharged. The general rule of law in respect to matters of this sort, where there is a surety, is this: the creditor may be entitled to make his demand for a certain period and to enforce it in a certain way,—but provided he does not tie his own hands up so as to prevent himself from acting, he is not at all bound to use them. He may ab-

(2) 4 Man. & G. 466; s. c. 12 Law J. Rep. (N.S.) C.P. 62.

(8) 7 El. & B. 481; s. c. 26 Law J. Rep. (N.S.) Q.B. 156.

(4) 30 Law J. Rep. (N.S.) Q.B. 15.

(5) 8 El. & B. 1065; s. c. 27 Law J. Rep. (N.S.) Q.B. 185.

stain from using any right that he possesses; whether that be advantageous to the surety or not is not the question: the thing to be considered is, is the creditor bound to enforce his rights? if he be not bound, the surety cannot compel him to enforce them. No case has been cited in any degree countervailing this doctrine, and therefore the rule ought to be discharged.

BRAMWELL, B.—It was said, on the part of the defendants, that there was a written contract here that the plaintiffs would not proceed against the sureties for the four weeks. That is the only question raised, and the only one that could be raised. I do not think that anything more could have been said in favour of the defendants than has been said for them. The rule—which is merely a statement of the duties of the committee, the officers who are to inform the surety if default is made in the payment of the money—is not binding as between the society and the surety.

CHANNELL, B.—I do not dispute the doctrine in *Pooley v. Harradine* (3), that the defendant, though apparently the principal debtor, may shew himself to be only a surety, and may thereby set up an equitable defence. Here, for an equitable defence, the defendants say that the obligees have done something which altered the contract, for instance, that they have given time to the principal debtor. The only contract which the defendants attempt to set up is a contract that entitled them to say they were only to be sued in the event of notice given at the expiration of the four weeks. I do not think there was any contract that they were to be sureties only in that case.

Pigott, B. concurred.

Rule discharged.

1864. } *PHILLIPS AND ANOTHER v.*
Nov. 22, 24. } *LEWIN.*

Interrogatories—Discretion of Judge in allowing or rejecting them—Common Law Procedure Act, 1854, s. 51.

When interrogatories appear to a Judge to be framed carelessly, and with too much latitude, so as in reality to throw upon him the trouble of settling them, he is not bound

to select the one or two, which he may think proper, and to reject the others only, but in sending the whole of them back to be re-formed, he exercises a reasonable discretion with which the Court will not interfere.

This action was brought, by assignees of assignees of a lessor against the lessee, for breaches of covenant, and the declaration charged waste in not repairing the premises, and in removing fixtures therefrom. The plaintiffs applied at chambers for leave to examine the defendant on interrogatories, which Martin, B. refused to allow.

The first three interrogatories referred to the defendant's occupation of the premises, and the nature of the business carried on there. Then followed thirteen interrogatories as to the fixtures, similar in form to the following: "Were there not *then* (i. e. at the time of the lease being granted) or at any and what other time shelves and a hand-rail in the closet in the front room east second floor?" The 17th interrogatory was as follows: "Have you not removed, or caused to be removed, any and which of the said several fixtures, &c., or any and what other fixtures, &c. from the said premises? The 18th was similar to the 17th, inquiring as to *sale* of the fixtures; and lastly there was an interrogatory as to documents.

T. H. Baylis moved for a rule to shew cause why the interrogatories should not be administered, contending that the plaintiffs, who were only assignees of assignees of the lessor, were entitled to have such questions answered as the defendant would be bound to answer at the trial, in order to establish the alleged breaches of covenant.—[He cited *Zychlinski v. Maltby* (1).]

Cur. adv. vult.

POLLOCK, C.B. delivered the judgment of the Court (2).—The practice of interrogating either the plaintiff or the defendant is, no doubt, an extremely useful one, and it was a very important addition to the means of obtaining truth and of administering justice when the legislature

granted the power. But no suitor has a right to expect that a Judge will take on himself the office of settling interrogatories; and the Court, in my opinion, is a still more unfit instrument to accomplish the object.

It appears to us that my Brother Martin was well warranted in this case in not allowing these interrogatories; and that he was not bound, just because there happened to be one or two interrogatories which might be put, to pick them out and reject the others. The Judge is to exercise a reasonable discretion. If there be one or two interrogatories with reference to a matter that may be questionable, the Judge may well say that the interrogatories, as a whole, ought to be administered, or striking out this or that one, he may allow the others. On the other hand, if he perceive that they have been drawn with a careless and hasty hand, and that all manner of questions are put, taking the chance of their being allowed, which is, in reality, throwing upon the Judge the trouble of settling the interrogatories, and he may properly say, "Take them away; re-form them, and bring them back."

Now, on looking at these interrogatories, I observe that they are extremely objectionable, and that there are several that ought not to be presented at all. The action is brought with reference to certain fixtures, which it was supposed the defendant had improperly removed at the termination of the lease. It is supposed that they were on the premises at the time the lease was granted. Here is one question: "Were there not then (namely, at the date of the lease), or at any and what other time, shelves and a hand-rail in the closet in the front room east second floor?" Now, this is utterly unimportant, except the articles were there at the time the lease was granted, as otherwise the plaintiff had no right to claim any of them. And then again, "Was there not then, or at any other and what time, a wardrobe in the back room west second floor?" It is quite plain that these interrogatories were framed without attention to the time at which the articles ought to have been on the premises for the purpose of giving the landlord a right to inquire about them. Our judgment is, that the rule be refused, with a

(1) 10 Com. B. Rep. N.S. 838.

(2) Pollock, C.B., Channell, B. and Pigott, B.

notice to the parties to apply at chambers with re-formed interrogatories.

Rule refused accordingly.

[IN THE EXCHEQUER CHAMBER.]
(Appeal from the Court of Exchequer.)

1864. { M'CANCE v. THE LONDON AND
June 20. { NORTH-WESTERN RAILWAY
COMPANY.*

Railway Company—Carrier—Declaration of Value of Thing carried—Effect as an Estoppel.

*The first count of a declaration alleged, that the plaintiff employed the defendants, a railway company, to provide trucks for the carriage of horses of the plaintiff for reward, in consideration whereof the defendants promised that the trucks should be reasonably fit and proper for the carriage of the plaintiff's horses; breach by the defendants in not providing proper trucks, whereby the plaintiff's horses were injured. Second count—that the defendants, as carriers on the railway, having received from the plaintiff certain horses to be conveyed by them on their railway for hire, the said horses were injured in consequence of the defective state of the trucks provided by the defendants, and their negligence and want of care. The defendants paid 25*l.* into court, and the plaintiff claimed damages *ultra*. At the trial, it appeared, that before the defendants would furnish the trucks, the plaintiff was requested by them to sign, and did sign, a declaration, that the value of each horse did not exceed 10*l.*, and, in consideration of the rate charged for conveyance, that he agreed that they were to be carried entirely at the owner's risk. Evidence was given for the plaintiff that the horses were worth more than 10*l.* each, and it was admitted that, if taken at their real value, 40*l.* was the amount of compensation the plaintiff would be entitled to, but if at 10*l.* each, then 25*l.* was the right amount:—Held, that the declaration of the value of the horses was not part of the contract between the plaintiff and the company, but a*

*statement of a fact by the plaintiff assumed and agreed to by the company as the basis upon which the contemplated contract was to be framed; and that consequently the plaintiff was not at liberty afterwards to deny the truth of this conventional state of the facts, nor to shew that the real value of the horses exceeded 10*l.* each.*

This was an appeal, by the plaintiff, from the decision of the Court of Exchequer.

The facts and documents are set out with great fullness in the report below (1). The following summary is sufficient:

The action was for damage to the plaintiff's horses.

The first count stated that the plaintiff employed the defendants to furnish trucks to carry his horses by their railway for hire; and that the defendants promised that the trucks should be reasonably fit and proper for such purpose; and alleged as a breach that the trucks were not reasonably fit and proper for the carriage of the horses, whereby the horses were injured.

The second count was against the defendants as carriers on their railway, and alleged that by reason of the defective state of the trucks and the negligence of the defendants, the horses, which were delivered to the defendants to carry for hire, were injured.

The defendants paid 25*l.* into court.

Replication—Damages *ultra*.

At the trial, it appeared that the plaintiff's agent delivered seven horses at the railway station of the defendants to be carried along the line, and that at the time of their delivery to the company he signed a declaration that the value of each horse did not exceed 10*l.*, and that in consideration of the rate charged for the carriage the horses were to be carried at the owner's risk. The company charged a higher rate for the carriage of horses above 10*l.* value. It was agreed that if the jury were entitled to estimate the damage to the horses at their true value, 40*l.* would be the proper amount of the damage, but if the horses were to be assumed to be only of 10*l.* value then the sum paid into court was sufficient.

The Court below held that the defendants were entitled to the verdict.

* Decided in the Sittings after Trinity Term, coram Williams, J., Crompton, J., Willes, J., Byles, J., and Blackburn, J.

(1) 31 Law J. Rep. (n.s.) Exch. 65.

Brett (C. A. Russell with him), for the plaintiff, the appellant. — The defendants by paying money into court, and pleading no plea traversing the contract alleged, have admitted, that the contract declared on was the true contract on which the horses were carried. The statement therefore signed by the plaintiff that the horses were under the value of 10*l.* each was not admissible in evidence, for the purpose of varying the contract declared upon. No doubt it was admissible for the purpose of affecting the damages, but it was not admissible as an estoppel by agreement. It was not pleaded as an estoppel. It was part of a void stipulation, for the stipulation that the horses were to be at the owner's risk is unreasonable, and therefore void. The statement does not fall under the rule respecting a statement made by one party and believed in by the other, and consequently acted on by the other; for the railway company did not believe that these horses were under the value of 10*l.*, nor did they care what was the true value, if the plaintiff agreed to put no higher value than 10*l.* If the statement was part of the original agreement for the carriage of the horses, it ought to have been stated in the declaration, and if not, the omission should have been pointed out by a proper plea. If it was not part of the agreement the representation is not an estoppel, unless it be made wilfully and with the intent of its being acted on and believed in by the party affected — *Best on Evidence*, p. 619.

[CROMPTON, J.—Is it necessary that the party should believe this statement if he relies on it and acts on it? Is not this very like the case of *Aspitel v. Bryan* (2), decided a few days ago in the Exchequer Chamber, on appeal from the Queen's Bench, where by agreement a bill of exchange was drawn and indorsed in the name of a dead man, and the acceptor, a party to the agreement, was held estopped from denying the indorsement?]

The statement is, no doubt, some evidence that the value of each horse was under 10*l.*, but the jury have found as a fact that their value was considerably more. The Court cannot overrule the finding of the jury.

(2) 38 Law J. Rep. (N.S.) Q.B. 328.

Manisty, for the defendants, the respondents, was not called upon.

WILLIAMS, J.—We are all of opinion that the judgment below must be affirmed. It is perfectly clear that the question is wholly untouched by any consideration of the point of pleading which has been urged upon us—*Clarke v. Gray* (3). The declaration need not state anything more than is stated here. It sets out as much as is material for the maintenance of the action. That which merely goes in reduction of damages cannot be pleaded. The next question is, in what light the declaration made by the plaintiff, that the horses were of no greater value than 10*l.*, is to be regarded. It is clear, for the purposes of the question which we are now considering, that it was a mere declaration upon which the contract which the parties contemplated making was to be based, and by which it was to be regulated and governed. It is just the same thing as if at the railway station there had been one department in which contracts were to be made respecting the carriage of horses under the value of 10*l.* and another, or first-class department, for the carriage of horses above that value. If parties intending to make a bargain respecting the carriage of horses were to go to the particular department first mentioned, they would make their bargain upon the footing and understanding that the value of each horse was under the sum of 10*l.* Here it appears in evidence that the contract declared upon was to be regulated and governed by a state of facts understood between the parties, namely, that the horses were under the value of 10*l.* each. It is laid down in my Brother *Blackburn's Book on Sales*, 163, that where parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts, and not upon the truth. We think that both parties here are bound by the conventional state of facts agreed upon between them.

The other JUDGES concurred.

Judgment affirmed.

(3) 6 East, 564.

1864. }
Nov. 25. } *Ex parte GLAYSHER.*

Arbitration—Making Submission a Rule of Court—Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125.) s. 17.

Where two persons agree by deed to refer all matters in dispute which shall arise between them to two arbitrators, one to be chosen by each for that purpose; and on such disputes arising, in pursuance of such agreement the arbitrators are appointed by parol, the submission to arbitration is a parol submission, and therefore cannot be made a rule of Court under the 17 & 18 Vict. c. 125. s. 17.

This was an application for a rule to make a submission to arbitration a rule of Court.

It appeared from the affidavits that one F. T. Maitland, by lease, under seal, in September 1860, demised to J. J. Glaysher a farm and lands, at a certain rent, to hold for the term of eleven years, from the 29th of September 1860, but determinable at the end of the first four years of the said term by six months' notice in writing.

The lease contained a covenant as follows: That J. J. Glaysher, his executors and administrators, shall be paid and allowed by the said F. T. Maitland, his heirs or assigns, at the end or expiration or other sooner determination of this lease, for all the fixtures in and upon the said farm-house and buildings, which have been valued to him on taking possession, and also for the dung made during the last year of his tenancy; for all fallows, provided the same do not exceed one-fourth part of the arable land, and shall not have been ploughed more than four times, and have been landed up during the last time of such ploughing; for all dressings and mixings on the farm, manures, half-dressings of lime or other bought manure only, and underwood down to the stem according to the custom of the country, as well as for all hay, straw, fodder and litter, at a feeding price: such valuation to be made by two indifferent persons to be chosen for that purpose, one by the said F. T. Maitland, his heirs and assigns, and the other by the said J. J. Glaysher, his executors and administrators; and in case of their disagreement in the amount thereof,

then by a third person, to be chosen by the two former previous to their entering upon such valuation, whose decision shall be final and conclusive.

The tenancy was duly terminated on the 29th of September 1864, and F. T. Maitland thereupon appointed E. Drawbridge valuer, and J. J. Glaysher appointed C. Marchaut valuer, to make the valuation according to the covenant, and they did, previously to their entering upon the said valuation, choose J. Nash to make the valuation in case of their disagreement. E. Drawbridge and C. Marchant disagreed in the amount of the valuation, and thereupon the said valuation was referred to J. Nash, who made his award in favour of J. J. Glaysher, but omitted certain items of the valuation.

Beresford (Nov. 24), in support of his motion, contended that the covenant in the lease amounted to a submission, which could be made a rule of Court, under the 17th section of the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125.) which provides that "every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior Courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend it should not be made a rule of Court." *Parkes v. Smith* (1) is in point.

[CHANNELL, B.—In that case the arbitrator was named in the covenant, and it might be the submission was complete; here the arbitrators are not named in the deed, but afterwards the parties meet, and each appoints an arbitrator by word of mouth. The submission in this case seems to me to be a parol submission.]

Cur. adv. vult.

POLLOCK, C.B. now delivered the judgment of the Court (2).—This was an application to make a covenant contained in a lease a rule of Court, by which the parties undertook that any dispute that should arise should be referred to arbitra-

(1) 15 Q.B. Rep. 297; s. c. 19 Law J. Rep. (N.S.) Q.B. 405.

(2) Pollock, C.B., Channell, B. and Pigott, B.

tion. I apprehend that there is an obvious, clear and positive distinction between a general agreement to refer any matter of dispute and an actual reference of a subject which has become a matter of dispute. If there be a general agreement to refer, and in pursuance of that there be a parol reference, the reference is by parol, although the agreement may be by deed, and this Court cannot make that parol reference a rule of Court. We were pressed to give judgment to-day because this is the last day for moving to set aside the award, as I understand the object of this application was to set aside the award. The judgment of the Court is, that they cannot interfere to make a parol submission a rule of Court, although that parol submission is made in pursuance of a previous written agreement to refer. Mr. Beresford therefore can take no rule.

Rule refused.

1864. } ELWORTHY v. SANDFORD AND
June 1.* } OTHERS.

Lessor and Lessee—Right to Possession of Lease—Executor de son Tort.

To detain, by an administrator, for a title-deed whereby the defendant demised land and premises to the intestate for an unexpired term of fourteen years, the defendant pleaded that the deed was a farming lease, at a yearly rent, with various farming covenants, and that after the death of the intestate, and upon grant of administration the defendant, pursuant to the terms of the lease, re-entered, for breach of covenants, and thereupon the title-deed became the defendant's title-deed, and the lessee ceased to have any interest in it:—Held, that the plea was no answer to the action, and that the plaintiff was entitled to the deed.

To trover and trespass for taking goods of the plaintiff as administrator, the defendant pleaded that the claims arose by reason only of the defendant being executor de son tort of the intestate before grant of administration to the plaintiff, and that before such grant the defendant fully admin-

istered all the estate which had come to his hands:—Held, that the plea was bad.

Declaration by the plaintiff, as administrator, with the will annexed, of Henry Hewett, for that the defendants detained from the plaintiff a title-deed of the plaintiff, as administrator, that is to say, a certain indenture of lease made by and between the defendant Edward Sandford of the one part, and the said H. Hewett of the other part, whereby the said defendant demised to the said H. Hewett certain land and premises to hold to the said H. Hewett for the term of fourteen years thence next following, which said term is still unexpired, whereby the plaintiff, as administrator, had been prevented from disposing of the residue of the said term, and of letting the said farm at an increased rent, as he otherwise might and would have done. Second count, for that the defendants converted to their own use, or wrongfully deprived the plaintiff of the use and possession of the goods of the plaintiff, as administrator, that is to say, corn, hay, &c. Third count, for that the defendants seized and took certain growing crops and fixtures of the plaintiff as administrator, and carried away and converted the same to their own use.

Third plea to the first count, that by the indenture of lease the defendant Sandford demised to the said H. Hewett, deceased, all that farm called Holbrook Farm, with the several closes of land thereto belonging, to hold to the lessee, his executors and administrators, from the 25th of March 1856, for the term of fourteen years, yielding and paying the yearly rent of 75*l.*, by equal quarterly payments, and in like manner yielding and paying the further yearly rent of 20*l.* for every acre of meadow or pasture land broken up or converted into tillage without the written licence of the defendant, his heirs and assigns.—[The plea then set out various covenants by the lessee with the lessor, for payment of the rent, taxes and tithes, and 10*s.* towards insurance of the buildings from fire, to provide reed for thatching, and keep the iron-work and glass windows in repair, and provide materials for and pay a moiety of all other expenses attendant upon repair; and also that the lessee should not let or assign the said premises, nor assign the

* Decided in the Sittings after Trinity Term.

present indenture of lease or term, or any portion thereof, nor suffer the premises to be occupied by any other person without the written licence of the lessor, but that the lessee would reside on the premises, and should not cut or mow any of the lands more than once in any year, with various other farming covenants, with a proviso for re-entry by the lessor for non-payment of rent or breach of covenant.]—Averments, that the lessee entered and remained in possession until his death in April 1863, leaving a will, but the executor never acted, and there was no executor or administrator until January 1864, when the plaintiff became administrator with the will annexed; that the rents were unpaid, and the lessee, his executors or administrators, let the premises without the written licence of the lessor, and did not keep the covenants, and the lessee and the plaintiff, as administrator, became insolvent; and that before grant of the letters of administration, and before the plaintiff, except by way of relation, was administrator or had anything in the demised premises or in the said indenture, the lessor and the other defendants, as his servants and by his command, re-entered, and the lessor had again re-possessed and enjoyed the premises as of the lessor's former estate, and thereupon, and before any grant of administration to the plaintiff, and before the plaintiff, except by way of relation, became and was such administrator as aforesaid, the said title-deed belonged to the lessor, and became and was his title-deed, and the lessee, his executors or administrators, ceased to have any right, title or interest therein or thereto, and all conditions were performed, and all things happened, and all times elapsed necessary to entitle the lessor to re-enter as aforesaid, under the terms of the said lease, and to have and hold the same title-deed, and nothing happened to prevent the lessor or to disentitle him from so re-entering as aforesaid, and from having and holding the said title-deed.

Demurrer and joinder in demurrer.

Ninth plea, for a defence on equitable grounds, to the second and following counts, that the claims in those counts mentioned proceeded, arose and occurred by reason only of the defendants being and acting as executors of their own wrong, of

the personal estate and effects of the said H. Hewett, deceased, before any grant of any letters of administration to the plaintiff, and before the plaintiff, except by relation, was administrator as aforesaid; and that before the plaintiff, save as aforesaid, was administrator as aforesaid, they fully administered all the personal estate and effects which were of the said H. Hewett, deceased, and which had ever come to the hands of the defendants, as such executors as aforesaid, to be administered, and the defendants had not, at the commencement of this suit, nor had they since had, nor had they any personal estate or effects which were of the said H. Hewett, deceased, in the hands of the defendants as such executors as aforesaid, to be administered.

Demurrer and joinder in demurrer.

Beresford, for the plaintiff.—The pleas do not afford any answer to the action. The facts alleged in the third plea do not justify the detention of the lease. *Hall v. Ball* (1) is in point. As to the ninth plea, the authorities are clear that the matters there stated cannot be pleaded. An executor *de son tort* can give in evidence the payments he has made, but the plaintiff is still entitled to a verdict for nominal damages—1 *Williams on Executors*, 5th edit. p. 236. There is no distinction between law and equity in this respect; and an application in this case made to the Court of Chancery for an injunction was refused, with costs.

Bullar, for the defendants.—As to the third plea, this case is distinguishable from *Hall v. Ball* (1). That was the case of a counterpart. It may be gathered from the plea that in this case only one lease was executed by both parties, and that there was no counterpart, for in the case of a counterpart it is usual for the lessor to execute one part and the lessee the other, and the averment here is that the deed was executed by both. But, at all events, each party has such an interest in the deed as to prevent the one maintaining detinue or trover against the other. This case is further distinguishable from *Hall v. Ball* (1) by the fact that this is a farming lease containing covenants only by the lessee, including a covenant not to assign, and some of these covenants have been broken.

(1) 3 *Man. & G.* 242; s. c. 10 *Law J. Rep.* (n.s.) C.P. 285.

In *Philips v. Robinson* (2) Best, C.J. says, "It is a clear principle of law that the muniments of an estate belong to the person who has the legal interest in it; so that if the plaintiff was originally entitled to receive the deed on request, he was not so at the time of action, for he could only be so entitled so long as the right to the property continued in him." Upon the determination of the lessee's interest by the covenants broken and the re-entry thereon, the lease became the lessor's muniment of title. With respect to the 9th plea, the point raised by it has never been determined, when the question was on the record. It is a good plea at law—*Anonymous* (3), but, if not, as an equitable plea it may be supported on the ground that it is inequitable to allow an action to proceed to recover a farthing damages.

Beresford was not called on to reply.

POLLOCK, C.B.—The plaintiff is entitled to judgment. This case scarcely admits of argument, for it is concluded by authority.

MARTIN, B.—I am of the same opinion. The judgment of Tindal, C.J. in *Hall v. Ball* (1) disposes of the distinctions sought to be drawn between that case and the present. This deed is not a muniment of title. I may observe that it is a common application at chambers on the part of lessors for a copy of the lease in the possession of the lessee, and the order is frequently made on the ground that the lessee is a trustee for the lessor.

BRAMWELL, B.—Independently of *Hall v. Ball* (1), I think the plaintiff is entitled to our judgment. As to the ninth plea, it is consistent with it that the defendants may have applied the assets in payment of their own debt. If such a plea were held good, every creditor would make a scramble for the effects of a deceased debtor. Both pleas are clearly bad.

Judgment for the plaintiff.

1864. } THE ATTORNEY GENERAL v.
June 8.* } LORD LILFORD.

Succession Duty—Succession Duty Act, 1853, (16 & 17 Vict. c. 51.) s. 21.—Effect of Tenant in Tail in Possession acquiring the Fee and dying before Payment of the Instalments.

A tenant in tail, liable to duty on his succession, barred the entail and acquired the fee simple by his own act, and died before the instalments of duty payable on his succession became due:—Held (Pollock, C.B. dissenting), that the instalments were a continuing charge on the property under section 21. of the Succession Duty Act, 1853.

Information to obtain payment of duty in respect of the succession of the defendant's late father Thomas Atherton, Lord Lilford, deceased, in the real property comprised in the will and settlement herein-after stated, the defendant being tenant for life in possession under his father's will. The question was whether, upon the death of the late Lord Lilford, the duty upon his succession ceased to be payable, or whether it was a continuing charge upon the real property in respect of which it was claimed.

Peter Legh (hereinafter referred to as the testator) by will, dated the 9th of October 1787, devised all his manors, lands, &c. in Bratherton and Tarlton, in the county of Lancaster, to Legh Master, the Rev. Legh Hoskin and Richard Orford, for the term of 500 years, upon the trusts therein mentioned, and, subject thereto, to the testator's grandson G. A. Keck for life, with remainder to the first and other sons of G. A. Keck in tail male, with remainder to the testator's grandson P. A. Keck, with remainder to the first and other sons of the said P. A. Keck in tail male, with remainder to the testator's granddaughter E. A. Keck, with remainder to her first and other sons in tail male, with remainder to the testator's grandson A. L. Atherton for life, with remainder to the first and other sons of the said A. L. Atherton in tail male, with remainder to the testator's granddaughter H. Atherton for life, with remainder to her first son in tail male, with remainders over.

* Decided in Trinity Term.

(2) 4 Bing. 106, 109.

(3) 12 Mod. 441; cited in 1 Williams on Executors, 286.

By a codicil the testator revoked this devise, and thereby devised all the said hereditaments unto his sister Ann Legh in fee.

The testator died on the 20th of May 1792. By a settlement dated the 14th of June 1792, Ann Legh conveyed the said hereditaments to Legh Master and Legh Hoskin and their heirs, for and upon the like uses, trusts, and subject to the like term of years, as were mentioned in the will.

G. A. Keck, the first tenant for life, died on the 4th of September 1860, without issue; P. A. Keck, the next tenant for life, died in March 1797, a bachelor; E. A. Keck, the next tenant for life, had issue one son, who died without issue on the 16th of January 1854; A. L. Atherton, the next tenant for life, died in the testator's lifetime, a bachelor. The testator's granddaughter H. Atherton married the Honourable J. Powys, who afterwards became Lord Lilford, and she died on the 11th of August 1820, and the defendant's late father Thomas Atherton Lord Lilford was the first son of that marriage.

Upon the death of G. A. Keck in September 1860 (being after the time appointed for the commencement of "the Succession Duty Act, 1853"), the said Thomas Atherton Lord Lilford, by reason of the dispositions made by the said will and settlement, became beneficially entitled to the property as tenant in tail male in possession, and he became chargeable with succession duty.

By indenture, dated the 5th of November 1860, duly enrolled, in order to defeat the estate in tail male of the said Thomas Atherton Lord Lilford, the said Thomas Atherton granted and confirmed the said property to a trustee for the use of the said Thomas Atherton Lord Lilford, his heirs and assigns for ever.

Thomas Atherton Lord Lilford died on the 15th of March 1861, being competent to dispose by will of a continuing interest in the property, and having in fact by will, dated the 24th of February 1841, devised all the hereditaments to which he was entitled to the use of his eldest son, the defendant, and his assigns for life, with limitations over.

The said Thomas Atherton Lord Lilford died before any one of the eight half-yearly instalments of duty payable in respect of his succession had become due; and in

answer to applications made to his son and successor, the defendant, for payment, he declined to pay, alleging that upon the death of his father all of the said instalments ceased to be payable; whereas the Attorney General insists, on the contrary, that all the said instalments were a continuing charge on the property in respect of which the same were claimed, and that such instalments were payable by the defendant as the owner for the time being of such property, according to the provisions of the Succession Duty Act.

The Attorney General, The Solicitor General, Locke and Hanson, for the Crown (1).

—The only material points in the narrative of facts are, that the late Lord Lilford, after the passing of the Succession Duty Act, 1853, became entitled as successor under the act to the estate tail, and before his death he barred the entail and became owner in fee simple, and was owner in fee simple at the time of his death; and the question is, whether instalments of duty which became due by reason of the succession taken under a settlement falling into possession after the passing of the Succession Duty Act, continued payable out of the fee simple which belonged to the late Lord and passed by his will. This question arises under sections 21. and 42. of the act; section 42. enacts that "the duty imposed by this act shall be a first charge on the interest of the successor and of all persons claiming in his right in all the real property in respect whereof such duty shall be assessed, and such duty shall also be a first charge on the interest of the successor, or of any trustees for him." If this section stood alone with the 10th section, which imposes the duty, there could be no question that the defendant is liable; but the words of the proviso of section 21. are relied upon by him. That section, after enacting that the interest of every successor, except as therein provided, in real property shall be considered to be of the value of an annuity for his life equal to the annual value of such property, and providing for the payment of the duty by eight half-yearly instalments, contains this proviso: "Provided, that if the successor shall die before all such instalments shall

(1) June 6, 1864, before Pollock, C.B., Martin, B., Bramwell, B. and Channell, B.

have become due, then any instalments not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest in exoneration of his other property, and shall be payable by the owner for the time being of such interest." The principle to be collected from these provisions is, that the duty is to be charged upon the whole interest of the successor, and upon the whole interest of the property originally charged of every one claiming under him or in his right; but the duty is not made a charge on other people who do not claim through or under him, and for that reason if he shall have died before the instalments have become payable, and has left no continuing interest which anybody can take from him, or under him, or through him, the instalments cease to be payable; but they do not cease to be payable "in the case of a successor who shall have been competent to dispose by will"—of course that means at the time of his death—"of a continuing interest." What is the meaning of "continuing interest"? The interest that will be derived from him after his death. In the case of the tenant for life there is no continuing interest, for upon his death there is an end of it, and the next tenant in tail does not take through him; and therefore the next successor, taking by an independent title, is not operated with the unpaid duty; but there can be no reason why the clause of remission should apply to the case of a man who dies the owner in fee simple where the interest passing at his death is a continuing interest, liable to be charged with all his other debts, contracts, and engagements. Why not, therefore, with this? If a tenant in tail mortgages, and then acquires the fee, the mortgage binds. But if the succession has passed away to some one entitled by a paramount title before the instalments are paid, then the legislature puts the tenant in tail on the same footing with a tenant for life. *The Attorney General v. Hallett* (2) decides that the words "competent to dispose by will"

(2) 2 Harl. & N. 368; s. c. 27 Law J. Rep. (N.S.) Exch. 89.

refer to competency in respect of estate, and not to personal competency.

Mellish and *J. Brown*, for the defendant.—The only question is, whether the words "who shall have been competent to dispose by will" mean "competent to dispose by will at the time of his own death," or "competent to dispose by will of the succession at the time he came into succession;" because it is admitted, that if he had never barred the entail, the instalments would have ceased. If the words mean "competent to dispose by will at the time of his own death," it follows that if a man, tenant for life, or even for years, acquired the reversion, either by purchase or some subsequent gift from a third person, the instalments would not cease; and, on the other hand, if a man acquires by succession a fee simple, and afterwards re-settles the estate so as to become tenant for life only, and at his death to have no continuing interest, it would follow, from this construction, that the arrears of duty, payable when he acquired the succession, would cease on his death,—absurdities that could not have been contemplated. The only way of avoiding such difficulties is by reading the words as "competent to dispose by will of the succession at the time he came into succession;" and according to ordinary principles of imposing a tax, the state of things at the time of coming into succession must be looked at for the purpose of determining what duty is payable. The words "continuing interest in such property" in the proviso, must be read in connexion with "the interest of every successor," in the commencement of section 21, where they necessarily mean the interest derived by succession.

The Attorney General replied.

Cur. adv. vult.

MARTIN, B. now delivered the judgment of himself and of CHANNELL, B.—In September 1860, the late Lord Lilford became entitled, as tenant in tail in possession, to certain real property, and became chargeable to succession duty. In November of the same year he executed a disentailing deed, and limited the property to himself in fee. He died in March 1861, having, by his will, devised the property to the defendant for life, who is now in possession

of it. At the time of his death, none of the eight half-yearly instalments of duty, payable in respect of his succession duty, had become payable; the defendant has refused to pay them, and this information has been brought to compel payment; the Attorney General insisting that they were a continuing charge on the testator's interest at the time of his death, and are payable by the defendant as owner for the time being of such interest. We think the Attorney General is entitled to judgment. The question depends on the true construction of the 21st section of the Succession Duty Act, 16 & 17 Vict. c. 51. By the 42nd section the duty is declared to be a first charge on the interest of the successor, and of all persons claiming in his right; and by the 21st section the interest of the successor in real property shall be considered to be of the value of an annuity equal to the annual value of such property, to be valued according to the tables in the Schedule, and the duty chargeable thereon (that is, on the interest of the successor) shall be paid by eight half-yearly instalments. But there is a proviso, that if the successor shall die before the instalments shall become due, the instalments not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property. The word "property" in the section means the thing, that is, the land or hereditaments in respect of which the duty is charged. This is clear, as well from the 21st section itself, as from the interpretation clause; and not only was the late Lord Lilford competent to dispose by will of the continuing interest in the property, but he actually did so, and the defendant was the object of his bounty; so that the instalments unpaid at his death were, and are, a continuing charge upon his interest, and are payable by the defendant, who, for the time being, is the owner of such interest. It was argued, that the defendant was by such construction compelled to pay two succession duties, one his own, the other the testator's. This is a fallacy. He is liable, of course, to pay his own succession duty, properly so called; but what he is now required to pay is a charge or debt of the testator, who was the owner in fee simple of the land devised to him; and

we think that, not merely does the 21st section of the statute impose the liability, but that reason and good sense and the spirit of the act concur. The testator was liable to the duty. Had he been merely tenant for life, and died within the four years, the instalments unpaid would have ceased to be payable; but he was owner in fee, and why should not his fee simple interest be liable to his debts? Cases were put of a tenant for life and a tenant for years, purchasing the reversion in fee. We do not think there would be any very great difficulty in arriving at a correct conclusion in such cases, but for the present it is sufficient to say, that the case is a devise by will, by an owner of a fee simple acquired by his own acts.

BRAMWELL, B.—In this case it is clear that but for the latter part of section 21. the duty claimed would be due,—due from the deceased Lord Lilford,—and payable, at least, out of his assets. The question then is, if that part of the section causes it not to be due, or if due not a charge on the present defendant, or the estate he has taken. Now it is not easy to understand the reason of the enactment in question. The statute has imposed a duty on successions, or on real property, on successions to it. It has therefore very fairly and reasonably taken each successor's interest to be taxed as not greater than a life interest; because on his death there is another taxable succession. If land is devised to A. for life, on his death it is subject to a fresh succession duty; so it is if it is devised to him in fee. Then, to estimate what shall be paid, the value of his interest is taken to be the value of an annuity equal to the annual value of the property for his life. It is then assessed, and found for better or worse; but, for his convenience, it is made payable by instalments. This being the principle on which the legislature has proceeded, it is difficult to see why the successor to a life estate is relieved from unpaid instalments if he dies before they are due; but not so the successor to a fee. Nor is it easy to see why, if the successor lives four years and a half, he pays all the instalments without return, and no more if he lives fifty years, but has an abatement if he lives under four years and a half. Further, the language of the exception to the proviso is remarkable. It means, I sup-

pose, to say, first, that the instalments shall be payable; secondly, that they shall be a continuing charge on the successor's interest; thirdly, that his other property is to be exonerated; fourthly, that the owner of the land shall pay the duty. The first is enacted by implication only. Whether the last provision exonerates the first successor's executors may be a question, or if it makes the next successor liable beyond his interest; so what would be comprehended by the words "continuing interest" may be doubtful. However, there is the enactment, and it seems to me clear, that whatever the proviso may free, the exception to the proviso makes the owner of the property in respect of which the succession duty was due liable for it, at least to the extent of his interest, when the first successor "shall have been competent to dispose by will of a continuing interest in such property." The question then is, was the defendant's father so competent? I agree with the Attorney General that this particular case must be decided, and that difficult cases may be suggested, which must be met as they arise. Now, I think Lord Lilford was so competent; in fact, he did it; he did dispose by will of the "continuing interest." No doubt a preliminary step, the disentailing deed, was necessary; but that step was also in his competency, depending solely on his pleasure, whether or not it should be taken. In *Saltoun v. the Lord Advocate* (3), Lord Campbell, L.C., said, and justly, that this statute being applicable to the whole kingdom, the technicalities of the law of England and Scotland when they differ must be disregarded, and the language of the legislature must be taken in a popular sense: and can it be doubted that in popular language Lord Lilford was competent to dispose by will of a continuing interest in this property? Again, in *Lord Braybrooke's case* (4), the House of Lords held that an estate tail, though technically ended upon the re-settlement of the estates, in reality, for the purposes of the succession duty, continues. See per Lord Kingsdown, and *The Attorney General v. Floyer* (5). For these reasons,

and on these authorities, I think the Crown is entitled to judgment.

POLLOCK, C.B.—I regret that I am unable to come to the same conclusion as my learned Brethren, and the rather because the claim of the Crown seems to me very reasonable, inasmuch as the difference between an estate tail and an estate in fee seems to be (for the purpose of this question) scarcely more than technical; and not only is the claim of the Crown reasonable, but the language of the 21st section (on the true construction of which our judgment, I think, ought to depend) certainly without doing any violence to it, may be fairly read so as to support the claim. But in construing the 21st section of the act, we are bound to look, not merely at the case before us, but at other cases which may arise, and, assuming the construction to be doubtful, to put such a construction as will be uniform and consistent, with reference to all the cases that may come before us for decision.

The claim of the Crown is in amount and in time of payment precisely the same for a succession to an estate in fee simple as to an estate tail or an estate for life; and provided they all exist according to the expectation of life,—that is, unless the tenant in tail or tenant for life prematurely dies,—they all pay exactly the same succession duty, the only difference between them being, that in the event of the death of the tenant in fee before all the instalments are paid, (the claim upon whom seems to have been considered as a debt due to the Crown, whether he lived or died), the unpaid instalments continue to be a charge upon the estate,—not on his property generally, but on his interest in the estate which gave rise to the claim for succession duty. The difference between a tenant in tail and a tenant in fee is not, however, purely technical; the tenant in tail may, by executing a disentailing deed, acquire the fee absolutely, but then he must be of full age, or he cannot execute such a deed at all, and he must be in possession long enough for the preparation and execution of the deed. Supposing him to have executed such a deed, and to have thereby acquired the fee, and become competent to dispose by will of a continuing interest in the property,

(3) 3 Macqueen, 671.

(4) 9 H.L. Cas. 150; s. c. 31 Law J. Rep. (N.S.) Exch. 177.

(5) Id. 477; s. c. 31 Law J. Rep. (N.S.) Exch. 404.

is he, within the expression of the 21st section, a successor "who shall have been competent, &c.," because he has undoubtedly *become* so? Now, if in the case of a tenant in tail acquiring the fee by executing a disentailing deed, we read the words of the 21st section as if they had been "shall have been competent, or shall *become* competent"; in other words, if we construe the 21st section so as to include the successor, who after the succession becomes competent to dispose by will of a continuing interest, we must construe it in the same way in all cases, and we must construe it in the same way if the successor were merely tenant for life, the remainder going to some other person, and the tenant for life acquiring the remainder by purchase or under the will of the person entitled to it. Referring to these and similar cases which might be put, I think the reasonable and true construction of the whole act, and especially of this clause in it, is that with respect to a particular succession, the liability of the successor and the claim of the Crown are fixed and settled by the state of things existing at the time the succession takes place, and cannot be altered by the subsequent acts of the successor himself, or of any other person. I do not know what would have been the opinion of my learned Brethren in the case of a tenant for life acquiring the fee by purchasing the remainder, or by its being devised to him, or by its descending to him in consequence of the death of the intermediate heirs—in the latter case there would be some apparent ground for contending that the charge should be continuing, otherwise he would succeed to a remainder, for which he would pay no succession duty. But the ex-

planation of this is, that by the 21st section the interest is to be valued according to certain tables and by certain rules, which make the value of a remainder, after the man's own life, worth nothing at all. Now, I think it is clear that the words of the 21st section, namely, "a successor who shall have been competent to dispose by will of a continuing interest," may mean, as no time is mentioned, either at the time he became successor, or at any subsequent time. The latter mode of construing the words gives to them the same effect as if the language had been, "who shall have been competent, or who shall have (subsequently to the succession) *become* competent"; and if these words had been used, there could have been no doubt our judgment must have been for the Crown. The former mode gives to the language the same effect as if it had been "except in the case of a successor who shall have been (at the time of his becoming a successor) competent, &c.," and had these words been used, there would have been no doubt the other way, and our judgment must have been for the defendant. If the inquiry had been, which of those interpolations is the least violent, I should decide in favour of the latter. But I think a successor is spoken of with reference to the precise time when he became successor, and not to the subsequent period after he has actually succeeded, and in one sense may be said to have ceased to be a successor; and I think a uniform, consistent and just construction of the words of the 21st section would lead to a judgment for the defendant; but as the majority of the Court is of a different opinion, the judgment must be for the Crown.

Judgment for the Crown.

END OF MICHAELMAS TERM, 1864.

CASES ARGUED AND DETERMINED
IN THE
Court of Exchequer
AND IN THE
Exchequer Chamber and House of Lords
ON ERROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER.

HILARY TERM, 28 VICTORIÆ.

1865. }
Jan. 12. } CAMPBELL v. LOADER.

Trespass for Mesne Profits—Judgment of County Court—19 & 20 Vict. c. 108. ss. 50, 51.—Evidence—Practice.

A county court order for giving up possession of premises, made against a person holding under the tenant, under 19 & 20 Vict. c. 108. s. 50, is not conclusive evidence of title in a subsequent action against him for mesne profits.

The Court refused to go into the question of improper rejection of a document, on the ground that it did not appear by the Judge's notes that the document had been formally tendered in evidence at the trial.

Declaration in the usual form of trespass for mesne profits.

Plea, not guilty, and issue thereon.

The action was tried, at the Middlesex Sittings during Michaelmas Term, 1864, before Martin, B., when the following facts appeared in evidence: Harriet Ellis underlet to the defendant part of certain premises which she held as tenant to the plaintiff. On the 25th of May 1864, the plaintiff took proceedings in the Westminster County Court against Ellis, the defendant, and another sub-tenant, to recover possession, having, on the 26th of April, given them a week's notice to quit, which expired on the 4th of May. On the 20th of June an order was made by consent in the county court requiring the defendant to give up possession

on the 27th of June, with which order the defendant complied; the plaintiff, however, who had received no rent since Christmas 1863, now sought to recover mesne profits from the 4th of May to the 27th of June.

To shew that Ellis was a quarterly tenant, and that therefore the plaintiff was not entitled to possession, the defendant relied on (amongst other evidence) certain receipts, shewing that Ellis's rent was paid quarterly. These, which were put in during the plaintiff's case, were admitted in evidence by the Judge; but he refused to admit an unstamped document produced by the plaintiff for the purpose of shewing the terms of the tenancy; it did not appear on the Judge's notes however that the plaintiff's counsel had made any formal tender of the document.

The jury being asked to determine what was the nature of the tenancy, and whether the defendant had committed a trespass, found a verdict for the defendant.

Morgan Lloyd obtained a rule for a new trial, on the grounds of misdirection, in leaving the question of tenancy to the jury, and directing them that the judgment of the county court was not conclusive as to title, and in not directing the jury as to what was in issue under "not guilty," improper rejection of the unstamped document, and improper admission of the receipts.

Pearce shewed cause. — The only important point is, whether there was mis-

direction in leaving the question of tenancy to the jury, and in not directing them as to the issue under "not guilty." The plaintiff had the option of issuing a writ against either Ellis or the defendant.

[CHANNELL, B.—Section 50. of 19 & 20 Vict. c. 108. enables a landlord to go against either the tenant or the sub-tenant to recover possession; section 51. enables him to add a claim for mesne profits only in the case of the tenant.]

The documentary evidence produced by the defendant shewed a recognition by the plaintiff of a yearly or quarterly tenancy.

[MARTIN, B.—The defendant's strong point is, that the county court Judge directed something to be done with which the defendant complied.]

The defendant has a clear answer either way: first, as to the trespass, notice to quit on the 26th of April, followed by the summons in the county court, with whose order the defendant has strictly complied; secondly, as to the mesne profits, they cannot be claimed from a sub-tenant—19 & 20 Vict. c. 108. s. 51.

Morgan Lloyd, contra.—As to the first ground of the rule, that the plea of not guilty does not leave open the question of title for the jury. In an ordinary action of trespass, the plaintiff has to shew possession; but in the action for mesne profits, where the right to possession has been determined in another action, the judgment in that action is conclusive, and relates back to the day named or found by the jury; therefore, possession need not be proved in an action for mesne profits. Under "not guilty," the simple question is, was there an entry by the defendant?

[CHANNELL, B.—Proceedings under the County Court Act are not analogous to an action of ejectment.]

The record is simply an allegation on the part of the plaintiff, "You entered"; and on the part of the defendant, "I did not." The question of title is not open to the defendant on the record. But even assuming the proper plea of "not possessed" to have been on the record, the judgment of the county court was conclusive. The Judge has power to try questions of ejectment, where the relation of landlord and tenant exists, against either tenant or sub-tenant.

[CHANNELL, B.—Where the tenancy has expired or has been determined.]

He is to decide whether the tenancy has been determined or not, and the effect of his judgment here is, that at the date of the summons the defendant was not entitled to possession. The order of possession is proof of judgment, and the judgment is conclusive between the parties—*Vooght v. Winch* (1), *Aslin v. Parkin* (2) and *Doe v. Wright* (3). The document tendered by the plaintiff at the trial contained no words of demise, and was not signed by the plaintiff. *Clayton v. Burtenshaw* (4) shews that it did not require a stamp.

CHANNELL, B.—There were three points upon which we were pressed to make the rule absolute for a new trial: one is, that there was an improper rejection of evidence, inasmuch as an agreement purporting to be signed by Ellis ought to have been received in evidence. I decline to go into the argument addressed to us on this question, as I do not see upon the Judge's notes that any complaint was made of the rejection so as to entitle the plaintiff to move for a new trial. There may have been a discussion upon the point, but it was the duty of counsel, after the expression of the Judge's opinion, formally to tender the document and require a note to be taken of the tender; but as that was not done, the point does not avail.

Upon the second ground upon which we were asked for a new trial, viz., that certain receipts were given in evidence, it appears that the receipts were put in as the defendant's evidence in the course of the plaintiff's case, and therefore I take them as the defendant's evidence, received by consent and not objected to.

The third ground may admit of some little doubt, but after listening carefully to the arguments, I do not feel any. It is said that the judgment of the county court was conclusive, and there is mixed up with that this other argument, that the pleadings on the record did not put in issue any thing more than the fact of trespass, for that "not guilty" being the only plea, the plain-

(1) 2 B. & Ald. 662.

(2) 2 Burr. 665.

(3) 10 Ad. & E. 763.

(4) 5 B. & C. 41, per Bayley, J. at p. 45.

tiff's title was admitted; but it is still clear that in order to recover in this action of trespass the plaintiff was bound to prove the trespass. The plaintiff's counsel has endeavoured to shew that the proceedings in the county court are in all respects analogous to the action of ejectment. But I am inclined to think that the county court Judge is placed rather in a situation analogous to that of a magistrate under the old law, who might order possession of premises to be given in certain cases. If the county court order had not been put in, there would have been no case on the part of the plaintiff. If any efficacy is to be attributed to the order, it is by reference to the authority of the statute under which the order was made. It seems strange in point of common sense to hold that when a man has been taken before a county court Judge, and an order has been made which in letter and spirit he has obeyed, giving up possession when he had no longer any authority to retain it, he is then to be treated as a trespasser.

Our attention has been called to the difference between the 50th and 51st sections of the 19 & 20 Vict. c. 128, and to a class of cases where the plaintiff requiring possession is at liberty to proceed in the county court against the person in possession of the premises. By the 51st section, when he proceeds against his own immediate tenant, he is at liberty to add a demand either for rent or mesne profits. I think both processes were probably introduced with a view to remove any subtle distinction before the county court Judge; but the plaintiff has no right to insert any claim either for rent or mesne profits when he is proceeding against, not his own tenant, but the person in possession; and as the language of the 51st section is clearly distinguished from that of the 50th, I think it would be going a great way to hold that, when the defendant is liable to go out on a county court Judge's order, this order can be given in evidence against him in an action of trespass for mesne profits, to which there may have been no right in the county court at all. On these three grounds, I think the rule should be discharged.

PIGOTT, B. concurred.

MARTIN, B.—It is plain to my mind that this action has been misconceived. It was supposed that in an action for mesne profits

you can elect whom to sue; it is not so. When a man has been in possession under a tenant, and then steps are taken in the county court, and the Judge directs possession on a certain day, the tenant in possession is then a trespasser in continuing after the day named in the county court order. The defendant had paid the rent to his landlady up to the time he remained in possession, and that he should pay damages with respect to this continuing in possession is wholly contrary to my views of right and justice. I think the rule should be discharged.

Rule discharged.

1865. }
Jan. 18, 25. }

MOUNSKY v. ISMAY.

Custom — Easement — Prescription Act (2 & 3 Will. 4. c. 71.) s. 2.

A claim, by custom, for all the freemen and citizens of a neighbouring city to run horse-races over certain land on Ascension Day in every year, is not a claim to an easement within the meaning of the 2nd section of the Prescription Act.

Trespass for breaking and entering a certain close of the plaintiff abutting &c., and breaking down and prostrating and destroying the fences of the plaintiff and belonging to the said close, and divers posts and rails then standing and being in and upon the said close and affixed thereto, and also prostrating, levelling and destroying a bank then erected and being upon and being parcel of the said close, and pulling up and destroying the thorns there growing.

Fifth plea—That for the full period of twenty years next before this suit, on a certain day in each and every year (to wit), on Ascension Day, commonly called Holy Thursday, horse-races have been and of right ought to have been and still ought to be holden on a certain piece of land in the extra-parochial hamlet of Kingmoor in the said city (being in the neighbourhood of the city of Carlisle); and for the full period of twenty years next before this suit the freemen of the said city of Carlisle on the day aforesaid in each and every year, have during all the time aforesaid of

right and without interruption enjoyed and claimed to enjoy as a custom a certain reasonable and laudable right and privilege, that is to say, the freemen of the said city of Carlisle on the day aforesaid in each and every year should enter into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon, and the said freemen of the said city of Carlisle on the day aforesaid in each and every year without interruption have during all the time aforesaid been used and accustomed to enter, and of right have entered and ought to have entered, and still of right ought to enter, into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon; and the defendant says that the close &c. at the time when &c. was parcel of the said piece of land in the said hamlet, wherefore the defendant, being one of the freemen of the said city of Carlisle, committed the acts of trespass in the declaration mentioned.

The sixth plea contained all the allegations in the fifth plea, substituting a period of forty years for that of twenty years.

The seventh plea repeated all the allegations in the fifth plea contained, except so much of the plea as alleged that "the freemen of Carlisle" enjoyed and exercised the right and privilege as a custom, and alleged that all "the citizens of Carlisle," instead of "the freemen of Carlisle," enjoyed and exercised the said right and privilege as a custom, and that the defendant, being one of the citizens, committed the acts in the declaration.

The eighth plea repeated all the allegations in the seventh plea contained, and all the allegations in the fifth plea which were incorporated therein, substituting a period of forty years for that of twenty years.

Ninth plea—That for the full period of twenty years next before this suit, on a certain day in each and every year (to wit), on Ascension Day, commonly called Holy Thursday, horse-races have been and of right ought to have been, and still of right ought to be holden on a certain piece of land in the extra-parochial hamlet of Kingmoor in the said city, being in the neighbourhood of the city of Carlisle, and for the full period of twenty years next before this suit the freemen of the said city of

Carlisle on the day aforesaid in each and every year have, during all the time aforesaid of right and without interruption enjoyed and claimed to enjoy as a custom a certain reasonable and laudable right and privilege, that is to say, that the freemen of the said city of Carlisle, on the day aforesaid in each and every year, should enter without any interruption into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon, and should enter into and upon the said piece of land in the said hamlet at a reasonable time before the holding of such horse-races in each and every year for the purpose of preparing and making ready the said piece of land for the more conveniently holding the said horse-races on such day as aforesaid, and the said freemen of the said city of Carlisle on the day aforesaid in each and every year have during all the time aforesaid without interruption been used and accustomed to enter and of right have entered, and ought to have entered and still of right ought to enter, into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon, and have been used and accustomed to enter and of right have entered, and ought to have entered, and still of right ought to enter into and upon the said piece of land in the said hamlet at a reasonable time before the holding of such horse-races in each and every year during the time aforesaid for the purpose of preparing and making ready the said piece of land for the more conveniently holding the said horse-races on such day as aforesaid. And the defendant says, that the said close in which &c. at the said time when &c. was parcel of the said piece of land in the said hamlet; wherefore the defendant, being one of the freemen of the said city of Carlisle, committed the acts of trespass in the declaration mentioned.

The tenth plea contained all the allegations in the ninth plea, substituting a period of forty years for that of twenty years.

The eleventh plea repeated all the allegations in the ninth plea contained, except so much of the plea as alleged that the freemen of Carlisle enjoyed and exercised the said right and privilege as a custom, and alleged that all "the citizens of Car-

tiff's title was admitted; but it is still clear that in order to recover in this action of trespass the plaintiff was bound to prove the trespass. The plaintiff's counsel has endeavoured to shew that the proceedings in the county court are in all respects analogous to the action of ejectment. But I am inclined to think that the county court Judge is placed rather in a situation analogous to that of a magistrate under the old law, who might order possession of premises to be given in certain cases. If the county court order had not been put in, there would have been no case on the part of the plaintiff. If any efficacy is to be attributed to the order, it is by reference to the authority of the statute under which the order was made. It seems strange in point of common sense to hold that when a man has been taken before a county court Judge, and an order has been made which in letter and spirit he has obeyed, giving up possession when he had no longer any authority to retain it, he is then to be treated as a trespasser.

Our attention has been called to the difference between the 50th and 51st sections of the 19 & 20 Vict. c. 128, and to a class of cases where the plaintiff requiring possession is at liberty to proceed in the county court against the person in possession of the premises. By the 51st section, when he proceeds against his own immediate tenant, he is at liberty to add a demand either for rent or mesne profits. I think both processes were probably introduced with a view to remove any subtle distinction before the county court Judge; but the plaintiff has no right to insert any claim either for rent or mesne profits when he is proceeding against, not his own tenant, but the person in possession; and as the language of the 51st section is clearly distinguished from that of the 50th, I think it would be going a great way to hold that, when the defendant is liable to go out on a county court Judge's order, this order can be given in evidence against him in an action of trespass for mesne profits, to which there may have been no right in the county court at all. On these three grounds, I think the rule should be discharged.

PIGOTT, B. concurred.

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Fifth plea—That for the full period of twenty years next before this suit, on a certain day in each and every year (to wit), on Ascension Day, commonly called Holy Thursday, horse-races have been and of right ought to have been and still ought to be holden on a certain piece of land in the extra-parochial hamlet of Kingmoor in the said city (being in the neighbourhood of the city of Carlisle); and for the full period of twenty years next before this suit the freemen of the said city of Carlisle on the day aforesaid in each and every year, have during all the time aforesaid of

right and without interruption enjoyed and claimed to enjoy as a custom a certain reasonable and laudable right and privilege, that is to say, the freemen of the said city of Carlisle on the day aforesaid in each and every year should enter into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon, and the said freemen of the said city of Carlisle on the day aforesaid in each and every year without interruption have during all the time aforesaid been used and accustomed to enter, and of right have entered and ought to have entered, and still of right ought to enter, into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon; and the defendant says that the close &c. at the time when &c. was parcel of the said piece of land in the said hamlet, wherefore the defendant, being one of the freemen of the said city of Carlisle, committed the acts of trespass in the declaration mentioned.

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The eighth plea repeated all the allegations in the seventh plea contained, and all the allegations in the fifth plea which were incorporated therein, substituting a period of forty years for that of twenty years.

Ninth plea—That for the full period of twenty years next before this suit, on a certain day in each and every year (to wit), on Ascension Day, commonly called Holy Thursday, horse-races have been and of right ought to have been, and still of right ought to be holden on a certain piece of land in the extra-parochial hamlet of Kingmoor in the said city, being in the neighbourhood of the city of Carlisle, and for the full period of twenty years next before this suit the freemen of the said city of

Carlisle on the day aforesaid in each and every year have, during all the time aforesaid of right and without interruption enjoyed and claimed to enjoy as a custom a certain reasonable and laudable right and privilege, that is to say, that the freemen of the said city of Carlisle, on the day aforesaid in each and every year, should enter without any interruption into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon, and should enter into and upon the said piece of land in the said hamlet at a reasonable time before the holding of such horse-races in each and every year for the purpose of preparing and making ready the said piece of land for the more conveniently holding the said horse-races on such day as aforesaid, and the said freemen of the said city of Carlisle on the day aforesaid in each and every year have during all the time aforesaid without interruption been used and accustomed to enter and of right have entered, and ought to have entered and still of right ought to enter, into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon, and have been used and accustomed to enter and of right have entered, and ought to have entered, and still of right ought to enter into and upon the said piece of land in the said hamlet at a reasonable time before the holding of such horse-races in each and every year during the time aforesaid for the purpose of preparing and making ready the said piece of land for the more conveniently holding the said horse-races on such day as aforesaid. And the defendant says, that the said close in which &c. at the said time when &c. was parcel of the said piece of land in the said hamlet; wherefore the defendant, being one of the freemen of the said city of Carlisle, committed the acts of trespass in the declaration mentioned.

The tenth plea contained all the allegations in the ninth plea, substituting a period of forty years for that of twenty years.

The eleventh plea repeated all the allegations in the ninth plea contained, except so much of the plea as alleged that the freemen of Carlisle enjoyed and exercised the said right and privilege as a custom, and alleged that all "the citizens of Car-

lialle," instead of the freemen of Carlisle, enjoyed and exercised the said right and privilege as a custom, and that the defendant, being one of the citizens, committed the acts in the declaration.

The twelfth plea repeated all the allegations in the eleventh plea contained, and all the allegations in the ninth plea, which are incorporated therein, substituting a period of forty years for that of twenty years.

Demurrers to all the pleas, and joinder in the demurrers.

By way of further replication to all the above pleas, the plaintiff replied that there was not before or at the commencement of the said period of years before this suit in each of these several pleas respectively mentioned, and during which the said right is alleged to have been enjoyed as therein mentioned, any valid or legal custom such as is therein mentioned.

Demurrer to the replication, and joinder in demurrer.

C. Hutton (Jan. 18), in support of the plaintiff's demurrers.—It has been decided that this is a good custom at common law—see *Mounsey v. Ismay* (1). The question here is, is it valid under the Prescription Act? The words in the 1st and 2nd sections are, "no claim which may be lawfully made at the common law, by custom, prescription, or grant." The defendant cannot claim this right by prescription, because the freemen of a ville are a fluctuating body, and a grant to them as such would be void. They can then only claim it by custom. What is its meaning in this act? It is clear that in the 1st section, the word "custom" is applied only to the case of copyholders claiming a profit à prendre against their lord—*Constable v. Nicholson* (2). The same meaning must be given to the word "custom" in the 2nd section that it bears in the first; if it had any other meaning in the 1st section, it would be subversive of the rule of common law, which allows a profit à prendre to be claimed only by prescription, and not by custom. Copyholders do not claim against their lord by prescription, as they are only tenants at will; therefore, where a right to take a profit à prendre exists within a manor, it

can only be claimed by custom. There is a distinction between a custom and a prescription—*Co. Lit.* 113 b., *Gateward's case* (3) and *Blewett v. Tregonning* (4). The 2nd section only applies to easements that are claimed by a *que* estate—*Bailey v. Stevens* (5). Willes, J., in that case, says, "There is no doubt that easements in gross could not be claimed by an occupier, as such, under the Prescription Act; and there is also no doubt that no right of that kind could be acquired by him under that act, by a user of twenty, thirty, or sixty years, either as an easement, or as a profit à prendre, except it is capable of being annexed to land within the rule I have already mentioned." The 5th section refers to the mode of pleading, as well by the plaintiff as by the defendant. With regard to the former, the difficulty does not occur, but with regard to defendants, if the 5th section applies to prescription, to a right in gross, why is the section limited to "the enjoyment" by the occupiers of the tenement, in respect whereof the right is claimed?

[CHANNELL, B.—The legislature, in passing the statute has two objects in view: first, to shorten the time of prescription in certain cases, not in all cases; secondly, to abolish the prescription in the *que* estate.]

Next, this is not an easement, but a mere licence.

Crompton, in support of the pleas.—[He was requested by the Court to confine his argument to whether the alleged right was an easement.] In *Gale on Easements*, p. 5, an easement is defined to be a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer, or not to do something on his own land, for the advantage of the dominant owner. But the late editor, at p. 10, note (d), and p. 12, note (d), contends an easement in gross may exist. It is quite clear that a plea of prescription at common law for a profit à prendre is valid—*Welcome v. Upton* (6); and if such a claim be good,

(3) 6 Rep. 59 b.

(4) 3 Ad. & E. 554; s. c. 3 Law J. Rep. (s.s.) K.B. 223.

(5) 31 Law J. Rep. (n.s.) C.P. 226; s. c. 12 Com. B. Rep. N.S. 91.

(6) 6 Moo. & W. 536; s. c. 9 Law J. Rep. (n.s.) Exch. 154.

(1) 32 Law J. Rep. (n.s.) Exch. 94; s. c. 1 H. & C. 729.

(2) 32 Law J. Rep. (n.s.) C.P. 240; s. c. 14 Com. B. Rep. N.S. 230.

why should not an easement in gross be equally valid? A grant of a right of way to a man and his heirs may exist irrespective of any estate in land.

[MARTIN, B.—Is a right to go for mere pleasure into a field to hold horse-races the subject of a grant? Can a man grant to A. and his heirs the right to walk in his park? Would it pass it to his heirs? Is it not a mere licence? PIGOTT, B. referred to *Dyce v. Lady James Hay* (7).]

C. Hutton was heard in reply.

Cur. adv. vult.

MARTIN, B. (Jan. 25) delivered the judgment of the Court (8).—This is a demurrer to pleas. The declaration is trespass for breaking and entering a close, and breaking down the fences, &c. There are several pleas, which are demurred to: they are all grounded upon the Prescription Act, 2 & 3 Will. 4. c. 71. The first alleged that for the full period of twenty years next before the suit, on a certain day in every year, namely, Ascension Day, or Holy Thursday, horse-races had been of right &c. holden on a certain piece of land, whereof the close in which &c. was parcel, and for the same full period of twenty years the freemen of the city of Carlisle had of right, and without interruption, enjoyed a custom that they should enter upon the said piece of land for the purpose of holding horse-races thereon, and the said freemen had, during all that time used &c. The pleas proceeded to justify the trespass by virtue of the custom, in the usual manner. The next plea was the same, alleging the user of the custom for forty years. The next plea was similar to the first above demurred to, save that the right was alleged to be in the citizens of Carlisle. The next was similar to the last, save that the user was alleged to be for forty years. The four pleas following were substantially the same as the preceding; and one objection only was made to all of them, viz., that the custom alleged was not within the Prescription Act. Some short time ago this custom was the subject-matter of discussion before us. It was then pleaded as a custom at common law, and we were of opinion

that it was a good custom (9). The present pleas have been added since. It is perfectly clear that such a right as is here set up can only exist by custom; a grant of such right to the freemen of Carlisle or the citizens of Carlisle would be void. Such indeterminate bodies as the freemen of a city or the citizens of a city, not being themselves a corporation, are incapable of being grantees; and there is probably another objection to it, as not being a legal subject of grant, but only a licence. The question, therefore, really comes to this: assuming that the owner of this close had forty-one years before the commencement of this suit, by parol, granted to or conferred upon the freemen of Carlisle or the citizens of Carlisle this right, and that they had during the forty years preceding the suit, in fact, exercised it as a right and without interruption, would the operation of the 2nd section of the statute render it absolute and indefeasible, notwithstanding that the origin of it could be clearly and satisfactorily proved, and that it began shortly before the commencement of the period of forty years? The occasion of the enactment of the Prescription Act is well known. It had been long established that the enjoyment of an easement as of right for twenty years was practically conclusive of a right from the reign of Richard the First, or in other words of a right by prescription, except proof was given of an impossibility of the existence of a right from that period; and a very common mode of defeating such a right was proof of a unity of possession since the time of legal memory. To meet this the grant by lost deed was invented, but in progress of time a difficulty arose in requiring a jury to find upon their oaths that a deed had been executed which every one knew never existed; hence the Prescription Act. The 1st section of the act relates to profits *à prendre*, and the respective periods therein mentioned are thirty and sixty years. The present case is not alleged to be within it. The pleas are all grounded on the 2nd, which enacts that no claim which may be lawfully made at common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or to the use of any water to be enjoyed upon any land &c., when such way or other matter shall have been actually

(7) 1 Macqueen's Scotch Appeals, 305.

(8) Pollock, C.B., Martin, B., Channell, B., and Pigott, B.

(9) See 1 H. & C. 729; s. c. 32 Law J. Rep. (n.s.) Exch. 94.

enjoyed by any person claiming right thereto without interruption for twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; and when such way or other matter should have been so enjoyed for the period of forty years, the right thereto should be deemed absolute and indefeasible, unless it shall appear that it was enjoyed by a consent or agreement by deed or writing. The question which has been argued before us, and which is the true one, is whether a custom for the freemen or citizens of Carlisle, upon Ascension Day, to enter upon another man's land for the purpose of holding horse-races there, is an easement within the 2nd section. To be so, it must be within the words custom, prescription, or grant, to a way or other easement, or to a watercourse, or to the use of any water to be enjoyed upon land of another; and we think it is not. In the first place, we do not think that this custom is an easement at all. One of the earliest definitions of an easement with which we are acquainted is in the *Termes de la Ley*, and it is "a privilege that one neighbour hath of another by writing or prescription, without profit; as a way or sink through his land." In this definition custom is not mentioned; prescription is, and it therefore seems to point to a privilege belonging to an individual, not a custom which appertains to many as a class. Again, in Mr. Gale's book, p. 5, an easement is defined; a very great number of authorities are collected, and it is stated in the most explicit terms that to constitute an easement there must be two tenements, a dominant one to which the right belongs, and a servient one upon which the obligation is imposed. We further think that the 2nd section itself points to a right belonging to an individual in respect of his land, not to a class, such as freemen or citizens claiming a right in gross wholly irrespective of land; for to obtain the benefit conferred by the 2nd section, it must be enjoyed by a person claiming right thereto for the full period of twenty years or forty years. We are not aware of any case or expression of opinion by any Judge contrary to this, but the 5th section of the act has been relied on as establishing it. This section relates to pleadings, and enacts that in all pleadings to actions of trespass and other pleadings

wherein before the passing of the act it would have been necessary to allege the right to have existed from time immemorial, it should be sufficient to allege the enjoyment thereof as of right by the occupier of a tenement in respect whereof the same is claimed, &c. It has been said that this shews that an easement within the protection of the statute must be an easement belonging to a dominant tenement; we think it affords an argument in illustration as to what the legislature contemplated; but after what fell from this Court in *Welcome v. Upton*,—5 *Mec. & W.* 398, and the same case 6 *Mec. & W.* 536,—and a note of the late Mr. Henry Willes, in p. 152 of the edition of *Gale on Easements*, edited by him, we are not prepared to say the statute may not extend to easements in gross; although it is to be observed that all which Lord Wensleydale says in the last report of the case (6 *Mec. & W.* pp. 542-3) is, "we might be disposed to think that the present case (an alleged easement in gross) is within the equity of the statute"; and he goes on to add, that the question was then immaterial. But, however this may be, we are of opinion that to bring the right within the term "easement" in the 2nd section, it must be one analogous to that of a right of way which precedes it and a right of watercourse which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement. In our opinion, therefore, the present alleged right is not within the language or meaning of the Prescription Act, and we are satisfied that it was never in the contemplation of Lord Tenterden, who framed it, (see per Lord Wensleydale, 5 *Mec. & W.* 404,) to include within the act such customary rights as entering land to enjoy rural sports, as in *Millechamp v. Johnson* (10), or to dance upon a green, as in *Abbot v. Weekly* (11), by analogy to which we held this alleged customary right to run horse-races a lawful one at common law (1); what we think he contemplated were incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment, and not customs for mere pleasure. In our opinion, therefore, the pleas demurred to are bad, and our judgment is for the plaintiff.

Judgment for the plaintiff.

(10) Willes, 205, n.

(11) 1 Levinz, 176.

1865. }
Jan. 13. } BAKER v. LANE.

Interrogatories — Libel — Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 51.

Interrogatories will not be allowed in an action of libel if they tend to charge the defendant with an indictable offence.

This was a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to deliver to the defendant interrogatories in writing, pursuant to the Common Law Procedure Act, 1854, and why the defendant should not within ten days answer the same in writing by affidavit to be filed at the Rule Office of this court.

The declaration stated that the plaintiff was the editor and proprietor of a newspaper, called the *Stockton Herald, South Durham and Cleveland Advertiser*, and the defendant falsely and maliciously printed and published of the plaintiff, in the form of a letter in a newspaper called the *Universe*, as well in relation to his conduct as such editor as of him in other respects, the words following; setting out the libel.

Plea, not guilty, on which issue was joined.

The following were the interrogatories sought to be delivered :

1. Did you, on the 14th of November 1863, or at any other and what time, carry on, by yourself or your agents, any and what trade or business, at 43, Lamb's Conduit Street, London ?

2. Have you ever, in any capacity, whether as editor, proprietor, publisher or printer, or how otherwise, been concerned in the publication of a newspaper or newspapers, and if yea, state the name or title of such newspaper or newspapers, and the period during which you were so concerned with the same ?

3. Have you ever in any way been engaged in, or connected with, the ownership, editing, writing, printing, publishing or sale of a newspaper called the *Universe* ; or, *Catholic Standard*, and if yea, in what capacity or capacities ; and state during what period of time you

were so engaged in, or connected with, the same ?

4. Were you the proprietor, printer or publisher of the said newspaper on Saturday the 14th of November 1863, and did you print or publish it on that day ?

5. Have you ever received monies or made any payments arising from or on account of, or in any way connected with the said newspaper ; and if yea, state the period during which, and in what capacity, you received or made the same ?

6. Did you ever authorize the affixing of the printed name "D. Lane" or "Denis Lane" to the published copies of the said newspaper ? If not, did you know of its being so affixed, and what steps, if any, did you take with respect thereto ?

7. Did you write, or were you in any way connected with the composition, printing or publication of a letter containing the libel complained of in the declaration in the said cause, and signed "A Stocktonian," which appeared in the number of the said newspaper published on the 14th of November 1863 ?

8. Do you know, and if yea, state who was the proprietor, or who were the proprietors, and who were the publisher or publishers of the said newspaper called the *Universe*, on the 13th, 14th and 15th days of November 1863 respectively ?

The application was accompanied by an affidavit of the attorney of the plaintiff, which stated that he had searched at the proper office in Somerset House where newspapers are filed, and although there were several numbers of the said newspaper filed there, bearing dates prior and subsequent to the said 14th of November 1863, and all signed "D. Lane," yet he had been unable to find any copy of the said newspaper, dated the said 14th of November 1863 ; and he was informed by a clerk in the said office having the care and custody of newspapers filed there, that notwithstanding he has made numerous applications to the said defendant, at the publishing office of the said newspaper in the Strand, for such copy, and that promises had been from time to time made to the clerk that a copy of the newspaper, dated the 14th of November 1863, should be filed, no such copy had ever yet been filed at Somerset House ; that he had also

searched at Somerset House, at the Registry of Declarations (1) of Ownership of News-

(1) The 6 & 7 Will. 4. c. 76. s. 6. enacts,—That no person shall print or publish any newspaper before there shall be delivered to the Commissioners of Stamps and Taxes, or to the proper authorized officer at the head office for stamps in Westminster, &c., or to the distributor of stamps or other proper officer appointed by the said Commissioners for the purpose in or for the district within which such newspaper shall be intended to be printed and published, a declaration in writing containing the several matters and things hereinafter for that purpose specified; that is to say, every such declaration shall set forth the correct title of the newspaper to which the same shall relate, and the true description of the house or building wherein such newspaper is intended to be printed, and also of the house or building wherein such newspaper is intended to be published, by or for or on behalf of the proprietor thereof, and shall also set forth the true name, addition and place of abode of every person who is intended to be the printer or to conduct the actual printing of such newspaper, and of every person who is intended to be the publisher thereof, and of every person who shall be a proprietor of such newspaper who shall be resident out of the United Kingdom, and also of every person resident in the United Kingdom who shall be a proprietor of the same. . . . And if any such person shall knowingly and wilfully sign and make any such declaration in which shall be inserted or set forth the name, addition, or place of abode of any person as a proprietor, publisher, printer, or conductor of the actual printing of any newspaper to which such declaration shall relate, who shall not be a proprietor, printer, or publisher thereof, or from which shall be omitted the name, addition, or place of abode of any proprietor, publisher, printer, or conductor of the actual printing of such newspaper, contrary to the true meaning of this act, or in which any matter or thing by this act required to be set forth shall be set forth otherwise than according to the truth, or from which any matter or thing required by this act to be truly set forth shall be entirely omitted, every such offender being convicted thereof shall be deemed guilty of a misdemeanor.

Section 7. That if any person shall knowingly and wilfully print or publish, or shall cause to be printed or published, or either as a proprietor or otherwise sell or deliver out any newspaper relating to which such declaration as aforesaid, containing such matters and things as are required by this act to be therein contained, shall not have been duly signed and made and delivered when and so often as by this act is required, or any other matter or thing required by this act to be done or performed shall not have been accordingly done and performed, every person in such case offending shall forfeit for every such act done the sum of 50*l.* for every day on which any such newspaper shall be printed or published, sold or delivered out, before or until such declaration shall be signed and made and delivered, or before or until such other matter or thing shall be done or performed as by this act is directed.

papers, and found that no declaration of ownership of the said *Universe* newspaper had been registered there.

Bullen shewed cause (Nov. 8, 1864).—The ground on which the defendant asks to have this rule discharged is, that the answers to the questions would tend to criminate him, because he might be subjected to an indictment for libel, and he might also be subjected to an indictment for a misdemeanor under the 6 & 7 Will. 4. c. 76. ss. 6, 7. No doubt, the case of *Bartlett v. Lewis* (2) will be relied on for the plaintiff, but that case is at variance with *Tuppington v. Ward* (3) in this court. Here the defendant is directly asked if he has been guilty of an indictable offence.

[BRAMWELL, B.—How do we know that the defendant is guilty of an indictable offence? It might be that the alleged libel is true, and that it was necessary or conducive to the public interests to publish it. Are we to assume that the defendant has been guilty of an indictable offence?]

At any rate if he answers the questions he is subject, under the 6 & 7 Will. 4. c. 76, to penalties, and perhaps to an indictment. There is a distinction between the case of a witness who is examined in court and the case where interrogatories are administered to a witness. In the first case the witness must be sworn, for he does not know what question he may be asked, but where interrogatories are administered the witness sees and knows what the question is. The dictum of Alderson, B., that proceedings on interrogatories were analogous to that of an examination of a witness at a trial, has been questioned by Lord Campbell in *Whateley v. Crowter* (4).

[BRAMWELL, B.—But how can we tell whether the answer will tend to criminate him?]

He is prejudiced if he declines to answer. In the case of *Stern v. Sevastapulo* (5), the Court of Common Pleas refused to allow interrogatories to be administered in an

(2) 31 Law J. Rep. (N.S.) C.P. 230.

(3) 30 Law J. Rep. (N.S.) Exch. 222; s.c. 6 H. & N. 749.

(4) 5 E. & B. 709; s.c. *nom.* *Whateley v. Crowter*, 25 Law J. Rep. (N.S.) Q.B. 163.

(5) 32 Law J. Rep. (N.S.) C.P. 268.

action of slander. In *M'Mahon v. Ellis* (6), upon a motion to attach the plaintiff for refusing to answer interrogatories, it was insisted on behalf of the plaintiff that the answers might tend to expose him to criminal proceedings for having acted in the office of weigh-master, under the 4 Ann. c. 14. (Ireland), without having taken the qualifying oaths; the Court of Common Pleas in Ireland held that to be a valid reason for declining to answer, and in that case the plaintiff was not required to state upon his oath that he would criminate himself by answering the questions. *Monaghan, C.J.*, in his judgment says, "But it has also been insisted by plaintiff's counsel, though no such point is suggested by affidavit, that the plaintiff is not bound to give the required information, as being such as could be used against him on a criminal charge. As it is on this latter view of the case that we are about disposing of the present motion, it will be advisable that I should state distinctly the grounds on which we proceed. The defendants having relied on the not taking the oaths and subscribing the declaration required by the 9th section of the act as a defence to plaintiff's action, we must at all events, for the purpose of this motion, assume that the defence so pleaded is a valid one, from which it follows that if the plaintiff had acted as weigh-master without having taken the prescribed oaths and signed the prescribed declaration, he has violated the 9th section of the act, and if he has, which is of course the case sought to be proved by the defendant, it occurs to us that he has committed a misdemeanor, and is therefore not bound to answer any questions or give any information tending to establish as against him such misdemeanor."

Holl, in support of the rule.—First, by the 6 & 7 Will. 4. c. 76. s. 6, if the proprietor of a newspaper wilfully makes a false return, he is guilty of a misdemeanor; but by the 7th section the non-delivery of a declaration is not made a misdemeanor; the proprietor of a newspaper in such case is only liable for penalties. It is a well-known rule of law, that where a particular section of an act creates an

offence and gives a remedy, that remedy alone can be pursued. Under the 7th section the defendant could not be indicted for a misdemeanor. Next, the questions on the face of the interrogatories do not shew that the answer would tend to criminate the defendant, and the defendant must refuse on oath to answer and must state that the effect of the answer would be to criminate him. *Boyle v. Wiseman* (7) is a direct authority that the plaintiff has a right to insist on a witness stating on his oath whether the question put to him would or would not tend to criminate him. *Bartlett v. Lewis* (2) is to the same effect. *Erle, C.J.* in his judgment says, "It is clear that these are questions which might be put to the defendant if he were in the witness-box, and there he would be bound, if he desired to protect himself against answering them, to pledge his oath that they tended to criminate him. In *Osborn v. the London Dock Company* (8), it was contended by counsel in his argument that the 51st section of the 17 & 18 Vict. c. 125. was confined to cases where a discovery might have been obtained in a Court of equity, and that a bill of discovery could not be filed in a case where the questions sought to be put would criminate the party sought to be interrogated; but Lord Wensleydale observes that the language of the 51st section is much more extensive in its signification and has no such limitation as that contended for. *Chester v. Wortley* (9) was decided on the authority of *Osborn v. the London Dock Company* (8), and there it was objected that the interrogatories tended to disclose a forfeiture of the estate of the party interrogated; but the Court held, that the interrogatories might be delivered, and the defendant when sworn must claim the ordinary privilege of a witness to take objection to any particular question. In *M'Mahon v. Ellis* (6), the Court seem to hold that, whether there is the oath of the party sought to be interrogated or not, if the answer to the question would criminate the

(7) 10 Exch. Rep. 647; s.c. 24 Law J. Rep. (N.S.) Exch. 160.

(8) 10 Exch. Rep. 698; s.c. 24 Law J. Rep. (N.S.) Exch. 160.

(9) 25 Law J. Rep. (N.S.) C.P. 117; s.c. 17 Com. B. Rep. 410.

(6) 10 Irish Com. Law Rep. C.B. 120.

defendant, the interrogatories ought not to be allowed; but that case is opposed to all the cases decided in Westminster Hall. With regard to *Tupping v. Ward* (3), this Court ruled that under the circumstances of that case they would not allow the interrogatories to be put. This is quite a case for interrogatories, for the legislature has provided a mode in which to ascertain the information sought, and the defendant in violation of the act of parliament does not furnish it.

Cur. adv. vult.

On the 13th of January 1865,—

POLLOCK, C.B. delivered the judgment of the Court (10).—In the case of *Baker v. Lane*,—which was argued last term, and in which the question raised was, whether certain interrogatories which the plaintiff sought to administer to the defendant ought to be allowed inasmuch as they tended to shew that the party interrogated had committed a criminal offence,—we are of opinion that the interrogatories ought not to be allowed.

Rule discharged.

1865.	}	CLARKE v. WILLIAMS AND OTHERS.
Jan. 16.		

Debtor and Creditor—Bankruptcy Act, 1861—Deed of Arrangement—Release—Plea in Bar.

A deed executed by a debtor for the benefit of creditors under the Bankruptcy Act, 1861, cannot, unless it contain a clause of release, be pleaded in bar to an action.

Declaration for goods bargained and sold, for goods sold and delivered by the plaintiff to the defendants, and for money paid by the plaintiff for the defendants at their request, and for money due on accounts stated between them.

Plea, that after the accruing of the plaintiff's claim, and after the 11th of October 1861, the defendant was indebted to the plaintiff and divers other persons; and thereupon a deed, bearing date the 30th of Jan-

uary 1864, was made and entered into and executed by and between the defendant, W. Lewis, L. Lewis, J. Lewis and J. Williams of the one part, and W. W. Lewis of the other part, which said deed was and is as follows: "This deed, made the 30th of January 1864, between J. Williams, W. Lewis, L. Lewis, J. Lewis and J. Williams, all of, &c., of the one part, and W. W. Lewis, of, &c., on behalf of and with the assent of the undersigned creditors of the said J. Williams, W. Lewis, L. Lewis, J. Lewis and J. Williams of the other part, witnesseth that the said J. Williams, W. Lewis, L. Lewis, J. Lewis and J. Williams hereby conveyed all their estate and effects to the said W. W. Lewis absolutely, to be applied and administered for the benefit of the creditors of the said J. Williams, W. Lewis, L. Lewis, J. Lewis and J. Williams, in like manner as if the said J. Williams, W. Lewis, L. Lewis, J. Lewis and J. Williams had been at the date hereof duly adjudged bankrupt."

Averments, that a majority in number representing three-fourths in value of the creditors of the defendants whose debts respectively amounted to 10*l.* and upwards did, in writing, assent to and approve of the said deed, and the said trustees appointed by the deed executed the same, and the execution of the deed by the defendants was attested by an attorney; and within twenty-eight days from the execution of the deed by the defendants the same was produced and left, having been first duly stamped, at the office of the Chief Registrar of the Court of Bankruptcy for the purpose of being registered, and together with such deed there was delivered to the Chief Registrar an affidavit by the defendants that a majority representing three-fourths in value of the creditors of the defendants whose debts amounted to 10*l.* and upwards had in writing assented to and approved of the said deed, and also stating the amount in value of the property and credits of the defendants comprised in the deed, and the deed did before the registration thereof bear such ordinary and *ad valorem* stamp duties as were provided by the Bankruptcy Act, 1861, in that behalf, and immediately on the execution of the deed by the defendants possession of all the property comprised therein

(10) Pollock, C.B., Bramwell, B., Channell, B. and Pigott, B.

of which the defendants could give or order possession was given to the said trustees, and at the time of the execution of the deed the plaintiff was a creditor of the defendants in respect of the claim herein pleaded to within the meaning of the Bankruptcy Act, 1861, and all conditions have happened and been performed, and all things having happened necessary in that behalf, and the plaintiff became and was and is bound by the deed as if he had been a party thereto and had duly executed the same.

Demurrer and joinder in demurrer.

Hance, in support of the demurrer.—This case is identical with *Eyre v. Archer* (1) and *The Istones Park Iron Ore Company (Limited) v. Pattinson* (2).

THE COURT then called upon

Crompton, to support the plea.—*Eyre v. Archer* (1) shews that the plea is good by way of accord and satisfaction. This case is like that of an ordinary composition deed entered into between a debtor and his creditors, the non-assenting creditor here under the statute being precisely in the same position as an assenting creditor. The deed cannot be pleaded as a release, nor as a payment, but it operates by way of accord and satisfaction.

[CHANNELL, B.—Assume, for the purpose of argument, that the debtor's property is conveyed to trustees for the benefit of his creditors, where is the satisfaction? MARTIN, B.—The deed is only an answer to the action if the act of parliament make it an answer.]

It is submitted that the deed and the facts stated in the plea are an answer.

POLLOCK, C.B.—The case of *Eyre v. Archer* (1) in the Common Pleas and *The Istones Park Iron Ore Company (Limited) v. Pattinson* (2) in this court have decided this point.

MARTIN, B.—This is not a case like that of an ordinary composition deed.

CHANNELL, B. and PIGOTT, B. concurred.

Judgment for the plaintiff.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Exchequer.*)

1864. } BENHAM v. BROADHURST.*
Dec. 2. }

Debtor and Creditor—Composition-Deed—Covenant with the Creditors who Sign respectively to Pay a Composition to all the Creditors—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134. s. 192).

By a composition-deed between a debtor of the one part, and the several creditors who signed the deed respectively of the other part, after reciting that the debtor was unable to pay his debts in full, the latter covenanted with the several persons parties thereto of the second part, to pay to all his present creditors a composition of 5s. in the pound on their respective debts:—Held, that the deed was not valid, since the non-assenting creditors were not in an equally advantageous position with the executing creditors, for the deed gave to each individual creditor who had executed the deed the right of action for the composition on his individual debt, while a non-assenting creditor had no power of suing either personally or by means of any one as trustee on his behalf.

Error was brought in this case to reverse the judgment of the Court of Exchequer in favour of the plaintiff, on a demurrer to a plea.

The action was for goods sold and delivered. The defendant pleaded a composition-deed with his creditors, and alleged that the plaintiff though a creditor who had not executed or assented to the deed was bound by it under section 192. of the Bankruptcy Act, 1861. The plea set forth the fulfilment of all the matters required by the statute to make a composition-deed binding on non-assenting creditors, supposing the deed itself to be valid. The deed was set out in the plea. The material parts were in the following words: This indenture made on the 17th of December 1863, between M. B. Broadhurst, gentleman, of the one part, and the several persons whose names and seals are hereunto respectively subscribed and set, being seve-

(1) 16 Com. B. Rep. N.S. 638; s. c. 33 Law J. Rep. (N.S.) C.P. 296.

(2) 33 Law J. Rep. (N.S.) Exch. 193.

* Decided in the Sittings after Michaelmas Term, coram Erie, C.J., Crompton, J., Blackburn, J., Keating, J., Mellor, J. and Shee, J.

rally creditors in their own right or in co-partnership, or being agents or attornies of creditors of the said M. B. Broadhurst, of the other part. Whereas, the said M. B. Broadhurst is indebted, amongst others, unto the several persons parties hereto of the other part, or their respective principals, in the several sums of money set opposite their respective names in the schedule hereto, and being unable to pay his debts in full, he hath agreed to enter into covenants hereinafter on his part contained; and in consideration thereof, the said several persons hereto of the other part have agreed to enter into the covenants hereinafter on their parts contained: now, this indenture witnesseth, that in consideration of the premises he, the said M. B. Broadhurst, doth hereby for himself, his heirs, executors and administrators, covenant with the said several persons parties hereto of the other part respectively, their respective executors, administrators and assigns, in manner following; that is to say, that he the said M. B. Broadhurst, his executors or administrators, will pay unto all and every the present creditors of him, the said M. B. Broadhurst, the sum of 5*s.* sterling in the pound, on the several amounts of the respective debts of such creditors, by two equal instalments, at intervals of nine and fifteen calendar months from the day of the date of these presents; and this indenture also witnesseth, that in consideration of the premises and upon condition that, and during such time only as the said M. B. Broadhurst shall in all things well and truly perform and keep all and every the covenants and agreements in these presents contained in this behalf, each of them the several persons parties hereto of the other part doth hereby, for himself and herself respectively, and for his and her several respective heirs, executors and administrators, so far as relates to his or her own acts, deeds and demands, covenant with the said M. B. Broadhurst, his executors, administrators and assigns, in manner following; that is to say, that they the said several persons parties hereto of the other part, their or any of their co-partners, executors or administrators, will not at any time or times thereafter, unless and until default shall be made in performance of the covenants or covenant on his

part contained, or some part of such covenants or covenant, sue, arrest, prosecute or molest, or do or cause to be done any act, matter or thing, whereby, or by means whereof he, the said M. B. Broadhurst, his heirs, executors or administrators, or his or their lands and tenements, goods and chattels, shall or may be in anywise seized, arrested, prosecuted, detained or molested at law or in equity, or otherwise howsoever, for or in respect of any debt or debts due or owing unto them his said creditors, or any or either of them, from the said M. B. Broadhurst; and also that he, the said M. B. Broadhurst, shall and may from time to time and at all times hereafter, unless and until he shall make such default as aforesaid, have and be entitled to full and free liberty, leave, power and authority to go, pass and repass to and from such place and places and in such manner as he shall think proper, and for any purpose whatever, without any control or interruption of or by them, the said several persons parties hereto of the other part, or any or either of them, or any or either of their co-partners, executors or administrators, or any person or persons by or with their or any or either of their order, direction or covenant; and further, that in case the said several persons parties hereto of the other part, their or any or either of their partners, executors or administrators, shall sue or prosecute at law or in equity, or do or cause to be done any act, matter or thing whatsoever, whereby or by means whereof the said M. B. Broadhurst, his heirs, executors or administrators, shall or may be sued, prosecuted or molested for any such debt or debts now due as aforesaid, contrary to the foregoing covenant and the true intent of these presents, then and in every such case he or they shall or may plead these presents in bar of any action or actions, suit or suits, that may be commenced or prosecuted against him or them, and these presents shall operate as and are hereby declared and agreed to be an effectual and absolute discharge of the same; and moreover, that they the said covenanting parties, the partners, executors and administrators respectively, will, upon full payment of the said composition of 5*s.* in the pound on the amount of their respective debts, upon

the request and at the costs of the said M. B. Broadhurst, his heirs, executors or administrators, make, give, sign and execute unto him or them good and sufficient releases, acquittances and discharges for the several debts now due and owing to them as aforesaid by the said M. B. Broadhurst, and of and from all actions and demands whatsoever in respect thereof.

To this plea the plaintiff demurred.

The Court below held the deed to be bad on a different point from that decided in error.

Mellish (F. M. White with him), (June 21 and Dec. 1, 1864), for the plaintiff in error.—The composition-deed is good under the Bankruptcy Act, 1861, section 192. All the creditors are on an equality under it. It is made, no doubt, between the debtor and those creditors who sign; but the covenant is in substance a covenant by the debtor with those who execute the deed to pay the composition to all the creditors. Section 192. in terms says, a deed between a debtor and some of his creditors shall be a good deed if it be on behalf of all the creditors. The main object of the statute is that all creditors should have equal right, not that each should have a separate remedy. In *Ilderton v. Jewell* (1), in error from *Ilderton v. Castrique* (2), the deed was held bad because it did not refer to non-assenting creditors at all. The word "respectively" here must be rejected as repugnant to the manifest meaning of the whole covenant and the plain intention of the whole deed. The covenant as to the release helps this view. Unless the composition be paid to all the creditors, none are bound. The release is on condition of the debtor paying all the creditors. In the case of *Clapham v. Atkinson* (3), where the deed was held good, the release is less stringent on the debtor than in the present case. The creditors covenant back with the debtor that on condition that and so long as the debtor keeps the covenant, the creditors will not sue him. A non-assenting creditor has the same powers and privileges

with all the other creditors, because unless he is paid the composition, he may sue for the whole debt. In practice it is usual for one or two creditors only to execute the deed. The requisite majority of the assenting creditors do not execute it, but sign consents in writing. An assenting creditor who does not execute could not sue on the deed in his own name, any more than a non-assenting creditor; but each can sue in the name of the creditors who execute the deed.

Holl (Sill with him), for the defendant in error.—The deed is bad. The non-assenting creditors are in a worse position than the assenting creditors. If the parties use terms which confine the operation of the deed to executing creditors only, the deed is void—*Ilderton v. Jewell* (1), *Ilderton v. Castrique* (2). The deed here professes to be between the debtor and those creditors who sign. The debtor covenants with the creditors who execute respectively to pay the composition to them respectively. *Clapham v. Atkinson* (3) is distinguishable from this case. There there was no covenant at all to pay the composition until tender of the composition or payment: the covenant to release did not operate to bar the right of any creditor to sue for his original debt.

[BLACKBURN, J. — Surely there is, in effect, a promise by Atkinson to pay the composition. ERLE, C.J. — The effect of *Clapham v. Atkinson* (3) is, that an agreement to take a halfpenny composition and a tender of it, bars the action of the non-assenting creditor without any *cessio bonorum*. But the present case is very distinguishable.]

Here, the intention of the deed is to give each creditor a right of suing in his own name for his share of the composition. The word "respectively" cannot be rejected. It only expresses the full sense of the deed. It is very probable that many of the creditors would not have accepted the deed, unless they had severally got a separate right of suing for their individual share of the composition. The covenant as to the release does not carry it further. It would be a very unreasonable construction of that covenant to hold that the release was not intended to operate as to any creditor unless every creditor had received his composition.

(1) 16 Com. B. Rep. N.S. 142; s. c. 32 Law J. Rep. (N.S.) C.P. 256.

(2) 14 Com. B. Rep. N.S. 99; s. c. 32 Law J. Rep. (N.S.) C.P. 206.

(3) 33 Law J. Rep. (N.S.) Q.B. 51.

It is a covenant by each creditor that each will not sue, and that each will release on payment of his share of the composition. There is no trustee here in whose name a non-assenting creditor could sue. If there could be such a construction the non-assenting creditors would be in a worse position than the executing creditors, for the non-assenting creditors could not bring an action in the name of the executing creditors, without at least obtaining a Judge's order and indemnifying them against costs. In *Ex parte Cockburn* (4) the Lord Chancellor Westbury held the deed void, though there was a covenant to pay all the creditors; since the non-assenting creditors could not sue on the deed, and no trustees had been appointed through whom they could sue. *Ex parte Rawlins* (5) is to the same effect.

[BLACKBURN, J.—According to your argument there cannot be a good deed unless there is a trustee.]

If the agreement were to pay a sum down a trustee would not be necessary, or if the debtor described each creditor in the deed he might give him a right of suit, otherwise a trustee is necessary.

(Other points were discussed on which no judgment was given. They are, therefore, not further noticed.)

Cur. adv. vult.

Judgment was delivered on the 2nd of December 1864, by—

CROMPTON, J.—We think that we may dispose of this case upon the first point, as we are of opinion that the deed is invalid on the first objection taken. It appears to us, as it is now established, that a debtor's covenant to pay is sufficient without a *cessio bonorum*, and without there being any fund to which the creditors can look for their composition, that we ought to take greater care that the assenting and non-assenting creditors have equal rights under such a covenant. By the act it was evidently intended that such an arrangement might be made by the debtor with all the creditors, or with some of the creditors as trustees for the whole body; but we must always look to the deed to see how far this intention of

the act has been carried out. We must examine this deed to see whether the necessary provisions have been made for giving the parties equal rights under the covenant to sue, which covenant to my mind is in effect the substitute for the fund which the creditor would have had in the *cessio bonorum*. The present deed, it will be observed, is made between the debtor and the executing creditors only, who take a covenant to themselves respectively and individually. There is no covenant by the debtor with the non-assenting creditors, or with any trustee for them on which they or the trustee can sue. They have not, therefore, equal protection with the executing creditors, and the foundation of our judgment is, that here the non-assenting creditors have not an equal right to sue,—an equal right which is considered in effect an equivalent to so much property. The covenant run thus: "M. B. Broadhurst doth hereby for himself, his heirs, &c., covenant with the said several persons parties hereto of the other part respectively, &c. in manner following, that is to say, that he, the said M. B. Broadhurst, his executors, &c., will pay unto all and every the present creditors of him the said M. B. Broadhurst, the sum of 5s. sterling in the pound on the several amounts of the respective debts of such creditors by two equal instalments." That is a covenant to pay all and every of the present creditors, not to the covenantees only, the sum of 5s. in the pound on their debts in equal instalments; and then the executing creditors covenant back that they will release the debtor on certain terms, which are stated. Now, this covenant with the executing creditors clearly, in my mind, gives, and was intended to give, a right to each individual creditor to sue the debtor on the covenant contained in the deed, and I think the main object of the deed was that each creditor respectively should have that individual right. It was argued that we may reject the word so often and carefully repeated, "respectively," and that we might by thus rejecting it construe the covenant as one made with all the executing creditors; that all the non-assenting creditors should be paid so as to make the executing creditors trustees for the whole body, but by that construction each executing creditor could not have the legal right which it was the

(4) 33 Law J. Rep. (N.S.) Bankr. 17.

(5) 32 Law J. Rep. (N.S.) Bankr. 27.

chief object of the deed to give him. It seems to us that it is impossible to construe the covenant as a joint covenant with regard to some, and a separate one as regards the others. I cannot conceive that it was intended that the whole body of executing creditors, changing from time to time as they come in and execute, should be trustees to sue for each individual debt. Mr. Mellish did not shew any mode in which a right of suing on the covenant could be given to the non-assenting creditors, he only suggested it might by possibility be done. That being so, I am of opinion that the non-assenting creditors have not the benefit of the covenant to sue which the executing creditors have; and, therefore, without going into any of the other points, the judgment of the Court will be, that the judgment of the Court below be affirmed.

KEATING, J.—I did not hear the whole of the argument in this case, and therefore I take no part in the judgment.

The other JUDGES concurred.

Judgment affirmed.

1865. }
Jan. 18. } BOOSEY v. WOOD.

Libel—Accord and Satisfaction.

To an action for libel the defendant pleaded that, after the commencement of the suit, the plaintiff and the defendant agreed to accept certain mutual apologies to be published by the plaintiff and the defendant respectively, in certain weekly journals belonging to the plaintiff and the defendant respectively, in full satisfaction and discharge of all causes and rights of action in the declaration mentioned and all damages and costs sustained by the plaintiff; and that in pursuance of the agreement the defendant did publish his part of the mutual apologies in the weekly journal belonging to him, and that the plaintiff did also in pursuance of the agreement publish his part of the apologies in the weekly journal belonging to him:—Held, that the plea was a bar to the action as an accord and satisfaction.

Declaration for libel published of and concerning the plaintiff in a certain periodical called the *Orchestra*.

NEW SERIES, 34.—EXCHQ.

Plea—that after the commencement of this suit the plaintiff and the defendant agreed together to accept certain mutual apologies to be published by the plaintiff and the defendant respectively, in certain weekly journals belonging to and published by the said plaintiff and the defendant respectively, in full satisfaction and discharge of all the causes and rights of action in the declaration mentioned, and all damages and costs sustained by the plaintiff in respect thereof; and that thereupon and in pursuance of the said agreement he, the defendant, did, on the 14th of May 1864, print and publish his part of the said mutual apologies in the weekly journal belonging to and published by him, the said defendant, and so agreed upon on that behalf as aforesaid, that is to say, in the defendant's weekly journal called the *Orchestra*, of which the plaintiff had notice; and the plaintiff did also after the making of the said agreement and in pursuance thereof, to wit, on the 14th of May 1864, print and publish his part of the said apologies in the said weekly journal, belonging to and published by him, the plaintiff, and so agreed upon in that behalf as aforesaid, that is to say, in the plaintiff's weekly journal called *Boosey's Musical and Dramatic Review*.

Demurrer, and joinder in demurrer.

Joyce, in support of the demurrer.—The plea is bad. After the cause of action has accrued it can only be released by deed. The defendant is seeking by his plea to set up a parol arrangement as a release.

[MARTIN, B.—Why is not the plea good by way of accord and satisfaction? Do you say that the expense of labour and printing the apology is of no value? CHANNELL, B.—Does the plea go far enough? It states that there were mutual apologies, but it does not state that the form of these apologies was agreed upon. MARTIN, B.—The statement of the plaintiff's apology is mere surplusage.]

There is no averment in the plea that there was an acceptance of the apology; in order to make the plea good, it ought to have contained such averment.

[MARTIN, B.—Had the apology been a verbal one it might not have amounted to a good satisfaction. But I think a written apology might be a good satisfaction. In

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Lane v. Applegate (1) the plaintiff entered into a written agreement with the defendant, which stated that the plaintiff had burnt one of certain letters, and was then about to destroy another; and that she had undertaken to destroy all other letters which might come into her possession: the destruction of the letters was held to be a sufficient accord and satisfaction.]

A performance of the agreement might be well pleaded as a good accord and satisfaction.

[MARTIN, B.—That is this case. The judgment of Lord Ellenborough in *Lane v. Applegate* (1) is, “that the agreement was a bar to the action as an accord and satisfaction.” On general demurrer it must be taken that the form of the apologies was agreed upon. The case in *Starkie’s Reports* is a stronger case than the present. It would be a strong thing to call throwing letters into the fire labour, but the setting up of type might well be called labour. That case is an authority that this is a good plea, and I think the case is good law, because I find it reported by Mr. Starkie without any note or comment, and he was pre-eminently distinguished for his knowledge of this branch of the law.]

Needham, in support of the plea, was not called upon.

Per Curiam (2)—

Judgment for the defendant.

1865. } *CARR v. LAMBERT, WOODHALL*
Jan. 25. } *AND OTHERS.*

Common Appurtenant—“*Levant and Couchant*”—*Prescription Act*, 2 & 3 Will. 4. c. 71.

To a declaration in trespass the defendant pleaded thirty years’ enjoyment of right of common of pasture over the locus in quo for the cattle levant and couchant upon the toftstead belonging to him as appurtenant thereto:—Held, that the number of commonable cattle not being in question, it was not necessary, for the support of the plea, that the

cattle should actually be fed upon the produce of the toftstead; and that there is no distinction, in this respect, between a plea, founded on the Prescription Act, and a plea grounded on prescription properly so called.

Declaration in trespass for breaking and entering the plaintiff’s closes, and pulling up and destroying posts, rails, &c.; with a second count for injury to the reversion.

The defendants pleaded, *inter alia*, that the defendant John Woodhall (1), at the times when they did what was complained of, and thence to the commencement of this suit, was possessed of a toftstead, the occupiers whereof for thirty years before this suit enjoyed as of right, and without interruption, common of pasture over the said closes and pieces of land in which &c. for all their cattle levant and couchant upon the said toftstead at all times of the year, as to the said toftstead appertaining, and that the plaintiff wrongfully obstructed the said John Woodhall in the enjoyment of the common of pasture, by putting up, and at the said times when &c. wrongfully keeping the said posts and rails on the said closes and pieces of land in which, &c., over which the said John Woodhall had the said right of common, and thereby prevented him from enjoying the said common of pasture as he was entitled to do, so that without pulling up and destroying the said posts and rails the said John Woodhall could not enjoy his said common of pasture; and that the alleged trespasses and grievances in the first and second counts mentioned were respectively committed by the said John Woodhall, as such occupier in his own right, and by the other defendants as his servants and by his command, for the purpose of removing the said obstructions and preventions as they lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff on the occasion aforesaid.

Issue on all the pleas.

The action was tried, at the York Summer Assizes, 1864, before Blackburn, J., who directed a verdict for the plaintiff, with leave to the defendants to move to enter the verdict for them.

(1) There were seven defendants, and this plea was repeated accordingly, the name of each defendant being substituted in turn for that of John Woodhall.

(1) 1 Starkie, N.P.C. 97.

(2) Pollock, C.B., Martin, B., Channell, B. and Pigott, B.

Field, in Michaelmas Term, 1864, obtained a rule to set that verdict aside, and enter a verdict for the defendants.

All the material facts, together with the substance of the argument, fully appear in the judgment of the Court.

Macaulay and Kemplay (Jan. 11) shewed cause for the plaintiff,—

Field and *T. P. Thompson* supporting the rule for the defendants.

The following authorities were cited during the argument on the rule:—

Tyringham's case, 4 Coke, 38 b.

Whitelock v. Hutchinson, per Parke, B., 2 M. & R. 205.

Patrick v. Loure, Brownlow, 2nd part, 101.

Cole v. Foxman, Noy's Rep. 30.

Rogers v. Benstead, quoted by Bayley, J. in *Cheesman v. Hardham*, 1 B. & Ald. 711.

Fulcher v. Scales, 1 Selwyn's N.P. 484.

Emerton v. Selby, 2 Lord Raym. 1015.

Scholes v. Hargreaves, 5 Term Rep. 46.

Rumsey v. Rawson, Vent. 18.

Mellor v. Spateman, 1 Wms. Saund. 343, et seq.

G. W. Cooke's Inclosure Acts, pp. 9, et seq.

Musgrave v. Cave, Willes, 319.

Cur. adv. vult.

The judgment of the Court was now (Jan. 25) delivered by—

CHANNELL, B.—The present question was reserved by my Brother Blackburn at the trial of the cause at York at the last Assizes. The action was trespass *quare clausum fregit*. The plea of a defendant, John Woodhall, alleged that for thirty years before the suit he had enjoyed, as of right and without interruption, common of pasture over the *locus in quo* for his cattle levant and couchant upon the toftstead belonging to him as appurtenant thereto. This was traversed.

It was proved at the trial that the toftstead was a close of about two acres in extent, and that upon it there was a house or houses which had been used for stalling cattle, but that the cultivated part of the land during the thirty years was occupied as garden ground, and no part of its produce applied to feed the occu-

piers' cattle. It was further proved that the defendant Woodhall and other defendants (owners of small pieces of land in the neighbourhood) had for long beyond thirty years turned out their cattle to graze upon the *locus in quo*; and at the conclusion of the case the learned Judge stated that it was clearly established that the owners of these pieces of land (the defendant Woodhall included) had as of right for upwards of thirty years turned their cattle, housed upon their respective pieces of land, to use the common, but that the cattle had not during this period derived their sustenance from the produce of the pieces of land, the alleged dominant tenements, and he doubted whether such cattle were in law levant and couchant, and directed a verdict for the plaintiff, giving the defendants leave to move.

A rule was granted last term to enter the verdict for the defendants upon the issues joined on the pleas raising the question, and it has been argued. The argument was confined to the case of Woodhall.

His case was this: he had a toftstead or close, two acres in extent; he had for thirty years as of right, and claiming to have a right of common over the *locus in quo* as appurtenant to his toftstead, turned his cattle upon it; the cattle had been housed upon his toftstead, but were not at any time during the thirty years fed upon the produce of it, all their food, beyond what was got upon the common, being provided from elsewhere.

The right claimed by the plea and upon the facts is for common appurtenant, and not for common appendant. No question of surcharge arises, such as has been the point in dispute in most of the cases where the term "levant and couchant" has been interpreted and explained. Here the number of the cattle put upon the common in exercise of the right claimed, is not in question, and the only point we have to determine is, whether, under the circumstances stated to us, any cattle could be levant and couchant in the sense required to make the right of common such an one as the law will recognize. We think that they can. The term "levant and couchant" is a very old legal phrase, and in its primary sense means "when

the beasts or cattle of a stranger are come into another man's ground, and there have remained for some good space of time." This is the definition of it in the *Termes de la Ley*, 424; but it is clearly established by the authorities—see notes to *Mellor v. Spateman* (2)—that, as used in this plea, it means something more, namely, a measure of number, and that it implies within it that the number of cattle which are alleged to have used the common, is such as the winter eatage of the toftstead, together with the hay and other produce obtained from it during the summer, was capable of maintaining.

The plea therefore, when expanded, avers that, for thirty years before the suit, the defendant Woodhall had enjoyed common of pasture for such number of cattle as his toftstead could maintain by its produce, beyond the amount of food obtained by them from the common: and the real question is, whether it further involves that the cattle must have actually been fed, either wholly or in part, from the produce of the toftstead. We think it does not. All the cases and authorities bearing upon the subject were cited in the argument, and there is in none of them a distinct statement to this effect. The cattle must be "levant and couchant" in its primary sense, and their number is to be such as the produce of the dominant tenement would suffice to feed if cultivated for that purpose. But no authority has been cited which shews that the cattle must actually and in fact be fed upon the produce, provided the test can be applied, so as to ascertain the number. Here there is no dispute as to the number. In the absence of express authority, we should not be justified in holding what would in effect restrict the right of the person entitled to the common to use his dominant tenement in such manner, and for such purposes, as he may deem most beneficial to him. *Prima facie* it is the right of every man so to do, and in the absence of a clear rule of law to the contrary, we ought to uphold it. The argument for the plaintiff was, that the dominant tenement must, in part at least, be used for the purpose of the production of food for the commonable

cattle; but that was not supported by any sufficient authority, and we think that the actual consumption of the produce of the toftstead was not involved in the averment in this plea.

It was alleged, that the plea being founded on the Prescription Act (2 & 3 Will. 4. c. 71.) made a difference; and that, although the evidence might have proved the averment in a plea grounded upon prescription properly so called, it did not, when contained in a plea grounded on thirty years' actual enjoyment. Upon consideration, we think there is no distinction. The defendant, in our judgment, proved that he actually took and enjoyed the right of common, without interruption, for the full period of thirty years before the suit, which is all that the statute requires. The rule will therefore be made absolute to enter the verdict for the defendants.

Judgment for the defendants.

1865. } MASON AND ANOTHER, admi-
Jan. 26. } nistrators, &c. v. MITCHELL.

Baron and Feme—Divorce and Matrimonial Causes Act, (20 & 21 Vict. c. 85), s. 21.
—*Protecting Order—Unlawfully acquired Property.*

The protection of an order granted to a wife under the 21st section of 20 & 21 Vict. c. 85, is confined to the lawful earnings of lawful industry, and does not extend to earnings (or property purchased with earnings) acquired by her as keeper of a brothel.

Declaration in trespass and trover, with *indebitatus* counts.

Pleas—Not guilty; leave and licence; a denial of the plaintiffs' property, and never indebted.

Issue joined on all the pleas.

The action was brought by the administrators of Mary Ann Wild, who at the time of her death was living apart from her husband, against an auctioneer employed by the husband to realize the furniture, &c. in her possession at the time of her death.

The case was tried, in Liverpool, before Blackburn, J., during the South Lancashire Winter Assizes, 1864, when evidence was given to shew that the deceased had volun-

tarily left her husband in 1857, and had since that time kept a brothel; also that on the 9th of November 1860 she applied for and obtained a magistrate's protecting order under the 21st section (1) of 20 & 21 Vict. c. 85. The necessary expenses of obtaining the order (which was duly registered according to the provisions of the 21st section) were defrayed by a man with whom she was at the time living in adultery. The order had not been discharged.

In answer to the questions put to them, the jury found that the order had been obtained by fraud, and that the property of the deceased had been acquired by unlawful means.

The learned Judge directed a verdict for the plaintiff for the value of the goods, ruling that the order was good until discharged, and giving the defendant leave to move.

(1) This section is as follows: "A wife deserted by her husband may at any time after such desertion, if resident within the Metropolitan District, apply to a police magistrate, or if resident in the country to Justices in petty sessions, or in either case to the Court, for an order to protect any *money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors or any person claiming under him; and such magistrate, or Justices, or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife, as if she were a feme sole; provided always that every such order, if made by a police magistrate or Justices at petty sessions, shall, within ten days after the making thereof, be entered with the Registrar of the county court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or Justices by whom such order was made, for the discharge thereof; provided also that if the husband, or any creditor of, or any person claiming under the husband, shall seize or continue to hold any property of the wife after notice of such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring) to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: if any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a decree of judicial separation."*

Edward James (Jan. 14) obtained a rule to enter a nonsuit on the grounds, first, that the order was fraudulently obtained; secondly, that even if it were not, it did not protect goods which were not the proceeds of lawful industry; and, thirdly, that the verdict was against the evidence.

Quain now shewed cause.—The fact of the jury having found that the property was obtained by unlawful means does not affect the case, for the enacting part of the section speaks of "earnings and property acquired" generally. The word "lawful" is entirely omitted in the Scotch Act, 24 & 25 Vict. c. 86, and it is also omitted in the 7th and 8th sections of the 21 & 22 Vict. c. 108, the Amending Act.

[*POLLOCK*, C.B.—The introductory part of the 21st section contains the word "lawful"; and the word must therefore be understood wherever "earnings" are subsequently mentioned.]

The words are quite general. These goods were clearly the wife's property; for they were purchased lawfully, though the money with which they were purchased may have been acquired unlawfully. The 25th section (2) of the act confirms this view.

Edward James (*Holker* with him), for the defendant.—The legislature only intended to protect women who were improperly deserted by their husbands, and to enable them to deal lawfully with property obtained by their honest labour. The word "lawful" in the commencement governs all the rest of the section. Here there was no pretence for saying that the deceased woman had any other property than what she had earned by her immorality; and the business she carried on was not only immoral, but indictable (3).

POLLOCK, C.B.—Although some difficulty may arise in dealing with this new legislation, in which a wife who has ob-

(2) The words in the 25th section are, "In every case of a judicial separation the wife . . . shall be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her," &c.

(3) The question as to the jurisdiction of the magistrate to grant the order under the circumstances, and the validity of the order, was also argued by *Quain*; but the Court stopped *James* in his argument on that head, intimating that the case would be decided on the second ground of the rule only.

tained a decree of judicial separation is treated, with regard to property, as if she were a *feme sole*, we are all of opinion that the legislature intended to confine the protection given by the act to the lawful fruits of lawful industry, and that they studiously avoided extending that protection to property acquired by such means as were used by the wife in this case. Were it not so, a direct encouragement would be given to vice and profligacy.

CHANNELL, B. concurred.

PIGOTT, B.—A clear distinction is drawn between property “which the wife may acquire by her lawful industry,” and property “which she may become possessed of”—a distinction which would have been unnecessary if the legislature had intended to extend the protection afforded by the act to the earnings of a profligate course of life.

Rule absolute.

1864.	}	GARROD v. SIMPSON.
Nov. 7, 9.		
1865.		
Jan. 31.		

Debtor and Creditor—Validity of Composition Deed—24 & 25 Vict. c. 134 (Bankruptcy Act, 1861)—Plea alleging Tender of Composition.

To a declaration by indorsee against drawer and indorser of a bill of exchange, the defendant pleaded a plea setting out a composition deed, whereby a majority in number and three-fourths in value of his creditors, in consideration of the payment of the composition agreed upon before the 10th of April then next, agreed to accept a composition of 2s. 6d. in the pound in discharge of their respective debts, so far as they were able to do so without the consent or permission of, and without prejudice to the rights of third parties or sureties, but no further. The plea also alleged compliance with the requisitions of the 192nd section of the Bankruptcy Act, 1861, and a tender to the plaintiff of the composition in respect of his debt:—Held, on demurrer, that this deed, although containing no actual release in terms, was good under the Bankruptcy Act, 1861, so as to bind the plaintiff, as if he had executed it; and that the plea alleging a tender of the

composition shewed a good defence to the action.

The writ in this action was issued on the 7th of March 1864. The declaration was by the indorsee against the drawer of a bill of exchange for 50*l.*, due on the 4th of February 1864.

The sixth plea set out an indenture, dated the 9th of March 1864, and expressed to be made between the defendant of the one part, and the creditors of the defendant of the other part, whereby, after reciting that the defendant was indebted or liable to sundry persons in divers sums of money which he was then wholly unable to pay in full, and that the names of the said persons and the amounts to which the defendant was so indebted or liable to them respectively, or as nearly as the same could be ascertained, were set forth in a schedule to the deed; and that the defendant had proposed to pay to all his said creditors a composition of 2*s.* 6*d.* in the pound, upon their respective debts; and that a majority in number representing three-fourths in value of the creditors had agreed to accept the said composition in discharge of their respective debts, so far as they were able to do so without the consent or permission of, and without prejudice to the rights or claims of third parties or sureties, but no further; it was witnessed, that in consideration of the payment of the said composition to the said creditors respectively, on or before the 10th of April next, the said creditors agreed to receive and accept the said composition in discharge to such extent as thereinbefore mentioned. The plea then averred performance of the first six conditions required to be observed by the 192nd section of the Bankruptcy Act, 1861, and further, that there were no trustees of the said deed, nor was there any property comprised therein, whereof the defendant could give or order possession: and that the plaintiff at the time of the making of the said deed was a creditor of the defendant for the sum of 50*l.* in respect of the causes of action sued for, and that all things had occurred, &c. necessary to make the said indenture binding on the plaintiff in respect of his said debt, and to release and discharge the defendant from the payment of any greater sum than the sum of 6*l.* 5*s.*, being

the said composition of 2s. 6d. in the pound on the debt so due to the plaintiff as aforesaid; and that before the said 10th of April 1864, the defendant was and thence hitherto had always been ready and willing, and before the said 10th of April, tendered and offered to pay to the plaintiff, who then refused to accept the said sum of 6l. 5s. as and for such composition as aforesaid.

Demurrer and joinder in demurrer.

Hance, for the plaintiff.—The deed cannot be pleaded in bar of the action, even if it be a valid deed under the statute, because it contains no release—*The Ipsstones Park Iron Ore Company v. Pattinson* (1), *Eyre v. Archer* (2) and *Wells v. Hacon* (3), per Blackburn, J.; and because there is no covenant by the debtor to pay, and the creditors have no means of enforcing the payment of, the composition agreed on. At the most the plea amounts to a mere accord without satisfaction. [He also cited *Tabor v. Edwards* (4), which was decided on the 12 & 13 Vict. c. 106. s. 224.]

Henry James, for the defendant.—*The Ipsstones Park Iron Ore Company v. Pattinson* (1) differs from this in two points: first, there was in that case a bare accord without satisfaction, there being no allegation of tender as here; and secondly, there was nothing equivalent to a release by non-assenting creditors. The statute makes the assenting creditors *quasi* agents for the non-assenting, for the purposes of the deed; and by this deed the assenting creditors say all the creditors shall discharge the debtor. In *Wells v. Hacon* (3) it could not be said that the plaintiff had released the debtor, for there was no covenant binding on the non-assenting creditors; besides, the remarks of Blackburn, J. as to a release were mere *obiter dicta* in the case. In *Eyre v. Archer* (2) there was no agreement to accept a composition; and the deed was a mere assignment in the form given in Schedule D. to the act. The defendant here rests his case entirely on the ground of composition taken for the debt. All the cases shew that, if there be a release, it binds the non-assenting as well as the as-

senting creditors; they can be bound for the purposes of common law procedure as well as of bankruptcy procedure, and if the deed be not good under the act, it is good at common law—*Symons v. George* (5). There is no special virtue in the use of the word "release"; if an intention to release be gathered from the deed, there is a release in law. The plea shews a good accord with satisfaction.

Hance, in reply.

Cur. adv. vult.

CHANNELL, B. now (Jan. 31) delivered the judgment of the Court (6).—In this case the main point insisted on, on the part of the plaintiff, was that, as the deed contained no release, it could not be pleaded in bar. Two cases were cited in support of this view—*The Ipsstones Park Iron Ore Company v. Pattinson* (1) and *Eyre v. Archer* (2). On the part of the defendant, it was urged that the plea was good, as an accord and satisfaction.

The plaintiff did not execute the deed; and therefore the first question here is, whether the requirements of the 192nd and following sections of the Bankruptcy Act of 1861 have been sufficiently complied with to bind the minority by the assent of the majority of creditors in number and value. Compliance with such requisites, procuring assents, registration, &c., is sufficiently alleged in that plea, and therefore admitted on demurrer. The case of *Clapham v. Atkinson* (7), in error, decided that it is no valid objection that a deed is a mere composition-deed, containing no *cessio bonorum*. Another objection was suggested, namely, that the deed contains no covenant by the debtor to pay the composition mentioned, and that it shews no means by which the creditors can enforce payment. It is very clear, we think, that, upon actual default made by the debtor, the creditors are admitted to their remedy on their original debts; and it appears to us that the creditors cannot complain of any inequality or unreasonable preference. We think, therefore, that this is such a deed as, by virtue of the Bankruptcy Act of 1861, to bind the plaintiff in the same manner as if he had executed it.

This being so, the question before us is, whether the plea is a good one, which

(1) 2 H. & C. 829; s. c. 33 Law J. Rep. (N.S.) Exch. 193.

(2) 16 Com. B. Rep. N.S. 638; s. c. 33 Law J. Rep. (N.S.) C.P. 296.

(3) 33 Law J. Rep. (N.S.) Q.B. 204.

(4) 4 Com. B. Rep. N.S. 1; s. c. 27 Law J. Rep. (N.S.) C.P. 183.

(5) 33 Law J. Rep. (N.S.) Exch. 231.

(6) Pollock, C.B., Bramwell, B. and Channell, B.

(7) 4 B. & S. 73; s. c. *ante*, Q.B. 49.

alleges that the creditors of the defendant, the plaintiff being one, "had agreed to accept a composition of 2s. 6d. in the pound, in discharge of their respective debts, so far as they are able to do without the consent or permission of, and without prejudice to the rights or claims of third parties or sureties, but no further"; and then alleges a tender, by the defendant to the plaintiff, of the amount of the composition. We think that such a plea is good, and that our judgment must be for the defendant. It has been held that the agreement of other creditors to accept the composition is a sufficient consideration for the agreement of each individual creditor to accept a smaller sum in satisfaction of a larger. There is therefore here a good accord. And then arises the question as to the effect of the tender. It may be inferred from *Reay v. White* (8) that where there is a binding accord to receive a particular composition in discharge of a debt, a tender of the composition agreed upon is sufficient to make the plea good. This may also be inferred from *Roeling v. Mugeridge* (9) and *Norman v. Thompson* (10), *Cooper v. Phillips* (11) and *Hazard v. Mare* (12). The cases cited on the part of the plaintiff are distinguishable from the present. In *Eyre v. Archer* (2) the deed was in the form of Schedule D. of the Bankruptcy Act of 1861, and was therefore a mere assignment, and not a composition-deed. In *The Ipstones Park Iron Ore Company v. Pattinson* (1) there was an agreement by the creditors to accept a particular composition as well as an assignment by the debtor; but there was no allegation of tender. The question to decide was, whether the plea was good as a statutable release, and not whether, if it had averred a tender, it would have been good. We think the deed in this case is as good, under the Bankruptcy Act, to bind the plaintiff as if he had signed it, and that the plea which alleges a tender shows a good defence. There will therefore be

Judgment for the defendant.

(8) 1 Cr. & M. 748; s. c. 2 Law J. Rep. (N.S.) Exch. 229.

(9) 16 Mee. & W. 181; s. c. 16 Law J. Rep. (N.S.) Exch. 38.

(10) 4 Exch. Rep. 755; s. c. 19 Law J. Rep. (N.S.) Exch. 193.

(11) 1 Cr. M. & R. 649.

(12) 30 Law J. Rep. (N.S.) Exch. 97.

1865.

Jan. 31.

} STONE v. STRANGE

Inspection of Documents—Breach of Promise of Marriage.

The Court will allow a defendant in an action for breach of promise of marriage (as in other cases of contract) to inspect and take copies of letters in the plaintiff's possession written by the defendant to the plaintiff.

This was an action for breach of promise of marriage. The defendant applied at chambers for an order to inspect letters in the plaintiff's possession which he had written to the plaintiff. Bramwell, B. refused the order; and *H. T. Cole* subsequently obtained a rule to shew cause why the defendant should not inspect and take copies of the letters written by him to the plaintiff, or why the plaintiff should not answer on affidavit, stating what documents she had in her possession relating to the matters in dispute, or what she knew as to the custody such documents were in, and whether she objected to their production, and if so on what grounds.

C. G. Prideaux now shewed cause.—The defendant's affidavits do not suggest that the letters will assist his case, but merely state that he will be prejudiced if the inspection be not allowed. He cannot have discovery or inspection to ascertain the weak points of the plaintiff's case—*Wigram on Discovery*, 261, *Schneider v. Mangino* (1), *Shadwell v. Shadwell* (2).

[*POLLOCK, C.B.*—He wants to know what he himself wrote. If the letters contain an agreement to marry, he is entitled to see them *ex debito justitiæ*, just as he would be in the case of any other contract.]

H. T. Cole cited *Price v. Harrison* (3),—but was not called on to argue.

POLLOCK, C.B.—Let the rule be made absolute in the first alternative.

Rule absolute accordingly.

(1) 7 Exch. Rep. 229; s. c. 21 Law J. Rep. (N.S.) Exch. 181.

(2) 6 Com. B. Rep. N.S. 679; s. c. 28 Law J. Rep. (N.S.) C.P. 315.

(3) 29 Law J. Rep. (N.S.) C.P. 335.

1865. } HENRY WALKER AND OTHERS
 Jan. 25; } v. WILLIAM NEVILL AND
 Feb. 10. } WILLIAM JAMES NEVILL.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), sections 192. and 197.—Composition-Deed—Joint and Separate Creditors—Joint and Separate Estates—Covenant not to sue.

A deed of composition and inspection entered into by the defendants and their creditors, and purporting to be made under section 192. of the Bankruptcy Act, 1861, shewed that there were joint and separate creditors and joint and separate estates of the compounding debtors, and that both classes of creditors were to receive a uniform composition of 18s. in the pound:—Held, that, although the deed placed the joint and separate creditors on the same footing, it was a valid deed, under sections 192. and 197. of the Bankruptcy Act, 1861.

Quære—Whether the deed would have been valid if it had been a deed of assignment, and for a distribution of the debtor's estate.

A plea of an arrangement by deed, under section 192. of the Bankruptcy Act, 1861, between the defendants and their creditors, shewing that there were joint and separate creditors and joint and separate estates, averred that "a majority in number representing three-fourths in value of the said creditors of the defendants, and each of them, &c. executed the indenture":—Held, that it was sufficiently averred in the plea, that the requisite majority of each class of creditors had assented to the deed, so as to make the deed binding on non-assenting creditors.

A deed of composition and inspection contained a covenant, on the part of the creditors, not-to sue within a time limited, viz. before the 20th of May 1865, accompanied by the following stipulation: "That these presents shall and may be pleaded and allowed in any court of law or equity as a bar, or in discharge of all and every action or actions, suit or suits, or other proceedings, judgments and executions which shall or may be brought, commenced, sued, prosecuted, or taken against the debtors, or either of them, or their, or either of their, goods or estates by the said several creditors, or any of them . . . contrary to the true intent and meaning of these presents":—Held, that although

a covenant not to sue for a limited time cannot be pleaded in bar, yet such a covenant accompanied by an express provision that during the limited time it may be so pleaded can be pleaded in bar.

The affidavit required by the fifth condition of section 192. to be delivered to the chief Registrar, stating a majority in number representing three-fourths in value of the creditors of the debtors . . . have in writing assented to or approved of such deed, and also stating the amount in value of the property and credits of the debtors comprised in such deed, need not distinguish the joint from the separate debts of the debtors.

Declaration against the defendants on a joint and several bond to recover the sum of 10,000*l.* payable by instalments.

Plea, by the defendant William Nevill, that he had entered into an arrangement by deed, under the 192nd section of the Bankruptcy Act, 1861, with his creditors to pay them a composition of 18s. in the pound.

The material parts of the deed were as follows: This indenture, made on the 24th of June 1864, between William Nevill and William James Nevill, son of the said W. Nevill, merchants and copartners, of the first part, E. P. White, D. G. Asser, and H. Blackburn, who or whose respective partnership firms are creditors of W. Nevill and W. J. Nevill, and such copartners, of the second part, and the several persons, companies and partnership firms, including the parties hereto of the second part who are creditors of the said W. Nevill and W. J. Nevill, or of one of them, whether executing by themselves or their respective attornies, partners or agents, or assenting to these presents, being an instrument intending to take effect under the 192nd section of the Bankruptcy Act, 1861, or bound thereby in consequence of the same being executed or assented to, or approved of in writing by a majority in number representing three-fourths in value of the joint and separate creditors of the said W. Nevill and W. J. Nevill, whose debts respectively amount to 10*l.* or upwards, of the third part.

It recited that W. Nevill and W. J. Nevill carried on, in Gresham Street West, the trade of manufacturers of hosiery, in copartnership, under the firm of T. B. and W. Nevill & Co. That W. Nevill and W. J. Nevill were in-

debted jointly as copartners or severally to several persons whose names, or the names of whose firms, were mentioned in the schedule in the sums set opposite to such names. That W. Nevill and W. J. Nevill, thereafter occasionally referred to as the said debtors, being unable to pay in full the amount of the several debts due from them, had proposed to pay to their creditors at once a dividend of 10s. in the pound on the amount of their debts and further dividends, amounting to at least 5s. in the pound on the amount of the debts before the 20th of November 1864; and further dividends, making together with the previous dividend an aggregate dividend of 18s. in the pound on the amounts of the debts on the 20th of May 1865; and that on such payments, amounting to 18s. in the pound, the said debtors should be released and discharged upon the remaining part of such debts, and that the debtors should have a letter of licence from their creditors; and that the creditors had assented and agreed to such proposal on condition that the debtors should collect their assets and wind up their estate under the inspection and subject to the direction of the committee. And that there was a sum of money belonging to the debtors in the bank of Barclay & Co. sufficient for the payment of the dividend of 10s., and which was available for that purpose, and the debtors had other assets the realization of which would, it was estimated, furnish the means of paying such further dividends as would make up the composition of 18s. in the pound.

The deed then witnessed that W. Nevill and W. J. Nevill did jointly and severally covenant with each of their creditors parties thereto, in the manner following: "That they, W. Nevill and W. J. Nevill, or one of them, their or one of their heirs, executors, or administrators, shall and will pay out of the sum or fund now available or appropriated for that purpose, unto the creditors respectively, or their executors or administrators, on demand made as to each debt by the creditor or creditors to whom it is owing, his or their executors or administrators 10s. in the pound, on the amounts of the respective debts due and owing to the creditors respectively, and also shall and will, before the 20th of November 1864, pay or cause to be paid unto the creditors respec-

tively, or their executors and administrators, *pari passu* and without any preference or priority, at one time, or from time to time, according to the assets in hand, such sum or sums as will make up a further dividend of at least 5s. in the pound on the amounts of the debts due and owing from them the debtors to the creditors, and also shall and will, before the 20th of May 1865, pay or cause to be paid unto the creditors or their respective executors and administrators, *pari passu* and without any preference or priority, at one time, or from time to time, such sum or sums of money as will make up a further dividend of 3s. on the amount of such debts, which dividends will together amount to the aggregate dividend or composition of 18s. in the pound on the amounts of the respective debts."

"And also will until the composition of 18s. in the pound shall have been paid, manage and wind up the partnership trade, and realize and collect their stock, credits and assets under the inspection and subject to the control of the committee." And the deed further witnessed, "that in consideration of the premises, they the several creditors parties hereto do, and every of them doth hereby, give and grant unto W. Nevill and W. J. Nevill, and each of them, full force and perfect licence and liberty to come and go, pass and repass, from place to place within the United Kingdom of Great Britain and Ireland, when, where, and as their or either of their business or occasions shall serve or require, until the 20th of May 1865, without being sued, molested, arrested, charged or troubled in their or either of their persons or otherwise, for and concerning or on account of any debt, sum or sums of money, or other matter or thing whatsoever, whereby or wherewith they or either of them are or is or may be charged or chargeable or indebted to the several creditors or any of them, or their or any of their heirs, executors or administrators, partners or partner. And each of them the several creditors parties hereto, so far as relates to the acts and deeds of himself, his heirs, executors and administrators, doth covenant with W. Nevill and W. J. Nevill, and each of them, their and each of their heirs, executors and administrators, that they the several creditors respectively, or their respective executors and administrators, or any other

person or persons whomsoever, by, with or through their or any of their order, consent or discretion, privity or contrivance, shall not nor will at any time hereafter before the 20th of May 1865, sue, arrest, attach, extend, molest, implead or trouble W. Nevill and W. J. Nevill, or either of them, their heirs, executors or administrators, or their or either of their bodies, goods or estates, for or on account of any debts, dues or sums of money which they or either of them now owe or owes to the creditors respectively, or their respective partners, either solely by themselves or himself, or jointly with or for any other person or persons whomsoever, by bond, bill or covenant, simple contract or otherwise howsoever, for or on account of any other cause, matter or thing whatsoever, wherewith they the debtors, or either of them, now are or is or shall or may be charged or chargeable; and that these presents shall and may be pleaded and allowed in any court of law or equity as a bar and in discharge of all and every action or actions, suit or suits, or other proceedings, judgments and executions which shall or may be brought, commenced, sued, prosecuted or taken against them or either of them, their or either of their heirs, executors or administrators, or their or either of their goods or estates, by the said several creditors or any of them, their or any of their executors or administrators, or any other person or persons whomsoever, by, through or with their or any of their acts, means, privity, order, consent or procurement, contrary to the true intent and meaning of these presents; and further, that if and when the said composition of 18s. in the pound shall be duly paid to the creditors respectively, then W. Nevill and W. J. Nevill respectively, and their respective heirs, executors and administrators, estates and effects, shall stand and be for ever acquitted, released and discharged of or from all the several debts and liabilities now owing from or incurred by them or either of them and the creditors respectively, all claims and demands in respect or on account hereof; and these presents shall be pleaded as such release accordingly, but without prejudice to any mortgage, lien or other security which any of the creditors now hold or are entitled to for their respective debts, or to their right to enforce or avail themselves

of such security, and without prejudice to rights and remedies against parties other than the debtors liable to the creditors. Provided always, and it is hereby agreed and declared, that if the said W. Nevill and W. J. Nevill shall have, in the opinion of the said committee, made default in the observance or performance of any of the covenants or agreements hereinbefore on their behalf contained, or if the committee shall deem it advisable with reference to the general interests of the creditors so to do, in consequence of any proceedings being adopted adversely to the debtors or either of them, or to the present arrangement, it shall be lawful for the committee at any time before the payment of the composition, by writing under their hands, to revoke the letters of licence, hereinbefore contained."

The deed also contained clauses that the committee should adopt or oppose any proceedings against the debtors in the Court of Bankruptcy, with the view of obtaining or contesting any adjudication of bankruptcy, and that the parties of the second part should be indemnified and saved harmless out of the estate and effects of the debtors in respect of all matters and things which they shall lawfully do in or concerning the business affairs of the debtors, and that the creditors should at all times allow and confirm their acts in all respects, and that the parties of the second part should be reimbursed and repaid out of the estate and effects of the debtors all costs, charges, and reasonable expenses that they should sustain about the matters and things aforesaid.

The plea then averred that the plaintiffs were creditors of the defendants within the meaning of the indenture, and that the defendants duly executed the indenture, and that its execution was duly attested by an attorney, and that the parties to the indenture of the second part duly executed the deed, and that a majority in number representing three-fourths in value of the said creditors of the defendants and each of them whose debts respectively amounted to 10*l.* and upwards, executed the indenture or in writing assented thereto or approved thereof, and that within twenty-eight days from the day of its execution by the defendants the same was produced

and left, having been and the same was before registration duly stamped with and bore such ordinary *ad valorem* stamp duties as in and by the said act were and are in that behalf required, at the office of the chief registrar, in the said act in that behalf mentioned, for the purpose of being, and the same was within the said twenty-eight days duly registered according to the act, and that together with the said indenture there was delivered to such registrar an affidavit by the defendants that such a majority as aforesaid had executed or in writing assented to or approved the said indenture as aforesaid, and which affidavit also stated the amount or value of the property and credits of the defendants and each of them as and being such debtors comprised in the said deed, and to be distributed thereunder, of which said deed and of the said execution thereof the plaintiffs at the time of the commencement of this suit had full notice and knowledge; and that the plaintiffs, as and being such creditors as aforesaid, afterwards, contrary to the covenant, licences, liberty and letters of licences in the indenture mentioned, and without the said letters of licence having been at all revoked, sued and impleaded the defendants by bringing this action and declaring and proceeding herein, and on account of the causes of action in the declaration mentioned, the same being and consisting of certain debts, dues and sums of money which the defendants at the date and at the time of the said execution of the said indenture by the defendants and the parties thereto of the second part, and by the said majority in number representing three-fourths in value of the creditors as aforesaid, owed to the plaintiffs by and under the bond in the declaration mentioned; and that the defendants have since their execution of the said indenture always been ready and willing to do, and have done, and the said committee in the said indenture mentioned and the said creditors have respectively done, and everything has happened necessary to make the said indenture, and each and every of the provisions thereof, valid under the said act, and as binding upon the plaintiffs as if they had been parties thereto and had duly executed the same.

The plaintiffs replied by a fifth replica-

tion—That at the time of the execution of the said indenture by the defendants, they the defendants were and still are jointly, and each of them was and still is severally, indebted to the plaintiffs in the amount for which this action is brought, and that amongst the said creditors parties to the said indenture of the third part there are other joint creditors of the said defendants whose debts respectively amount to 10*l.* and upwards, and that the said defendants at the time of their said execution of the said indenture were possessed of joint property and estate, and each of them was possessed of separate property and estate.

Sixth replication—That amongst the creditors parties to the said indenture of the third part, there are joint creditors of the defendants whose debts respectively amount to 10*l.* and upwards, and also separate creditors of each of the defendants whose debts respectively amount to 10*l.* and upwards, and that together with the said indenture there was not delivered to the chief registrar a full account of the debts of the defendants which respectively amounted to 10*l.* and upwards, distinguishing the partnership debts of them, the said defendants, from the separate debts of each of them, as required by the General Order in Bankruptcy of the 22nd of May 1862.

The plaintiffs also demurred to the plea.

The defendant joined in demurrer, and demurred to the fifth and sixth replications respectively, to which there was a joinder in demurrer.

Butt (W. Paterson with him), in support of the demurrer.—The first point is, that it appears from the deed that there are joint and separate creditors and joint and separate estates, and as the deed provides a uniform dividend to be paid to both classes of creditors it places them on the same footing. Now, under the Bankrupt Act, 1849, the two estates would have to have been kept distinct, the separate estate for the separate creditors and the joint estate for the joint creditors; and the Bankruptcy Act, 1861, by the 177th section, likewise contemplates a distinct administration of the joint and separate estates in bankruptcy.

[CHANNELL, B.—No doubt, under the practice in bankruptcy the proceeds of the separate estate were applied to the discharge

of the debts of the creditors on the separate estate, and the joint assets in like manner to the payment of the creditors claiming on the joint estate, and then if there was a surplus of assets of the separate estate it was carried over to the joint estate: but may there not be by section 197, where the deed shall expressly so provide, a division of assets otherwise than according to the law and practice of bankruptcy?]

The deed cannot put upon a non-assenting creditor the same dividend, with respect to his claim on the separate estate, as that received by a creditor claiming on the joint estate from the assets of such joint estate. If the estate is administered without the joint and separate estates being kept distinct, the joint creditors may have their dividends increased at the expense of the separate estate, and the creditors on the separate estate, who may possibly be entitled to be paid in full out of the separate estate, would have to share *pari passu* with the creditors on the joint estate. Under the Bankrupt Act of 1849, this question was decided in *Leonard v. Sheard* (1). The point made in that case was, that the deed was bad because either it did not provide for the separate creditors at all, or if it did, it put them upon the same footing as those creditors to whom the joint debts were due, and on this ground the Court held the deed invalid; Erle, C.J., who then was a member of the Court of Queen's Bench, in his judgment says, "The assignment to the trustees is of the joint and separate estate of the defendants, and the trusts which the parties of the second part have to perform is to distribute the joint and separate estate of the defendants equally among the joint creditors. In a case of bankruptcy the joint estate would have to be distributed among the joint creditors and the separate estate among the separate creditors."

[CHANNELL, B.—In that case there was an assignment of the debtor's property for the benefit of his creditors, and the Court held that such property ought to be distributed as required by the Bankrupt Law; but the present is the case of a composition-deed.]

There is no real distinction between the two cases. The 224th section of the Bankrupt Act, 1849, is repealed, but the 197th section places the case on the same footing as it would have occupied had the 224th section not been repealed. The section in the present act provides, first, that the parties to the deed in all matters relating to the estate and effects of the debtor shall be subject to the jurisdiction of the Court of Bankruptcy, and shall have the benefit and be liable to all the provisions of the act; and then goes on to state, that the creditors under the same shall have the same rights with respect to the debtor and his estate and effects as are possessed by creditors with respect to the bankrupt or his estate and effects in bankruptcy. This point was raised in *Ex parte Cockburn* (2); but the Lord Chancellor in disposing of it grounded his judgment on the fact, that the deed did not shew that there was any joint estate at all. Now, here it appears on the record that there are joint and separate creditors and joint and separate estates. In his judgment the Lord Chancellor says that it has been argued "the word 'creditors' ought to be taken as indicating the several classes of creditors, and that the words of the statute ought to be taken, distributing as to the majority and value of each class, the object of course being to shew that if there be not a majority of each class assenting the parliamentary conditions have not been fulfilled; and the result being represented to be that if the separate creditors were to unite the joint estate might be distributed amongst the separate creditors. But if there be no joint estate the assets will be distributed *pari passu* amongst all the creditors joint and separate. In this case I am obliged to assume that there is no joint estate, because it lies at the very foundation of this objection that there should be a joint estate. If there had been any, there might have been some weight in the argument; but I must assume the contrary, and there being no joint estate the joint and separate creditors are not distinguishable in any respect." The Lord Chancellor's observations apply as much to composition-deeds as they do to deeds of assignment, and on the face of the present deed the existence of joint and separate estates is shewn; it

(1) 28 Law J. Rep. (N.S.) Q.B. 183; s.c. 1 E. & E. 667.

(2) 33 Law J. Rep. (N.S.) Bankr. 17.

also appears that there is a sum of money in the hands of certain bankers which is to be applied to the payment of the dividend. Secondly, the averment in the deed is, that a majority in number representing three-fourths in value of the said creditors have executed the deed is insufficient, as "*said creditors*" can only mean joint and separate creditors. As that averment stands at present, it is impossible to say whether a majority in number representing three-fourths in value of the joint creditors or separate creditors, and of both joint and separate, have executed the deed; if the requisite number of joint creditors have not signed the deed, the plaintiffs as non-assenting creditors are not bound by it.

[CHANNELL, B.—On general demurrer, I think the averment in the plea must be taken to mean that the requisite number of joint and separate creditors have signed.]

Either the deed ought to be made with the joint creditors alone, and there ought to have been a separate deed with the separate creditors, or it might be possible to draw a deed including both joint and separate creditors, and then to obtain the assent of three-fourths in number and value of the joint and separate creditors respectively, and thereby shew that the requisite number of each set of creditors have signed the deed. Thirdly, the covenant not to sue contained in the deed is not pleadable in bar. It does not amount to a covenant not to sue at any time, but is a covenant not to sue for a limited time. Now, it is well-considered law that a covenant not to sue at any time may be pleaded in bar to avoid circuitry of action, but a covenant not to sue for a limited time cannot be so pleaded—2 *Wms. Saund.* 150 a, *Thimbleby v. Barron* (3); the reason is, that if the right to bring a personal action be once suspended, for ever so short a time, it is extinguished—*Ford v. Beech* (4). To defeat this strict rule of law, a covenant not to sue is construed according to the intention of the parties, and as it never could be their intention that the right of action should be for ever lost, it is held that such a covenant does not operate so as to

be pleaded in bar, but that it only gives the covenantee a remedy by cross-action. Here the covenant is not to sue until the 20th of May 1865; it is clearly therefore a covenant not to sue for a time limited, and is not pleadable in bar. Fourthly, a deed under the 192nd section is only binding on the non-assenting creditors when all the requisites of that section have been complied with. By the fifth condition of that section it is made necessary that together with the deed an affidavit should be delivered to the Chief Registrar, amongst other things, stating the amount in value of the property and credits of the said debtor comprised in the deed. Now, the averment in the plea limits the operation of that section by confining the statement in the affidavit to the property to be distributed under the deed. The creditor is entitled to have a statement on oath, not only of that which his debtor can pay but also of his credits; the statement in the affidavit is also insufficient, because it does not, according to the General Order in Bankruptcy, 22nd of May 1862 (5), distinguish the partnership debts from the separate debts. Lastly, the covenant not to sue and the proviso relating to the revocation of the letters of licence by the Committee of Inspection are unreasonable, and the deed is therefore not binding on the non-assenting creditors.

Mellish (*Beresford* with him), in support of the plea. — The main question is, whether the deed is bad because the same dividend is to be paid to the joint and separate creditors. In some cases the assets must be distributed as in bankruptcy,

(5) Together with every deed or instrument left after the 5th of June next at the office of the Chief Registrar, under section 192. of the Bankruptcy Act, 1861; and in addition to the affidavit or certificate required to be delivered to the Chief Registrar under the fifth condition of the said section, there shall be delivered to the Chief Registrar a copy of such deed or instrument certified by the attorney or solicitor attesting the execution of the same by the debtor to be a true copy, and also and as near as may be in the form of the schedule hereunder written, a full account of the debts of the debtor which shall respectively amount to 10*l.* and upwards, together with the names in alphabetical order and the residences of his creditors, distinguishing those who have, in writing, assented to or approved of the deed, and such account shall be accompanied with an affidavit by such debtor verifying the same.

(3) 3 *Mee. & W.* 210; s. c. 7 *Law J. Rep.* (N.S.) *Exch.* 128.

(4) 17 *Law J. Rep.* (N.S.) *Q.B.* 114; s. c. 11 *Q.B. Rep.* 852.

but in the case of a composition-deed, the composition may be paid by some third person, and it may be that it is the interest of the creditors to accept a composition, because they obtain a better dividend through some third person than they would if they had an assignment of the debtors' estate and distributed it among themselves. It certainly appears here that there is a certain sum of money at the bankers' available for the payment of the first instalment of the composition, but it does not appear whether it forms part of the assets of the debtors or from whence it comes. When once it is decided that a composition-deed is within the 192nd section the act applies.

[CHANNELL, B.—It was decided in *Clapham v. Atkinson* (6), in the Exchequer Chamber, that a deed between a debtor and his creditors means all his creditors, and that such a deed is within the 192nd section of the act.]

Yes, "all his creditors"; that must mean joint and separate creditors. How is it possible to read this deed without holding that it deals with all the creditors?

[CHANNELL, B.—*Prima facie*, "creditors" means all the creditors.]

In bankruptcy there is no such thing as a certificate that applies to a discharge from separate creditors without applying as well to a discharge from the joint creditors. The words in the 192nd section, "a majority in number representing three-fourths in value of the creditors," mean three-fourths of all creditors, joint and several. There are plenty of anomalies in the act; that cannot be helped; if the deed is within section 192, then it is valid, and the act must be worked out as best it can. The plea does not shew that any injustice is done to any set of creditors; if it could be shewn that the separate assets were enough to pay 20s. in the pound, there might be some foundation for the argument on the other side. A creditor who has a joint claim upon his debtors as well as a several claim against one of them, has his choice whether he will prove on the joint or separate estate. Take the common case of a holder of a joint and several promissory note, he has his election as to the proof of his debt. In which list is he, the holder of a joint and several promissory note, to be ranked? Is he to

be counted in both lists? This only shews that there are great difficulties in carrying out the act, and it is only a reasonable construction to hold that the act is complied with if the creditors, both joint and separate, constitute the requisite number. It is so in inspection deeds. It is not more reasonable to create two classes of creditors, and for that purpose to take them separately. In deeds of assignment and inspection the difficulties of applying the act are less numerous, but in the case of composition-deeds, the essence of which is that there is to be no distribution of assets, it is impossible to apply some of the expressions in section 192. One argument used to shew that this is not a deed within the act is, that the 197th section does not apply to composition-deeds. The answer is, it can only be applied so far as the nature of the thing admits. It is there enacted that the creditors have certain powers, rights and remedies with respect to the debtor "*and his estate and effects*"; how can those words be applied to composition-deeds, "*and the collection and recovery of the same*"? or how can that expression be applied when there is no estate and effects to be collected or recovered and there is nothing to be distributed? From the proviso at the end of the section, it may with reason be held, that the intention of the legislature was that the 197th section is not to be applied strictly to all deeds, but only so far as its provisions may be applicable. No authorities can be adduced adverse to this argument. *Leonard v. Sheard* (1) was a case of a deed of assignment.

[CHANNELL, B.—And independently of that, it was a case in which a distribution of assets was contemplated.]

Ex parte Cockburn (2) decides nothing to the present purpose; a point somewhat similar to that raised in the present case was taken, but the facts did not support it, and from that alone it must not be inferred what the decision would have been. The true construction of the 192nd section is that a majority in number representing three-fourths in value, means three-fourths of the creditors taking the joint and separate creditors together. The averment in the plea, that a "majority in number representing three-fourths in value of the said creditors of the defendants and *each of them*," sufficiently shews that the majority

(6) 4 B. & S. 722; s. c. 34 Law J. Rep. (N.S.) Q.B. 49.

is composed of both classes of creditors. Next, with regard to the objection to the covenant not to sue. No doubt, at common law, except in the case of bills of exchange, a right of action cannot be suspended; a right of action once suspended is lost. But the plea in the present case is good, because the covenant expressly goes on to stipulate "that these presents shall and may be pleaded and allowed in any court of law or equity as a bar and in discharge of all and every action or actions, suit or suits, or other proceedings, judgments and executions which shall or may be brought, commenced, sued, prosecuted or taken against them, or the debtors, or either of them, by the said several creditors, contrary to the true intent and meaning of these presents." In *Gibbons v. Vouillon* (7) it was held, that if the covenant operates as a defeasance, it could be pleaded in bar. The objection to that is, that if the deed contain such a covenant and the creditor sue for his debt, he loses his debt altogether, so that he is not even entitled to a dividend on it; and that is thought, and properly so, to be very unreasonable; but this deed has been very carefully worded, so that the consequences of a creditor bringing his action is not to extinguish his debt, but merely to prevent him from recovering it. This case differs from that of *Dell v. King* (8), and is similar to the covenant contained in the deed in the case of *Strick v. De Mattos* (9), which this Court held to be a good deed. *Keyes v. Elkins* (10) is also an authority in favour of the defendant that the covenant not to sue is pleadable in bar. With regard to the last point. Special demurrers are now abolished, and the plea is to be construed according to the requirements of the act. The only object of the affidavit is for the purposes of the stamp-duty; it is required simply to shew the amount of the duty to be charged, and not to state the amount of the debtor's property. Besides, the replication is bad. It ought to have set out the order in bankruptcy. Can it be said that a disobedience of the order invalidates the whole deed?

(7) 8 Com. B. Rep. 483; s. c. 19 Law J. Rep. (N. S.) C. P. 74.

(8) 33 Law J. Rep. (N. S.) Exch. 47; s. c. 2 H. & C. 84.

(9) 33 Law J. Rep. (N. S.) Exch. 276; s. c. 3 H. & C. 22.

(10) *Ante*, Q. B. 25.

There is no penalty attached for a disobedience of the order. It is merely a direction to the registrar that he is not to register a deed unless it be accompanied with a proper affidavit; it cannot mean, that if an affidavit be delivered and it contain an error the deed is to be vitiated. The Lord Chancellor by an order in bankruptcy cannot add a condition to the act of parliament.

Butt, in reply.—This is not strictly a composition-deed, for it provides for the distribution of a certain sum of money which is stated in the deed to be ready for distribution; and it also states that there are other assets, the realization of which would furnish the means of paying the further dividends. In construing the 197th section the 192nd section cannot be excluded. The words of the former section are, "every such deed"; that must mean deeds mentioned in section 192. The present deed is not a valid deed within those sections. In *Addison on Contracts*, p. 920, 5th edit., under the head 'Covenant not to sue,' it is laid down, Where a creditor has covenanted that he will not put his contract in suit at any time, there the covenant is pleadable in bar as a release; but where the covenant is that it shall not be put in suit for a certain time, there it is only a covenant not pleadable in bar unless it be a covenant not to sue for a limited time, with a proviso for forfeiture if an action be brought within that time, in which case it operates as a bar by force of the condition if the action be brought within the time. That is not the case in the present instance; here the covenant is simply one not to sue for a limited time. In *Gibbons v. Vouillon* (7) there was not only a covenant not to sue, but a forfeiture of the debt if the plaintiff sued. *Strick v. De Mattos* (9) is distinguishable. The covenant not to sue in that case was unlimited as to time; it was, not to sue whilst the deed was in force. The deed was in force for ever, therefore it was not a covenant not to sue for a limited time.

Cur. adv. vult.

CHANNELL, B. (Feb. 10) delivered the judgment of the Court (11).—This was an action of debt on a bond given by the

(11) Pollock, C. B., Martin, B., Channell, B. and Pigott, B.

two defendants to the plaintiffs, conditioned for payment by defendants jointly and severally of money by instalments.

The defendant William Nevill pleaded a deed dated the 20th of June 1864, relied on by him as a valid deed under the Bankruptcy Act of 1861.

After setting out the deed *verbatim*, the plea goes on to allege the existence and performance of such matters *dehors* the deed as *prima facie*, and subject to the objections hereinafter stated, would make it a valid deed under the Bankruptcy Act. To this plea there was a demurrer, and the question arises whether the plea is good.

The first objection raised to the plea is, that it appears therefrom that there are joint and separate creditors, and also joint and separate estates of the compounding debtors, and that the deed places the joint and separate creditors on the same footing, and that such a deed, even though a good deed under the 192nd section of the Bankrupt Act, looking to that section only, is void as against non-executing creditors by reason of the facts stated and the 197th section. In support of this objection, the statute 12 & 13 Vict. c. 106. s. 140. was referred to. We think that this objection to the deed cannot be sustained. Looking to the 192nd section, apart from the 197th section, a deed of composition, though it contain no *cessio bonorum*, comes within the words in the 192nd section, namely, a deed "relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters."

Whatever doubt may have formerly existed, we hold this point to be now decided by the recent case of *Clapham v. Atkinson*, in the Court of Queen's Bench, and in the Exchequer Chamber (6). The present deed is not, it is said, a deed of composition only; but it does not at all purport to be a deed of assignment. It is, we think, a deed of composition and inspection, and good as such under the 192nd section. Then, do the provisions of the 197th section (taking the fact to be that there are joint and separate creditors and joint and separate estates, whilst as to the composition to be paid both classes of creditors are placed on the same

footing) render the deed inoperative against non-executing creditors? We think not. The words relied on in the 197th section to invalidate the deed, are the word "such" in the commencement of that section, and the words "all parties bound thereby shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the creditors under the same shall, as between themselves respectively, have the same rights with respect to the debtor and his estate and effects, and the collection and recovery of the same, as may be used or exercised with respect to the bankrupt, or his estate and effects in bankruptcy." Whatever weight there might be in the objection, as applicable to a deed of assignment, where the property assigned is to be distributed, but at the same time a distribution according to the law of bankruptcy as applicable to joint and separate creditors and joint and separate estates, is excluded, we think that it does not invalidate a deed of composition and inspection, good within the 192nd section. As the words of the 192nd section have been considered as applying to several classes of deeds, namely, deeds of composition as apart from deeds of assignment and for distribution, we think the words in the part of the 197th section which we have been considering may be so read as to be inapplicable to a deed of composition, however they may apply to and affect a deed of distribution.

We were referred by Mr. Butt to the case of *Ex parte Cockburn* (2) on appeal. There the point was mooted; but in that case there was no proof of the existence of any joint estate, and no opportunity was afforded of deciding the point. We do not find any expression of opinion by the Lord Chancellor in that case, as to the weight of the objection had it distinctly arisen, that calls upon us to doubt the conclusion at which, in the present case, we have arrived.

It is also objected that the deed could not bind the non-assenting creditors, unless the

requisite majority of each class, namely, of the joint creditors, and of the separate creditors of each debtor, had assented. If that be so, we think the allegation in the plea, that "a majority of the said creditors of the defendant and each of them assented," is a sufficient averment of such assent.

It was further contended, by the plaintiffs, though not very strenuously, that the covenant by the creditors not to sue was unreasonable, and that the proviso in the deed relating to the revocation of the letters of licence by the committee of inspectors was unreasonable, and that in respect of these matters the deed was not binding on non-executing creditors. We do not think that these are such unreasonable conditions as would avoid the deed.

It was more shrewdly contended that the deed in question could not be pleaded in bar; that it contained no present release, but a covenant to execute a release at or after the time when 18s. in the pound should be paid.

It was further argued, that though a covenant not to sue at any time might be pleaded as a discharge, the present covenant was not such a covenant, but only a covenant not to sue for a limited time, and that such a covenant could not be pleaded in bar.

Now, there is no doubt that a simple covenant not to sue for a limited time, is of itself only the subject for a cross-action, if broken, and not pleadable in bar. But here there is an express provision, that during this limited time, the deed may be pleaded in bar; and we think, that if the plaintiff had in fact executed such a covenant, it might be pleaded in bar to an action by him. This being the case, he is in the same position by virtue of the statute, unless this or some other covenant in the deed is so unreasonable that the assent of the requisite majority cannot bind the minority. In *Dell v. King* (8) the covenant, which we held to make the deed bad, was so framed as to work a forfeiture of all claim against the debtor's estate in the case of an action being brought. If a creditor had brought an action with the *bona fide* intention of contesting the validity of that deed, or of proving the amount of his claim, he would, if the deed had been held to bind him, have lost not only his original demand, but also all claim to the

composition. Now here the case is different. The creditor may, if he chooses, bring an action for the purpose of testing the validity of the deed, and by so doing will not forfeit his right to the composition.

A covenant not to sue, which, though differently worded, was in effect the same as this, was contained in the deed in *Hidson v. Barclay*, the decision of which case in this court is reported in the 33 *Law J. Rep.* (N.S.) Exch. 273, and 3 *Hurl. & C.* 9. That deed has now been held good by the Court of Exchequer Chamber, reversing the judgment of this Court (12). It may, therefore, now be taken, that a covenant not to sue does not make the deed void as against the non-assenting creditors, and further that if properly worded to effect that purpose as this one is, it may be pleaded in bar. We think, therefore, that this plea is good.

Besides the demurrer to the plea, there were two replications which were demurred to. The fifth replication only states facts for the purpose of raising rather more distinctly the first objection to the plea which we have already disposed of. The sixth replication alleges, that an affidavit distinguishing the joint and separate debts, was not delivered to the registrar. The 192nd section does not require that the affidavit to be delivered shall so distinguish the debts, and we think that we cannot import such requirement into the act as an additional condition to the validity of the deed.

Our judgment will therefore be for the defendant on all the demurrers.

Judgment for the defendant.

1865. }
Jan. 14. } WRIGHT v. GOODLAKE

Evidence—Interrogatories—Payment into Court.

Interrogatories may be put to a plaintiff to ascertain the true measure of the damages he has sustained, and so guide the defendant as to the amount he may fairly pay into court.

The plaintiff, who was the author and registered proprietor of a pamphlet called *History and Construction of the Clifton*

Suspension Bridge, brought this action against the printer and publisher of *The Times* newspaper, for infringing the copyright of the pamphlet. The plaintiff's affidavit stated that the most valuable part of his pamphlet, relating to the construction and engineering of the bridge, was copied *verbatim* in the columns of *The Times*, without any acknowledgment, on the 20th of September 1864, the day before that fixed for the visit of the members of the British Association to the bridge, on which occasion the plaintiff expected to sell a large number of copies of the pamphlet; and that though application had since been made to the editor of *The Times*, no acknowledgment had been made of the article having been taken from the plaintiff's book. Martin, B. at chambers made an order by which the following (among other) interrogatories were allowed to be put to the plaintiff by the defendant: "When did you publish the pamphlet, and do you claim to have a subsisting copyright in it? State how many copies were sold during the two months next preceeding the 20th of September last, and how many during the two months next following the said 20th of September; also how many, if any, were sold on the said 20th of September."

Wills moved for a rule to set this order aside, on the ground that it was unfair to interrogate with the view of ascertaining how little the defendant could safely pay into court, and that the order amounted to leave to inspect the plaintiff's books to see how much damage he had sustained.

[CHANNELL, B.—Lord Tenterden said that the *bona fide* desire to meet a plaintiff's claim by payment into court shewed an honest intention on the part of a defendant.]

A defendant must be considered to enjoy a great privilege in being allowed to pay money into court at all. This is substantially an application to inspect the plaintiff's books of trade, which the defendant is not to be allowed to do just because he has injured the plaintiff.

POLLOCK, C.B.—There is no reason why these interrogatories should not be administered.

MARTIN, B., CHANNELL, B. and PIGOTT, B. concurred.

Rule refused.

1865. }
Jan. 30. } WHITMORE v. WAKERLEY.

Debtor and Creditor—Bankruptcy Act, 1861 — Composition-Deed not pleaded—Subsequent Attempt to set aside Fi. Fa.

A defendant, who did not plead a composition deed, under the Bankruptcy Act, 1861, when he had the opportunity, will not be allowed afterwards to avail himself of it for the purpose of defeating execution.

The writ in this action was issued, under the Bills of Exchange Act, on the 24th of November 1864, and the defendant not having applied for leave to appear, judgment was signed on the 20th of December, and execution levied under a *fi. fa.* on the 26th of December.

On the 6th of December the defendant executed a valid deed of composition with his creditors, which was registered on the 9th; and he now sought to have the *fi. fa.* set aside, although he had not pleaded the deed.

E. Besley having obtained a rule for that purpose,—

Hayes, Serj. shewed cause, contending that, as the validity of the judgment was not questioned, the defendant could not now, after omitting to plead the deed when he had the chance, and so to give the plaintiff an opportunity of answering it, avail himself of it to set aside the execution.

Pollock (with him *Besley*), for the defendant, argued that there was no laches on the part of the defendant; and that if there were, still it was contrary to the spirit of the 198th section of the Bankruptcy Act, 1861, to allow the defendant's laches to be set up against him, for the effect would be, that the laches of the debtor would give a fraudulent preference to the non-assenting creditors, and thus fraudulent debtors would be encouraged.

POLLOCK, C.B.—Though fraud be a possible result, we must give effect to the law of the land; and as the defendant did not plead the deed when he had the opportunity, he cannot avail himself of it now.

MARTIN, B. and CHANNELL, B. concurred.
Rule discharged.

1865. { NICHOLSON v. THE LANCA-
Jan. 31. { SHIRE AND YORKSHIRE
RAILWAY COMPANY.

Negligence—Accident—Railway Station.

The level crossing between the platforms at a railway station, which formed part of the "way out" for passengers arriving at the south platform, was blocked for more than ten minutes by the train in which the plaintiff arrived there. Under such circumstances, it was usual for the arriving passengers—and the railway company did not object to the practice—to walk alongside and round the end of the train in order to cross the line. The plaintiff in so doing, in the dark, stumbled over a hamper which had been taken out of the train, and placed at the side of the line, some distance from the platform:—Held, that there was evidence of negligence on the part of the railway company.

Declaration—That the defendants were carriers of passengers for hire from Wakefield to Thornhill Lees, in carriages on a railway, and used a certain station at Thornhill Lees for the use and accommodation of the said passengers there; and the said station was in the possession, and under the management of the defendants, for the purpose aforesaid. Yet the defendants negligently managed the said station and carriages, and omitted to light the said station in a proper and sufficient manner for the use and accommodation of the said passengers there, and to provide proper and sufficient accommodation for the said passengers to depart safely from the said carriages, on their arrival at the said station, and negligently left hampers in the way of passengers departing from the carriages at the said station, whereby the plaintiff, having been received and carried by the defendants as a passenger, on the said railway, from Wakefield to Thornhill Lees, and being in the act, on his arrival at the last-mentioned place, of departing from the said carriages, fell over the said hamper and was thrown down with great violence at the said station, and was greatly shaken, and suffered great pain, and was permanently injured, &c.

Plea, not guilty. Issue thereon.

This action was tried, before Blackburn,

J., at Leeds, during the West Riding Summer Assizes, 1864, when the following facts appeared in evidence.

At the Thornhill Lees station on the defendants' railway, the west end of the platform at the north side of the line was opposite to the east end of the platform at the south side, and there was a level crossing between those points, which was used by passengers arriving at the south platform in order to get to the place of exit from the station, which was situate on the north platform. After dark on the 12th of November 1863, the plaintiff alighted on the south platform from a train in which he had come from Wakefield. The train was so long as to reach considerably beyond the level crossing at the east end of the platform, where the ticket collector was stationed with a light; and, after giving up his ticket there, the plaintiff was directed by the collector to "pass on," and in order to reach the place of exit on the north platform, he walked, with other passengers, alongside the train, intending to cross over the line behind it. This was the usual practice of passengers, and was not objected to by the defendants' servants, when the arriving train was of extraordinary length. While so walking, the plaintiff stumbled over a hamper which had been taken out of the train, and set down at the side of the line, and he thereby sustained the injuries complained of. There was no light near the place where he fell.

The jury found a verdict for the plaintiff, damages 200*l.*, the Judge reserving leave to move to enter a nonsuit, if the Court should think there was no evidence of negligence.

Overend having obtained a rule accordingly,—

Manisty and *Kemplay* (Nov. 17, 1864) shewed cause, contending that there was strong evidence of negligence, it being proved that the plaintiff was only following the practice usually observed under similar circumstances, and that his being obliged to go by the path where he sustained the injury, amounted to an invitation to him by the company to use that path.

Overend and *Maule*, contra, insisted that there was no invitation or even sanction given to the plaintiff by the company to use the road he did. It was his duty to wait where the ticket collector was till the train moved

off. Even if there had been a sanction, the fact that there was no light where the plaintiff fell would not amount to negligence on the part of the defendants—*Wilkinson v. Fairrie* (1).

[POLLOCK, C.B.—There was in that case no obligation to go where the accident happened.]

It was the usual practice at the station to deposit goods taken from the trains alongside the line, where the hamper was, and therefore *Cornman v. the Eastern Counties Railway Company* (2) is in point.

[CHANNELL, B. referred to *Toomey v. the London, Brighton and South Coast Railway Company* (3).]

Cur. adv. vult.

POLLOCK, C.B. delivered the judgment of the Court (4).—In this case the learned Judge reserved the question for the Court in these terms: "I think there is a case to go to the jury, and I reserve leave to enter a nonsuit if the Court should think there is no evidence; the defendant not to appeal without the leave of the Court of Exchequer." The accident appears to have happened by reason of the train, in which the plaintiff arrived at the station, being of greater length than the platform on which the passengers had to alight, in consequence of which the ordinary way across the line for the purpose of getting at the opposite platform and the place of exit from the station was impeded and stopped up by the train; and it appears that the train remained as long as ten minutes or a quarter of an hour. This had happened before, and the passengers, therefore, had acquired the habit of passing along the line, so as to reach the opposite platform by going round the end of the train, and then crossing; and some evidence was given that when the passengers, on this occasion, were at the end of the platform on which they alighted from the train, where the tickets were taken, they were told to "go on," and certainly there was no other way of going

on, except by going alongside and round the end of the train. Under these circumstances, we are all of opinion that there was some evidence of negligence to go to the jury. There was no light; there was a hamper put down, which the plaintiff stumbled over, and he received considerable damage. It appears to us sufficient to say that, if on the arrival of a train there is an obstacle to the passengers getting at the place of exit from the station, which remains there for ten minutes or a quarter of an hour, there is some evidence of negligence; certainly a passenger should be able to get away in much less time than a quarter of an hour after the arrival of the train by which he came; and, if that be so, the defendants would be responsible for any mischief that arose in this case, unless the jury thought that the accident was entirely attributable to the negligence of the plaintiff. Under these circumstances, we are of opinion that it is impossible to say that there was not some evidence of negligence. The rule, therefore, to enter a nonsuit will be discharged, and the verdict must stand.

Rule discharged.

1865.	}	LATOCHE AND OTHERS v. LATOCHE.
Jan. 23;		
Feb. 10.		

Feme Covert — Separate Estate — Promissory Note — Good Consideration — Statute of Limitations.

*A married woman, who had property settled upon her in the usual way to her separate use, in 1837 made a joint promissory note with her husband for 950*l.*, and delivered the same to his bankers as a security for his overdrawn account; from time to time the note was renewed until the death of the husband, in 1855, the last renewal bearing date 1848. At the time of his death the debt due by the husband to the bankers was 2,340*l.* 16*s.* 4*d.*, which was reduced by the realization of certain other securities they held to 917*l.* 11*s.*, for which sum, on the 28th of August 1856, she, after her coverture had determined, made and delivered her promissory note:—Held, that there was a good consideration for the last-mentioned note, as the note made in 1848, although made during coverture, was binding on her separate estate in equity, and that it was*

(1) 32 Law J. Rep. (N.S.) Exch. 73; s.c. 1 H. & C. 633.

(2) 29 Law J. Rep. (N.S.) Exch. 94; s.c. 4 Hurl. & N. 781.

(3) 3 Com. B. Rep. N.S. 146; s.c. 27 Law J. Rep. (N.S.) C.P. 39.

(4) Pollock, C.B., Bramwell, B., Channell, B. and Pigott, B.

immaterial whether it was barred by the Statute of Limitations or not.

This was a SPECIAL CASE stated for the opinion of the Court. The facts and arguments sufficiently appear from the judgment.

Bovill (*W. R. Cole* with him), for the plaintiffs, cited the following cases :

Ridout v. Bristow, 1 Cr. & J. 231.

Nelson v. Serle, 4 Mee. & W. 795; s. c.

8 Law J. Rep. (N.S.) Exch. 305.

Byles on Bills, 8th ed. p. 77.

Lee v. Muggeridge, 5 Taunt. 36.

Flight v. Reed, 1 H. & C. 703; s. c. 32

Law J. Rep. (N.S.) Exch. 265.

Pollock (*Harrington* with him), for the defendant, cited—

Lampleigh v. Brathwait, 1 Smith's Lead. Cas. 135, 140.

2 *Wms. Saund.* 137 f.

Johnson v. Gallagher, 30 Law J. Rep. (N.S.) Chanc. 298.

Bovill, in reply, cited—

Pease v. Hirst, 10 B. & C. 122.

Cur. adv. vult.

CHANNELL, B. (Feb. 10) delivered the judgment of the Court (1).—This was a special case stated without pleadings for the opinion of the Court, and was argued before us in the course of the present term.

The question is, whether the defendant is liable on a promissory note for 917*l.* 11*s.* dated the 28th of August 1856, payable to the plaintiffs or order.

The facts, as they may be extracted from the case agreed upon, may be shortly stated. The plaintiffs are bankers at Dublin; and they had for many years prior to 1837 and down to the time of his death a banking account with Mr. George Latouche, with whom the defendant Amelia Latouche intermarried in the year 1831. On the occasion of the marriage, property was settled in the usual way to the defendant's separate use. On the 25th of November 1855 the defendant's husband died. After his death she gave the note now sued upon. The circumstances which preceded the giving this note which are material to be noticed are the following. In 1837, her husband's account being then overdrawn, and the plaintiffs being aware that she had separate estate, agreed that her husband should have permission to overdraw his

account to the extent of 950*l.* for a period of two years, the plaintiffs retaining certain securities then in their hands, and having by way of further security a joint promissory note of the defendant's husband and herself for 950*l.* The defendant's husband and herself gave a joint promissory note for that amount.

In 1840 a new arrangement was come to, substantially the same as the former. A new joint promissory note was given, dated the 1st of August 1840, for the sum of 950*l.* In 1848 an arrangement was come to, and a third joint promissory note, namely, one for the sum of 1,000*l.*, dated the 1st of January 1848, was given by the defendant's husband and herself. The terms of this arrangement are not distinctly stated in the case. It is, however, clear that the note was given as a security to the bank for the overdrawn account of George Latouche. It is not, however, at all clear with respect to this note, whether there was any limitation of time during which the arrangement was to be enforced, as on the previous occasions. In 1855 the husband died. At that time there was a balance of 2,340*l.* 16*s.* 4*d.* due from him to the bank. This was reduced by securities, which have been realized, namely, assignment of a policy and of a legacy, to 917*l.* 11*s.* The bank then applied to the defendant by a letter, in which they state that this last-mentioned balance "is uncovered by any security, an application for your and Mr. Latouche's joint note for the same having been postponed on account of his illness." The defendant, in reply, expresses her regret that she is unable to pay this amount, and ultimately signs the note on which this action is brought. The question we have to decide is, whether she is liable upon this note; and we think she is.

We do not adopt the argument of the plaintiffs' counsel, that the words "for value on account of the late George Latouche" in the note precludes the defendant from shewing there was no consideration for her making it. But as the note *prima facie* imports a consideration, the onus of proof lies upon the defendant to shew that there was no consideration for this note, which was made at a time when she was not under coverture. We do not think that the facts stated in this case shew there was no consideration. The note of 1848, although

(1) *Pollock*, C.B., *Martin*, B., *Channell*, B. and *Pigott*, B.

made during coverture, was binding on the defendant's separate estate. Unless something occurred to discharge the defendant's separate estate from liability, there was, we think, a good consideration for the note now sued upon, made by her after her coverture was determined. It is not, we think, material that more than six years elapsed from 1848 to 1855, for it has been held that a debt barred by the Statute of Limitations, and as to which the remedy has gone, is still a good consideration for a promise in writing to pay. We think that the same principle applies to the present case, though the note of 1848 was signed by the defendant when covert, and only bound her separate estate in equity.

It was argued that the note must be taken to have been made subject to some agreement between the parties, either as to the time for which George Latouche was to be permitted to overdraw his account, or that it was to be a security (collateral to the assignment of the policy and legacy) for the then overdrawn account to the amount of 1,000*l.* only, and not a security for a new credit beyond the 1,000*l.*; and if such agreement existed, then that, 1,000*l.* having been realized on the policy and assignment of the legacy, the note of 1848 was in effect satisfied, and afforded no consideration for the subsequent one. We think, however, that it does not appear upon the case stated that there was any such agreement, and it is for the defendant to shew it. The only statements in the case at all tending to shew such an agreement are contained in the letters of the plaintiffs of the 31st of July and the 28th of August 1856, and which are to the effect that the balance on the amount of the policy and legacy is uncovered by any security. This, however, when taken with the next sentence, "an application for your and Mr. Latouche's joint note for the same having been postponed on account of his illness," seems to refer to the fact that the six years had expired since the note of 1848, rather than to admit that that note would not have been during the six years a security for such a balance on the ground of any agreement subject to which it was given. Our judgment will, therefore, be for the plaintiffs.

Judgment for the plaintiffs.

1865. } *In re* ROBERT EATON.
Jan. 31.

Legacy Duty—Attachment for Non-payment—13 & 14 Vict. c. 97. s. 8.

Under the 8th section of the 13 & 14 Vict. c. 97, the Court will grant an attachment, absolute in the first instance, against a person withholding legacy duty, who has failed to shew cause why he should not pay the money to the Receiver General of Inland Revenue.

Coxon, on the 24th of November 1864, obtained a rule calling on Robert Eaton to shew cause why he should not pay to the Receiver General of Inland Revenue the sum of 24*l.* 4*s.* 1*d.*, which he had received for the purpose of paying legacy duty.

The 8th section of the 13 & 14 Vict. c. 97. is as follows: "If any person shall have received or gotten into his hands or shall receive or get into his hands any sum or sums of money as and for the duty upon or in respect of any legacy or residue, and shall improperly neglect or omit to appropriate such sum or sums of money to the due payment of such duty, or shall otherwise by or under any means or pretences whatsoever, improperly withhold or detain the same, every such person shall be accountable for the amount of such duty or sum or sums of money, and the same shall be a debt from such person, to Her Majesty, and recoverable as such accordingly; and it shall be lawful for the Barons of Her Majesty's Court of Exchequer in England, Scotland or Ireland respectively, upon application to be made for that purpose on behalf of the Commissioners of Inland Revenue, upon such affidavit as to such Court may appear sufficient, to grant a rule requiring such person to shew cause why he should not deliver to the said Commissioners an account upon oath of all such duties and sums of money as aforesaid, and why the same should not be forthwith paid to the Receiver General of Inland Revenue or to such persons as the said Commissioners shall appoint or authorize to receive the same."

It appeared on affidavit that Eaton had been duly served with the rule, but did not shew cause. The rule was afterwards made absolute; and

C. Hutton now moved for an attachment absolute in the first instance.—Eaton had disobeyed to the rule absolute of the Court, which was served on him in the usual

way; therefore there may be an attachment absolute in the first instance. This resembles the case of an attachment for non-payment of costs between subject and subject; and if a subject may in such case have the attachment absolute, *a fortiori* the Crown may.

POLLOCK, C.B.—We think that the Commissioners are entitled to an attachment absolute in the first instance.

MARTIN, B., CHANNELL, B. and PIGOTT, B. concurred.

Rule absolute accordingly.

[IN THE EXCHEQUER CHAMBER.]
(Appeal from the Court of Exchequer.)

1864. }
Dec. 2.* } GREEN v. ATTENBOROUGH.

Bill of Sale—Registration under 17 & 18 Vict. c. 36. — Alteration — Property in Chattels.

The filing of a copy of a bill of sale of personal chattels is valid and effectual under the statute 17 & 18 Vict. c. 36, although the original bill of sale has been previously altered or destroyed. The property in the chattels will remain in the person to whom they were conveyed by the deed on its execution.

This was an appeal, by the defendant, against the decision of the Court of Exchequer, discharging a rule to enter a verdict for the defendant, or for a new trial.

The question was as to the validity of a certain bill of sale, by which certain goods were assigned to the plaintiff as the security for a loan. At the time of the execution of the bill of sale a rough inventory of the goods which had been previously made by the plaintiff on several loose sheets and appended to the bill of sale remained fixed thereto. A few days afterwards a fair copy of the inventory was made and signed, and, with the consent of both parties to the bill of sale, the rough inventory was disannexed from the bill of sale and the fair copy affixed to it instead. A copy of the bill of sale and of this fair inventory was duly registered. The rough inventory and the fair copy exactly agreed.

Quain (*Hawkins* with him), for the ap-

pellant, contended that by disannexing the first inventory, the bill of sale was mutilated and altered by the plaintiff, and so rendered void; that as this was done before registration there was, in fact, no bill of sale to register under 17 & 18 Vict. c. 36, consequently that the bill of sale, not being duly registered, was inoperative under the statute—*Pigott's case* (1) and *Davidson v. Cooper* (2).

J. D. Coleridge (*Day* with him), for the respondent, the plaintiff, urged that all that the Bill of Sales Act, the 17 & 18 Vict. c. 36, required was that a copy of the bill of sale and schedule should be registered within twenty-one days after the execution of the bill of sale; that this had been done in the present instance; that the alteration was immaterial, as it was only carrying out the intention of the parties, and made with the full knowledge and consent of both; that even if the alteration were material, the property in the goods passed to the plaintiff by the deed at the time of the execution, and remained in him, as the requirements of the statute had been complied with.

[CROMPTON, J.—A bond or a bill, which lie in contract, may be vacated by an alteration; but I never heard of an estate in land being divested because the title-deeds conveying it were destroyed. The object of the act of parliament is to inform the public that on a bygone day a certain deed was executed. BLACKBURN, J.—Supposing the alteration vacated the bill of sale, what does it matter, if a true copy of the bill was filed within the twenty-one days? The property in the goods passed to the plaintiff on the execution of the bill of sale.]

ERLE, C.J.—The distinction is noticed by Lord Abinger, C.B., when delivering the judgment of the Court in *Davidson v. Cooper* (2), between the case where an altered deed is relied upon as the foundation of a right sought to be enforced, and where it is used merely as proof of some title resulting from its having been executed. Registration of a copy under this act, is not the least affected by the previous destruction of the original deed.

The other JUDGES concurred.

Judgment affirmed.

(1) 11 Rep. 27 a.

* Decided in the Sittings after Michaelmas Term, coram Erle, C.J., Crompton, J., Blackburn, J., Keating, J. and Mellor, J.

(2) 11 Mee. & W. 778; a. c. 12 Law J. Rep. (N.S.) Exch. 467; a. c. in error, 13 Mee. & W. 343; a. c. 13 Law J. Rep. (N.S.) Exch. 276.

1865. } CHANDLER v. DOULTON AND
Jan. 21. } ANOTHER.

Landlord and Tenant—Excessive Distress—Damages.

In an action for an excessive distress the plaintiff is entitled to nominal damages, although he proves no actual damage.

Declaration for an excessive distress.

Plea, not guilty.

The cause was tried, before Martin, B. and a special jury, at the London Sittings after Trinity Term, 1864. The plaintiff was tenant to the defendants of a mill and premises situate at Broad Street, Lambeth. The plaintiff being indebted to the defendants for six quarters of rent, amounting to 121*l.* 15*s.* 6*d.*, the defendants directed their broker to distrain for the same, and accordingly on the 15th of June 1863 the broker entered the mill and seized corn and flour to the value of 260*l.* as a distress for rent. He remained in possession of the premises until the 20th of June, when the plaintiff paid the amount of the rent and costs incurred in making the distress. At the trial the plaintiff proved no actual damage. The learned Judge directed the jury that, if the plaintiff had sustained no real damage, to find a verdict for the defendants. The jury found that the plaintiff had sustained no real damage, whereupon the learned Judge directed the verdict to be entered for the defendants, reserving leave for the plaintiff to move to enter a verdict for 1*l.* (being the amount agreed upon between the parties), if the Court should be of opinion that the plaintiff, notwithstanding he had incurred no actual damage, was entitled to nominal damages.

Laxton having obtained a rule accordingly,—

E. James and J. H. Hodgson, for the defendants, shewed cause.—This action for an excessive distress is brought under the Statute of Marlbridge (52 Hen. 3. c. 4), and that enactment is, that “distresses shall be reasonable and not too great, and they that take unreasonable and undue distress shall be grievously amerced for the excess of such distresses.” The true construction of this act is, that there must be some real damage done to the tenant. In *Piggott v.*

Birtles (1), Lord Wensleydale, then a member of this Court, in delivering the judgment of the Court, said, “The common law right of a landlord to distrain for rent service appears to be restricted at common law to the taking of a reasonable distress.” So Lord Coke intimates in his reading on the Statute of Marlbridge, c. 4 (2), which statute he there says, “agreeth with the reason of the common law.” But whether the duty to make a reasonable distress be created by the common law or by the statute an action will equally lie, if there be a breach of that duty, *and damage thereby arise to the person on whose goods the distress is made*,” but in the present case the defendant suffered no damage.

[*PIGOTT*, B. referred to *Proudlove v. Twemlow* (3). *MARTIN*, B. referred to *Rodgers v. Parker* (4).]

Laxton, contra, was not called upon to argue.—He cited *Smith v. Ashforth* (5).

POLLOCK, C.B.—I do not think that we need hear the learned counsel upon the other side. I think we must take it that the arrangement was made at the trial, as reported by the Judge. The case of *Piggott v. Birtles* (1) appears to me to mention several instances in all of which there was damage; and it is, I think, in reference to that case that Baron Parke, now Lord Wensleydale, thought, and the whole Court thought with him, that depriving a man of the use of his property for a week was a ground of damage and injury to him, and was a question fit to be left for the consideration of a jury. My Brother Martin, having consulted my Brother Bramwell, reserved the point. In my opinion the plaintiff is entitled either to enter the verdict for 1*l.*, or, if he were not he would be entitled to a new trial. The present verdict for the defendant cannot stand. The evidence disclosed facts which resemble those stated in *Piggott v. Birtles* (1), a case which decided that an excessive distress continuing for a week was an injury for

(1) 1 *Mos. & W.* 441; s.c. 5 *Law J. Rep.* (N.S.) *Exch.* 193.

(2) 2 *Inst.* 107.

(3) 1 *Cr. & M.* 326; s.c. 2 *Law J. Rep.* (N.S.) *Exch.* 111.

(4) 18 *Com. B. Rep.* 112; s.c. 25 *Law J. Rep.* (N.S.) *C.P.* 320.

(5) 29 *Law J. Rep.* (N.S.) *Exch.* 259.

which the jury might have given some damages. Under these circumstances, it appears to me that the rule ought to be made absolute to enter the verdict, according to the arrangement at the trial, for 1*l*. There was actual damage in this case, which, according to the case already alluded to, was a proper subject for a jury to consider.

MARTIN, B.—I am of the same opinion. The circumstances of this case were these. The defendants made a distress upon the goods of the plaintiff; it was obviously an excessive distress, for the goods seized were of more than double the value of the rent due; the corn and flour having been seized, the sheriff's officer remained in possession for a week; and ultimately he was paid out without a sale. The question is, then, whether I ought to have told the jury, "If you think there was an excessive distress, you must find your verdict for the plaintiff for some damages." I am of opinion that would have been a proper direction; and it seems to me, I own, that the case which has been cited—*Piggott v. Birtles* (1)—is conclusive upon the matter. I say that there must have been some damage in consequence of the act of the defendants. Mr. James contends that if a man distrained excessively and seized a much larger quantity of goods than was necessary to produce the rent, and within a short time afterwards, or immediately upon having ascertained the distress was excessive, admits that he is in possession of more goods than he ought to have taken, but is willing to confine himself to a reasonable quantity, and says, "I have taken too much in respect of my claim and I will now reduce it," that in such a case the landlord is not liable in damages; but I think we must treat the whole matter as one transaction, and what the landlord did and said after the seizure is entitled to no consideration. But that is not this transaction; it is nothing like it. The plaintiff in this case was a dealer in corn and flour, and he was prevented for a whole week in consequence of the distress from dealing with it. It appears to me that the judgment in the case of *Piggott v. Birtles* (1) shews that the plaintiff has sustained damage. The damages at the trial were agreed upon; perhaps 1*l*. is too much, but the amount was immaterial; 40*s*. was first named, and then a farthing, and then

1*l*.; I made it 1*l*., because I did not want to throw discredit upon the plaintiff's case; perhaps it would have been better if I had said 1*s*.; but it is an utterly immaterial circumstance. I may say that my Brother Channell is entirely of the same opinion, and he was strongly of opinion when the rule was moved that in an action for an excessive distress, under such circumstances, this was a proper direction to the jury.

PIGOTT, B.—I am of the same opinion. The jury have found there was an excessive distress, and it is impossible to say that there has not been some damage accruing for which the defendant would be responsible; they may be nominal damages, but no doubt the amount of damage will vary very considerably. It is a question of degree. If you seize a man's goods and hold them for a week, how can you say he is not put to inconvenience? The case of *Baylis v. Fisher* (6) was not so strong, but there the Court held the damages were excessive.

*Rule absolute to enter verdict for plaintiff for 1*l*. damages.*

1864.	}	
Nov. 7.		LONGLAND v. ANDREWS.
1865.		LONGLAND v. DOLING.
Feb. 10.		

Toll—36 Geo. 3. c. xxiv. (Local Act)—2 & 3 Vict. c. 93. and 3 & 4 Vict. c. 88. (Police Acts)—Exemption of Police Constable from Toll on Turnpike-road and Bridge.

The bridge erected and the roads made by a company of proprietors, under the provisions of 36 Geo. 3. c. xxiv., on which the company are authorized to take toll, subject to exemptions provided for in the act, are a "turnpike-bridge" and "turnpike roads" within the meaning of the 2 & 3 Vict. c. 93. and of the 3 & 4 Vict. c. 88. s. 1; and, therefore, the exemption from tolls granted by the last-mentioned act to police constables extends to such bridge and roads respectively.

These were cases stated by Judge's order for the opinion of the Court, pursuant to the provisions of the Common Law Procedure Act, 1852.

(6) 7 Bing. 153.

The plaintiff in both cases was the superintendent of the Southampton Police Force, established under the acts for the establishment of county and district constables, and the defendants were toll-keepers in the service of the Company of proprietors of Northam Bridge and Roads, and were appointed to take toll, the one from persons passing along the bridge, the other from persons passing through a toll-gate on the road hereinafter mentioned.

The questions in the two cases were substantially the same.

In the year 1796 the above-named company obtained an act of parliament, 36 Geo. 3. c. xciv. (which was to be considered as part of each of these cases) to enable them to build and maintain a bridge over the River Itchen, at or near Northam, within the liberties of the town of Southampton, to the opposite shore at or near Bitterne Farm, in the county of Southampton, and to make and maintain a certain road, with a footway by the side thereof, from the town of Southampton to the end of the said bridge at or near Northam, and a certain other road, from the end of the said bridge on the opposite shore at or near Bitterne Farm to a gate, called Botley Turnpike Gate, in the said county.

By the 2nd section of the act, the company are directed to build or cause to be built a good and substantial bridge at, near or from Northam aforesaid, over and across the River Itchen, to the opposite shore at or near Bitterne Farm, in the parish of South Stoneham, in the said county, with a proper ascent or approach to the said bridge at each end thereof, and fit and proper for the passage of travellers, cattle and carriages, with proper foot or causeways; and also one or more toll-house or toll-houses at the end or ends of, on or near to the bridge, with bars, gates and other proper conveniences for the collection of tolls; and it is enacted that the said bridge should for ever be and remain a public bridge, and all persons, horses, cattle and carriages should have free liberty upon payment of the respective tolls granted by the act, to pass over the bridge without any hindrance or interruption.

By the 8th section it is enacted that, in case the said bridge should at any time become impassable and unsafe for travel-

lers or carriages, the said company and their successors should cause the same to be forthwith rebuilt or repaired, and made safe and commodious for the passage of travellers, cattle and carriages, and in the mean time it should be lawful for the company and their successors, during all such time as the bridge should be impassable and unsafe as aforesaid, to provide a proper and convenient ferry for the passage of travellers, cattle and carriages over the said river as near to the said bridge as conveniently might be, and it should be lawful for such person or persons as the said company should appoint for that purpose, to demand, collect and receive for the passage of such travellers, cattle and carriages in the said ferry, before they respectively should be permitted to pass, the like tolls as were by the act authorized to be taken for passing over the said bridge.

By the 9th section of the act, directions are given for making the roads, with power to erect and set up toll-houses, toll-gates, bars and other proper conveniences, for taking the tolls granted in, upon and across the roads, or any part of either of them.

By the 21st section, in case any road or roads then in being should be continued or made part of the said intended roads, the persons liable to repair such roads at the passing of the act are to continue liable to such repairs.

By the 46th section it is enacted, that certain tolls therein mentioned might be demanded and taken at the several gates by such persons as the said company should appoint for that purpose, before any person, horse or other cattle, coach, waggon or other carriage should be permitted to pass over the said bridge, or through any or either of such toll-gates or bars: provided always, that it should be lawful to and for all and every person, and also to and for all and every carriage, horse, beast or other cattle or things chargeable with any of the tolls or duties granted by the act, to pass once for the same toll over the said bridge and through all and every the turnpikes, toll-gates and toll-bars to be erected by virtue of the act, without being liable to pay a toll at each turnpike, toll-gate or toll-bar, anything thereinbefore contained to the contrary thereof notwithstanding.

The 51st section empowered the company to erect gates on the sides of any of the said roads, or across any lane, highway, &c., contiguous to and leading into or out of such road and to collect tolls at the said gates, so as the same should not subject any person to a larger toll than was appointed to be paid for passing through any of the gates to be erected across the roads leading to the said bridge.

And by the 53rd section it is enacted, that the roads thereby directed to be made "should be deemed and taken to be *turnpike-roads* within the intent and meaning of the 13 Geo. 3. c. 84. (General Turnpike Act) and of the several acts made for the purpose of explaining, amending or repealing the same or some part thereof, and that all and every clause and provision contained in the 13 Geo. 3. c. 84, subject to the provisions of the said other acts (except when the same were otherwise altered by that act), should be in full force with regard to the roads included in this act, as fully and effectually to all intents and purposes as if this act had been made and passed previous to the 13 Geo. 3. c. 84."

By the 38 Geo. 3. c. 64. (an act to alter and enlarge the powers of the said act of the 36 Geo. 3. c. xciv.) so much of the 36 Geo. 3. c. xciv. as related to building the said bridge with the opening or waterway in the said current of the said river and constructing a drawbridge there was repealed; and by section 2. it is enacted, that in building so much or such part of the said bridge as shall extend across the main channel of the river, the said company should construct one or more arch or arches therein of as large exclusive dimensions as the nature or situation of the work would reasonably admit of, for the purpose of boats, barges or vessels passing underneath the same; and that in building so much or such part of the bridge as should extend across the lesser or Roman channel, the said company should have regard to the passing of ships and vessels from the sea to the place called Wood Mill and back again, and for that purpose should take care, order and provide that an opening or waterway of the width of 25 feet at the least, from side to side, be made or left in the mid current of the said lesser or Roman channel, so that a proper and convenient

drawbridge might, if the same should be found requisite as thereafter mentioned, be constructed and laid over the said opening or waterway of the same extent with or greater extent than the opening or waterway, and also two other openings in the same part of the said bridge, one at each end of the said drawbridge, each of which said openings should be of the width of 20 feet at the least from side to side in the said waterway, and should, when requisite as therein mentioned, order and provide that all proper and convenient ropes and pulleys, tackle and other necessary instruments and implements for opening the said drawbridge be provided for that purpose.

And by 3 & 4 Vict. c. 88 (also to be considered as part of each of these cases), entitled An Act to amend the Act for the Establishment of County and District Constables (2 & 3 Vict. c. 93), it was enacted in the 1st section, that no toll should be demanded on any *turnpike-road or bridge* for any horse, or police van, carriage or cart passing such road or bridge in the service of the police established under the provisions of the 2 & 3 Vict. c. 93, provided that the constable in charge of such horse, van, carriage or cart, if not chief constable, should produce an order in writing under the hand of the chief constable, or should have his dress according to the regulations of the police force at the time of claiming the exemption.

After the passing of the 36 Geo. 3. c. xciv, the said company built the bridge and made the roads authorized to be made, and also erected certain toll-gates and bars for taking the tolls granted by the said act, and amongst others a toll-house with a gate for collecting tolls at the Southampton end of the bridge, and a toll-house and bar at the other extremity of the road; and also a certain gate called the Hedge End Gate on the road from the end of the bridge, at or near Bitterne and leading to the said Botley Turnpike Gate; and the defendants Andrews and Doling had been appointed by the said company toll-keepers at the Bridge Gate and the Hedge End Gate respectively; and on the 1st of January 1863, the plaintiff, being such constable as aforesaid and being in charge of a horse and police cart, and in the service of the

said police, and having his dress according to the regulations of the police force at the time of the claiming the exemption hereinafter mentioned, and requiring to pass along the said bridge and also along the last-mentioned road, claimed the right to pass through the said gates without payment of any toll in respect thereof, nevertheless the defendants refused to allow him to pass along the bridge and along the said road without paying for toll the sums of 7½d. on the bridge and 3d. on the road; and the defendants respectively demanded the said sums from the plaintiff as and for such toll, and the plaintiff in order to pass along the said bridge and road was compelled to pay to the defendants respectively the said sums, which were now sought to be recovered back from the defendants respectively. It was admitted, by the plaintiff, that the tolls demanded and paid were the proper and legal tolls to be paid in respect of the said horse and cart, under the provisions of the 36 Geo. 3. c. xciv, if the plaintiff was not entitled to the exemption claimed; and the questions for the opinion of the Court were, whether the plaintiff, being such constable as aforesaid, having his dress, &c. as aforesaid, was exempt from paying the said tolls on passing along the said bridge and along the said road respectively.

J. D. Coleridge (Poulton with him), for the plaintiff.—The question, which is substantially the same in both cases, is, does the 1st section of the 3 & 4 Vict. c. 88. grant the exemptions which are claimed by the defendants? The matter is *res judicata* already, for the *ratio decidendi* adopted in *The Company of the Proprietors of Northam Bridge v. the London and Southampton Railway Company* (1) is to be adopted here. The definitions of “turnpike-road” given in that case by Lord Abinger, C.B. and Rolfe, B. (2) settle the question in favour of the plaintiff, while public policy and common sense point to the same conclusion.

(1) 6 Moo. & W. 428; s.c. 9 Law J. Rep. (n.s.) Exch. 165.

(2) A turnpike-road means “a road having toll-gates or bars on it, which were originally called ‘turns,’ and were first constructed about the middle of the last century.”—A turnpike-road is “a road on which a turnpike is lawfully erected and the public are bound to pay tolls.”

Lush (C. Pollock with him), for the defendants.—In *The Northam Bridge and Roads Company v. the London and Southampton Railway Company* (1) this Court only decided that the road in question was a turnpike-road within the meaning of the Railway Acts; that is, that a railway arch crossing it must be of a certain specified width. The definitions of “turnpike-road” given by the Judges were given solely with reference to those acts.

[CHANNELL, B. referred to *The King v. the Trustees of Great Dover Street Road* (3).]

The road in question is not a turnpike-road, within the meaning of the 3 & 4 Vict. c. 88; that act only adds an exemption to the exemptions already created by the General Turnpike Act. The bridge and road were made by the company out of their own funds; and the company do not receive the tolls as trustees for the public. The 13 Geo. 3. c. 84. was in force when the bridge and road were made, and was afterwards repealed by the 3 Geo. 4. c. 126, applying to “all acts then in force and thereafter to be passed.” This last act was then amended by the 4 Geo. 4. c. 95 (4), so that none of the exemptions given by the 3 Geo. 4. c. 126. apply here, this not being a *trust* road or bridge. The exemption given to policemen is to be ranked with the other exemptions given by the General Act, which include a constable *with* a prisoner, but do not extend to a constable *going to fetch* a prisoner. Now, that omission is supplied by the Police Act; and, consequently, the 3 & 4 Vict. c. 88. s. 1. only adds to the then list of exemptions over public turnpike-roads, and does not extend the area over which the exemptions previously created are to apply. Another distinction between general and special turnpike-acts is, that the latter contain no clause enabling a person to go and come during twenty-four hours for one toll. Again, the 53rd clause of the 36 Geo. 3. c. 94. refers to the roads only, and not to

(3) 5 Ad. & E. 692; s.c. 6 Law J. Rep. (n.s.) M.C. 25.

(4) Section 90. of 4 Geo. 4. c. 95. enacts that nothing in 3 Geo. 4. c. 126. shall extend to any road not under the care and management of trustees or commissioners.

the bridge; and the exemptions given by the General Act are inapplicable where there is a foot toll; so that the words "turnpike-bridge" can only mean a bridge where tolls are taken for cattle and vehicles only, and not for foot passengers.

Coleridge, in reply. — We are dealing with a local turnpike act, which is not to be construed differently according to the collateral statutes which are to be read in connexion with it. If we are dealing with a Police Act, the question is, what is a "turnpike-road" within the meaning of the Police Act? It must mean what ordinary people would understand by the words in ordinary language; so that the case which has been cited, and the definitions there given, apply here.

[POLLOCK, C.B.—There are no bridges with tolls, except proprietary bridges.]

It is only a proprietary bridge, which, within the meaning of the Police Act, can be a turnpike bridge.

Cur. adv. vult.

CHANNELL, B. (Feb. 10) delivered the judgment of the Court (5).—The question in *Longland v. Andrews* is, whether, under the circumstances stated, and having regard to the sections of the acts of parliament set out in the case, the plaintiff was liable to pay toll for passing over Northam Bridge, the bridge mentioned in the special case?

The toll was demanded under the provisions of the 36 Geo. 3. c. xciv., and would be payable by the plaintiff, unless he is exempted by the 1st section of the 3 & 4 Vict. c. 88.

The case seems to us to turn on the question whether the bridge mentioned in the case was a "turnpike bridge," within the meaning of the 1st section of the act last referred to? If so, the plaintiff, under the circumstances stated in the case, comes sufficiently within the other provisions of that section, and is entitled to the exemption claimed.

It was argued, on the part of the defendant, that the words "turnpike bridge" apply only to a turnpike *trust* bridge, and

that Northam Bridge is not a *trust* bridge; that the company of proprietors are owners of property in their own right, bound, indeed, to allow the public to pass over the bridge on payment of toll, where not entitled to exemption; but that the company in no case receive the tolls in trust for the public.

It was further argued that the words referred to, namely, "turnpike bridge," apply only to a bridge where tolls are taken in respect of horses and carriages only. We see no reason for so limiting the construction to be placed on the words of that section.

It is clear, we think, from the 2nd, 9th and 46th sections of the 36 Geo. 3. c. xciv. that a toll is authorized to be taken *at the bridge*; and though the 53rd section of that act only in terms applies to *road* (for the purpose of bringing roads within the operation of the General Turnpike Act), we think the bridge erected by the Company of Proprietors of the Northam Bridge Roads, at which the company are entitled to take toll, subject to such exemption as may be provided for, is a turnpike bridge, within the 1st section of the 2 & 3 Vict. c. 93.

We see no ground for limiting the very general words of that section, which speaks of "*any* turnpike bridge," to a turnpike *trust* bridge, as contended for on the argument, or to a bridge at which tolls are authorized to be taken in respect of horses and carriages *only*; and not, as by the 46th section of the 36 Geo. 3. c. xciv., for persons as well as for a horse or carriage. So to limit the operation of the 1st section of the 3 & 4 Vict. c. 88. would be, we think, to do violence to the plain language of the section. Our judgment must be for the plaintiff to enter a verdict for him, 40*s.* and costs of suit.

In *Longland v. Doling*, the question is substantially the same as in the last case. The toll claimed is for passing through a toll-gate on the road, and not over the bridge. We think that the exemption equally applies here, and we give judgment for the plaintiff.

Judgment for the plaintiff in both cases.

(5) Pollock, C.B., Bramwell, B., Channell, B. and Pigott, B.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER.

EASTER TERM, 28 VICTORIÆ.

1865. }
April 21. } SALOMONS v. PENDER.

*Principal and Agent—Buyer and Seller
—Commission.*

An agent who is intrusted to sell land for his principal at a commission, if he become the purchaser, is not entitled to any remuneration.

Declaration for work and labour done and performed, and for commission and reward due and owing in respect thereof, and on accounts stated.

Plea, never indebted.

The cause was tried at the London Sitings after Hilary Term, before Martin, B. and a special jury. It appeared from the evidence that the plaintiff was a surveyor, and brought his action to recover the sum of 456*l.* 10*s.*, which he alleged to be due to him for commission on the sale of land of the defendant. The defendant was possessed of 1,860 yards of land in Oxford Street, Manchester, and in a conversation with the plaintiff, told him, that if the plaintiff could get him, the defendant, 10*s.* per yard per

annum he would sell it. In the year 1864 a company was formed for the purpose of building a theatre. The plaintiff, with Messrs. Peacock and Negroponte, and some others, were the promoters of the company. In the beginning of 1864 the promoters of the company offered through the plaintiff to purchase the land at 10*s.* per yard. The defendant accepted the offer, but no written contract was entered into at the time. The purchasers, however, relying on the parol contract, commenced building operations some weeks before the date of the written contract was signed. The written contract for the sale of the land was entered into, signed by Peacock and Negroponte as buyers, on the 13th of April 1864. The plaintiff became a shareholder in the company on the 14th of April, and the company was registered as the Public Entertainments Company (Limited) on the 15th of April. The defendant subsequently became a director in the company. On behalf of the defendant it was contended that as the plaintiff was a promoter and director in the Public Entertainments Company, and therefore one of the purchasers of the land, together with Peacock and Negroponte, he

could not recover any commission. The learned Judge directed the jury, that if they thought that the plaintiff was a partner with Peacock and Negroponte in the purchase of the land, to find their verdict against the plaintiff. The jury found a verdict for the defendant.

Bovill moved for a rule for a new trial on the ground of misdirection. The question is, whether when a man is employed as an agent to sell land for another he is entitled to charge a commission, when he is himself the purchaser or one of them.

[*MARTIN*, B.—A man cannot be an agent for another and a principal in the same contract.]

If an agent employed to sell property becomes the purchaser, the principal is not bound by the contract. He may repudiate it if he pleases; but if he adopts the contract and takes the benefit of it, he cannot turn round and say to the agent, I will take the benefit of your work and labour, but I will not remunerate you for it. Suppose a man says to another—If you can find me a purchaser for my land at 10*s.* a yard, I will pay you commission; and the agent says, I have found you a purchaser, pay me my commission. The contract is fulfilled. Why is the person employed not to be paid his commission? Surely the principal cannot take the benefit of the introduction, and decline to pay for it?

[*MARTIN*, B.—The agent cannot recover because he has taken upon himself a position incompatible with the duty of an agent. *BRAMWELL*, B.—Besides, when he is employed to find a purchaser, that means, he is to find a third person as purchaser. If he is the purchaser himself he does not fulfil his contract.]

One way of putting the case is, that it is a contract to get the seller 10*s.* a yard for the land, less commission; no mention whatever is made about a third person.

[*MARTIN*, B.—Suppose a man offered 11*s.* a yard for the land, is he not bound to communicate that to the principal?]

Yes, and if the principal adopts the contract he must pay the commission. In *Story on Agency*, sect. 211, it is said, "Indeed, it may be laid down as a general principle, that in all cases where a person is either

actually or constructively an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers."

POLLOCK, C.B.—If there were any species of authority for breaking in upon the general principle, I should be very much inclined not to refuse a rule, but to allow the matter to be argued. But I have heard nothing, either in the way of authority or argument, which satisfies my mind that a person can, in the same transaction, buy as principal and also charge a commission as agent. I do not think that the privilege of repudiation is of such great value as that because a man may repudiate a contract, he must therefore be held bound to pay the commission when he has sold the land, in point of fact, to the very man who charges the commission. I think a man cannot charge commission for a sale in which he himself is the buyer; and on this ground it appears to me there should be no rule.

BRAMWELL, B.—I think my Brother *Martin's* view was quite correct. It certainly may be a little hard upon the plaintiff, whose interest in the land may be very much smaller than the commission he would have got if he had sold it to third parties; but we must look to the case on principle, and it appears to me that Mr. *Bovill* has made a fatal concession. He concedes that the defendant might have rejected the bargain if the defendant had known that the plaintiff was one of the principals. Why? It must be because the plaintiff had no authority to make such a contract on his employer's behalf; if the plaintiff had no authority to make the contract, he was not employed to enter into it, and therefore he has earned no commission. It is almost a matter of demonstration. It is quite true that the defendant gets the benefit, if benefit it be; but he may say, "If you choose to bring about a contract for my benefit, which I did not employ you to do, I will not pay you as if I had employed you—it is the act of a volunteer, and I will take advantage of it." But there is another view. He might say, "I did not employ you to make this contract, but you have

made it, and you have altered my position by what you have done, and I am not under an obligation to reject it." It seems to me that the case is against Mr. Bovill, even in his own way of putting it, and that there should be no rule.

MARTIN, B.—I am quite of the same opinion. It seemed to me, and the principle on which I acted at the trial was, that the plaintiff was employed to act as an agent, and it did not strike me in the way my Brother Bramwell has put it; although there seems to be a perfect answer on that ground, which is rather a narrow one. The view I took of it was this: that when a man is employed as agent, that is, to be middle man between his employer and another principal, if he himself becomes that principal, he takes a different position from that of agent; he becomes a principal, and his doing so annihilates any right as agent. That is the principle I acted on; but I think my Brother Bramwell has given a technical answer to this case, that, in point of fact, the plaintiff has never done that which he was employed to do and for which he was to receive a commission; for what he was to do was to sell to an independent third person, whereas he sold to himself and in point of fact never did that labour for which the defendant contracted to pay him. But there is another view of the matter. Mr. Bovill stated that here there was a contract for a sale which was not rescinded, and therefore the plaintiff was entitled to commission. In my judgment that is a pure fallacy. It is true that if the defendant desired to rescind the contract of sale he must do so *in toto*. But the contract in which the plaintiff sues is by no means a contract for sale; it is a by-contract altogether. In *Story on Agency*, page 172, section 210, the learned writer says, "In this connexion also, it seems proper to state another rule in regard to the duties of agents, which is of general application, and that is, that in matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence and zeal of the agent, for his exclusive benefit." And

then he goes on, "It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interest of his principal, as far as he lawfully may; and, even if impartiality could possibly be presumed on the part of an agent, where his own interests were concerned, that is not what the principal bargains for"—which is what my Brother Bramwell stated—"and, in many cases, it is the very last thing which would advance his interests." Then he goes on to cite a variety of instances, from writers on the Civil law, to that effect, and says, "If, then, the seller were permitted, as the agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other; and thus a temptation perhaps, in many cases, too strong for resistance by men of flexible morals, or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct and even crime. It is to interpose a preventive check against such temptations and seductions, that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity. This doctrine is well settled at law; but it is acted upon in Courts of equity to a very large extent." Mr. Justice Story therefore is a direct authority against this motion. Mr. Bovill read a passage which says that where a person is an agent for another, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers. What is meant is this, that where a property is sold by an agent and afterwards a suit is commenced in the Court of equity by the principal against him, on taking the account between the parties credit would be given to the agent for the amount of his commission, so as to take the account fairly between them; and that would be reasonable.

Rule refused.

[IN THE HOUSE OF LORDS.]

1864.	}	THE ATTORNEY GENERAL v. THE EARL OF SEFTON.
May 30;		
June 7.		
1865.		
March 3.		

Succession Duty—16 & 17 Vict. c. 51. ss. 2, 10, 21, 39, 45, &c.—*Unsaleable or Unproductive Land, Duty payable on Succession thereto—Mode of Assessing and Time of Estimating Duty—Annual Value.*

The late Earl of S. died in 1855, and the defendant, the present Earl, became entitled, under the will of his father, to certain real property, in respect to portions of which he paid succession duty, at the rate of 1l. per cent. on the value; with respect to other portions, amounting to 48,000 square yards, in the neighbourhood of Liverpool, he omitted such portions from his return for assessment, being advised that no duty was payable thereon, inasmuch as the same was not in demand as marketable or building land, nor was capable of being sold or let profitably as such, nor was capable of being used productively for agricultural or other purposes, and was then and had been for ten years previously and ever since wholly unoccupied and unproductive. He informed the officers of Inland Revenue of such omission and his reasons for so omitting such portions, and was told in reply that if after any interval he should derive income or profit from such portions he would be expected to deliver a further account. Some time after the late Earl's death, the present Earl still denying his liability to pay duty, gave notice to the officers of Inland Revenue that he had sold 1,561 square yards of the land at 16s. per yard, and he subsequently sold a further portion thereof.

Upon an information, by the Attorney General, asking for duty at the rate of 1l. per cent. in respect of the defendant's succession to the whole of the 48,000 square yards, or at least in respect of so much of such land as had then been or might at any time thereafter be sold or otherwise disposed of, it was held by the majority of the Court of Exchequer, that the defendant was not liable to pay the duty claimed on any portion of the 48,000 square yards; that "annual value," in the 26th section, means

present actual annual value, and that such value, and not possible or prospective annual value, is the basis on which succession duty is to be calculated; and this decision was affirmed, on appeal, by the House of Lords.

Semble (per the Lord Chancellor and Lord Chelmsford), that property, such as that in the present case, capable of being sold, has an annual value within the meaning of the act; and (per the Lord Chancellor) a value equal to interest at 3l. per cent. on the sum that might have been realized if the property had been sold at the time of the accruing of the succession, and (per Lord Chelmsford) the value of an annuity which could be purchased with the amount for which the land would sell. But that, inasmuch as the Crown had in the present case assented to the statement of the Earl that the property was of no saleable value at the time of his succession, it must be bound by such assent.

This was an appeal from the judgment of the Court of Exchequer on the 6th of July 1863, in a suit instituted on behalf of the Crown for the recovery of succession duty, and the questions in the appeal were the same as were involved in the suit below; that is to say, first, whether succession duty is payable in respect of real property which at the time of the successor becoming entitled thereto, and subsequently during his possession thereof, is not actually yielding income, but which is eventually sold by the successor for value? and, secondly, whether, if duty be payable, the amount of such duty is to be calculated on the value of the succession at the time when it fell into possession, or on the value realized by the subsequent sale?

The circumstances giving rise to the question in dispute are fully detailed in the report of the case in the Court below (1), and may be shortly re-stated as follows:

Under the will of the late Earl of Sefton, who died on the 2nd of August 1855, his son, the present respondent, became entitled in possession on his father's death to certain land, part of the Toxteth Park estate at Liverpool, in respect of which it

(1) 32 Law J. Rep. (N.S.) Exch. 230.

was admitted that but for the circumstances after mentioned he would be liable to pay succession duty at the rate of 1*l*. per cent.

The circumstances relied on as exempting the respondent from duty were, that at the time when he came into possession on the late Earl's death the land in question was neither in demand or marketable, or capable of being sold or let profitably as building land, nor capable of being used productively for agricultural or other purposes; and that it was then, and had been for ten years previously, and with the exception of what had been sold still was unoccupied and unproductive; and that no income had ever been derived by the respondent from the unsold portion, or, down to the time of sale, from that portion which had been sold.

Shortly after the late Earl's death, the respondent, in the course of some correspondence with the officers of Inland Revenue on the subject of his succession, informed them that he had omitted the land in question from his return for assessment, being advised that inasmuch as the same was wholly unoccupied and unproductive, and not capable of yielding income, no succession duty was or would be payable thereon. He was told in reply, that if after any interval from the late Earl's death he should derive income or profit from the land he would be expected to deliver a further account. And the matter remained in this state down to the time of the sale.

In the month of April 1862 the respondent, still denying his liability to pay duty, caused notice to be given to the officers of Inland Revenue that he had sold 1,561 square yards of the land at the rate of 16*s*. per yard. He subsequently sold a further portion consisting of 1,000 square yards at the rate of 6*s*. per yard. And thereupon the proceedings in the Court below were instituted for the purpose of obtaining a declaration that the respondent was chargeable with duty in respect of his succession to the land in question, or so much at least thereof as had been then or should thereafter be sold by him.

The respondent put in his answer, admitting the facts as stated by the information, and thereupon the suit was set down and

came on for hearing in the Court of Exchequer on the 27th of January 1863.

On the 6th of July the majority of the Court gave judgment, declaring that the respondent was not chargeable with succession duty in respect of the land in question. Hence the present appeal.

The Attorney General and *The Solicitor General* (with them *Locke* and *Hanson*), for the Crown.—The property in question is a succession clearly made liable to duty by the act of parliament, 16 & 17 Vict. c. 51; and there is nothing in the act which exempts it from duty under the peculiar circumstances stated upon the information. It is clearly a taxable succession, under the 2nd and 10th sections of the act, not afterwards exempted. The words "beneficially entitled" in the 2nd section simply mean that the property is not to be subject to a trust. To exempt the property from duty, it must be shewn that there is an impossibility, by any means which the Court of Exchequer can work out, of arriving at the value of this particular succession; such a possibility is not excluded here, and any augmentation of value accruing during the continuance of the succession may be afterwards then assessed. The 21st section is merely for determining a rate of valuation, and does not exempt anything from taxation which a taxing section taxes. The words "annual value," however, in that section do not require that the land should be at once capable of being let, or should be immediately productive. The annual value may be arrived at, if the principal value can be by any means arrived at. Notwithstanding the wording of the 21st section, the duty remains, in its nature and essence, a tax, not upon income, but upon capital—*In re Elwes* (2). Supposing this land to have devolved on a corporation instead of upon Lord Sefton, there would have been no difficulty in ascertaining the duty to be paid under the 27th section. It cannot have been intended by the 21st section that the interest of an individual is not to be taxed, when it would have been taxed if it had gone to a corporation under similar circumstances. Either duty was payable upon the succession when Lord Sefton died, or if not then, it was payable

(2) 3 Hurl. & N. 719; a.c. 28 Law J. Rep. (N.S.) Exch. 46.

under the 45th section, when a value could be ascertained to belong to the property. With regard to the series of provisions in the act, for general cases, which follow the 22nd section, those are cases which, if not dealt with specially by special provisions, would have fallen under the previous sections and the general taxing powers of those previous sections; and the fact that those particular cases are dealt with specially cannot take out of the general clauses cases which those particular sections do not deal with, because those particular sections take certain cases, and deal with them in a special manner. And when those particular sections are examined, if some of them do not hit the present case, which it is submitted they do, at all events there is a principle pervading them, which is consistent with, and favourable to, the claim which the Crown makes, and which negatives the notion of the legislature having meant to take such a case as the present out of the act, when the general words of the 10th section would cover it, merely because it may not have been the subject of some specific and particular provision. The 39th section shews clearly that the legislature contemplated that duty would be payable in a case like the present. This section shews also that the rules given by the act for arriving at the value do not apply in every case. The 39th section also gave the Commissioners power to demand, after the receipt of the notice sent by Lord Sefton, duty to be paid if after any time Lord Sefton should derive income or profit from the land. The legislature did not intend, in consequence of accidental circumstances, to relieve succession from taxation.

Sir Hugh Cairns and Mellish (with them *Crompton Hutton*), on behalf of the respondent.—The whole meaning of the act is, that the succession and its value must be ascertained at the time of the succession, except in certain specific cases; and, except in those specific cases, there is to be no repetition of the process of valuation at any subsequent period. There would appear to be cases in which, though property has become subject to succession, within the 1st and 2nd sections of the act, still there is no possibility of making it liable to the payment of duty. The principle pervading the

act is, that for the purpose of ascertaining the value, you are to deal with land as you find it in proper and natural use; you are not to look at it prospectively, and to some other use which a man might make of it, or which he might make of it at the time, if he altered the mode of occupation. The 39th section cannot assist the argument on the other side. That section merely gives the Commissioners power to make compromises and concessions, not to impose a tax. The section assumes that a tax is already imposed. In looking at the act, this is not a succession made liable to duty by the act. There is no section which makes it liable to duty. The 2nd section creates no liability to the tax; it is merely an interpretation clause as to what is a succession; there is no reference to duty in it. The duty cannot be levied under the 10th section; it is merely an introductory provision, and you cannot proceed under it until the value has been ascertained by the later sections. It merely defines what the rate is to be when the value is ascertained. The 20th section does not deal with assessments, but with payments. The 21st section gives the rule of valuation; and unless the present case can be brought under this section, no duty is payable, and it cannot be brought under it. The whole principle of the section is that of annual value, and that as the property stands; even in the cases provided for by the 24th section, the same principle of annual value is applied. The 22nd section shews that annual value is of the essence of the case where duty is to be paid on property not of a fluctuating character. Timber is an instance in which there may be a succession, and yet no duty payable; it would have been free from duty but for the 23rd section. This section assumes that no tax is imposed upon it by the general section. With regard to the 24th section, a similar observation occurs as to advowsons. The legislature has not said with regard to building land what it has said with regard to advowsons and timber, which are analogous to ground of no value at the time of the succession. In neither case can an immediate sale be compelled. The general intention of the act is, where there is annual value in the property at the time of the succession, that that value is to be taken as

the property is actually enjoyed, and an annuity is constituted upon the footing of that annual value; and this is done, even although, by a sale or by another mode of enjoyment, the property might be made more productive than it then is; and if there be no annual value, there is no tax until another succession comes. It is impossible to get the tax under the 10th section; then the Crown must come in with the 21st section, and it is impossible to get it under that section. A case similar to the present is not provided for by the act.

The Attorney General, in reply.—The question depends on the true interpretation of the 1st, 2nd, 10th, 20th and 21st sections, reading them in connexion with the 45th. The question presents itself in an alternative form. If because of the situation of the property at the time of the death of the late Lord Sefton, it was impossible that any duty could be assessed upon it then, it being of no value, the duty will be liable to be assessed upon it when it ceases to be of no value. On the other hand, if the property could be assessed to duty at the time of the death, we agree it could have been assessed; and there are grounds in the act from which it is clear that the duty is to be paid at some time or other, and the value can be ascertained. The 10th section, and that only, is the taxing clause, and all the rest is matter of regulation and modification. The succession here is a succession within the 2nd section, and the 10th section taxes "every such succession as aforesaid." Throughout the act there is shewn a principle which pervades the whole of it, of taxing the benefit when it accrues and comes into enjoyment if it is not meant, to tax it before.

THE LORD CHANCELLOR.—My Lords, two questions arise on this appeal. First, what is the subject of taxation in a succession? and secondly, at what time is that subject to be ascertained and assessed? For this inquiry the material clauses of the Succession Duty Act appear to be the 10th and 21st sections. The 10th is the taxing clause, and it imposes duties according to "the value" of the succession; which value is ascertained by the machinery of the 21st section. By this latter section it is declared,

that the interest of every succession in real property (with certain exceptions) shall be considered to be of the value of an annuity equal to the annual value of such property (that is, of the property the interest in which constitutes the succession), after making certain allowances; and the questions which arise are, what is meant by annual value, and at what time such value is to be ascertained?

Are the words "annual value" satisfied by taking the actual yearly value of the property in its existing state and manner of enjoyment, or the value which it would yield if applied or enjoyed in a different manner? And is the annual value to be ascertained at the time of the accruer of the succession, or will it include any future value, which it is certain or probable that the property will have within a short period of time? Upon these questions I think it clear that the value must be ascertained at the time of the accruer of the succession; and when the property is at that time yielding or capable of yielding annual income. I agree with the Lord Chief Baron and Mr. Baron Wilde(3), that the full present actual yearly value of the property in its existing

(3) The judgment of Mr. Baron Wilde not having been read in the Court below is not contained in the previous report. It is as follows:—"The defendant in this information appears to have succeeded to a plot of land at Liverpool, which was not at the time of his succession devoted to any remunerative purpose. Its immediate vicinity to a large town renders it probable that before long it will be very valuable as building land. And the question for our determination is, in what manner, and on what principle, is the succession duty in respect of such land to be assessed? Whether, on the one hand, the actual beneficial value at the time of the succession is to be looked at, or whether, on the other hand, it is competent to the Crown to any and what extent to regard the future but proximate, I had almost said immense, increase in value which awaits the land for building purposes? The governing sections of the act are as follows: By section 2. of the statute every successor is made liable to pay a tax 'in respect of every such succession, according to the value thereof.' It is not the value of the 'property,' or 'land,' but the value 'of his succession' which is the object of the tax and criterion of its amount. In the course of the argument in this case, various modes have been suggested in which this value should be ascertained. The results obtained are so widely different, and the principles of so universal an application, that the importance of arriving at a true determination can hardly be exaggerated. The next important section is section 21. It provides for the mode in which the value of

state or mode of enjoyment is the subject of assessment.

I concur with Mr. Baron Wilde, that no system of assessment or charge can be adopted, which draws into the calculation of value a prospective or future benefit, which is uncertain as to the time of its incidence. But there may be successions which at the time of accruer neither yield nor are capable of yielding in their existing state any annual income, but yet are saleable and would fetch in the market considerable sums; and in such cases I incline to think (but the point does not now require decision) that the property which forms the succession (not being excepted from the operation of the act, which is the case with unopened mines, timber and advowsons) has an annual value within the

meaning of the act, namely, a value equal to interest at 3l. per cent. on the sum that might have been realized if the property had been sold at the time of the accruing of the succession, and that the successor cannot baffle the statute by postponing a sale until a future period. Such might have been the course adopted in the present case, for it is impossible to suppose that land which sold for a large sum of money within a few months after the accruer of the succession was not of some value to be sold at the time of the succession. But this course was not taken, and the present appeal must be decided on the facts which are clearly admitted by the Crown.

For if the property has not at the time when the interest of the successor accrues any saleable value, or any actual or potential

successions to real properties are to be estimated, and it declares that this shall be done through the medium of an annuity. This annuity once ascertained the rest of the calculation is easy enough, and, so far as I am aware, admits of no doubt. Now, for calculating this annuity, the section desires us to refer to the 'annual value' of the property. It is to be 'an annuity equal to the annual value of the property.' And here it is that the question arises, What is the meaning of the 'annual value of the property'? The meaning attached to these words by the Crown officers is as follows: That the land should be valued, taking into consideration not only the rent, profit or benefit which it then produces, or is capable then of producing, but in addition thereto the future advantage which may attach to it from any cause whatever, such as the advantages of situation (involving building or occupation value), mineral strata, which in future may be worth working, brick earth capable of future productiveness, stone which may in future be quarried, and the like; all these matters should, they say, be brought into due consideration, and a present capital value fixed on that basis. This capital value so ascertained is to be turned into an annual sum at 3l. per cent., which will then represent the 'annual value' intended by section 21; so that if a man came to the succession of an acre of land then used as arable land, and producing 40s., but which was in the vicinity of a large and increasing town, 'the annual value for taxation purposes would be, not the 40s., but so much in addition, as a calculation of the probable future value of the land reduced to an average annual value would add thereto. But is this the annual value by the section intended? There are several grave objections to such a conclusion.

"In the first place, there is no language in the section authorizing the recourse to a calculation of average and the adjustment of a hypothetical annual value based upon expectations, however well founded, of the future. There is no system or method of making such a valuation indicated. The only words

are 'annual value,' and these without more would seem to mean 'actual' 'annual value.' But, moreover, it appears to me that when the legislature did intend this mode of calculation to be adopted they have distinctly said so. For in section 26, when it becomes necessary to provide for the case of manors, and opened working mines, whose amount is said to be fluctuating, the act, by express words, provides 'that the principal value of such property shall be ascertained, and the annual value thereof shall be considered to be equal to interest at 3l. per cent. on the amount of such principal.' This section is very instructive, for we have the legislature providing for an exceptional case the very system which it is now contended may be adopted under section 21. for the common case. But there is this further objection: The provisions of section 21. declare that the annuity representing the annual value having been ascertained, should be treated as an annuity payable during the residue of the successor's life, or for any less period during which he should be entitled thereto, and such annuity shall be valued according to the table in the schedule, and the duty charged upon such value. The object of taxation, therefore, was the actual benefit derived by the individual, and not the property itself. Each successor in turn is intended to pay a duty proportioned to the duration and extent of his enjoyment of the land, and no more. Any system of charge, therefore, which draws into the calculation a prospective and future benefit, uncertain as to the time of its incidence, has the vice of making a tenant for life or shorter period, pay upon the footing of an event which may not occur in his time, and for a benefit which may not accrue during his tenancy. Now, it is urged that if some system is not adopted which takes account of a value which, though future and uncertain, may, as in the present case, be something more than probable and near at hand, the result would be that the successor would obtain a benefit in respect of which he would pay no duty. And this is undoubtedly true, and it is the strength of the argument on the part of the

annual value, it is clear that it is not capable of being assessed, and that it is not a "succession"; which word is defined to mean property chargeable with duty under the act. And this is, as between the parties before us, the condition of the property in question. The information admits "that at the time of the death of the defendant's father, and of his becoming entitled to the land, the same was not in demand or marketable as building land, nor was it capable of being sold or let profitably as such." And then the word "profitably" is explained by the subsequent allegation, "that the land was not, at the time of the defendant's becoming entitled thereto, capable of being used productively for agricultural or other purposes, and that such land was then and had been for ten years previously, and has

Crown. But it is by no means plain that the legislature intended to prevent such a result. If the question lay between a system which should make a successor pay for a benefit he might never receive, and one under which a successor might possibly receive a benefit for which he never paid, I can well understand that the latter might be the alternative chosen. Moreover, it is to be borne in mind that, as the property pays duty afresh as it passes into each successive hand, the Crown will receive duty on the increased value at the next devolution of the property after such value has accrued; and this was probably all that the legislature intended. But there is another side to the question. Landed property, more especially houses, may fall in value as well as rise. If prospective increase is to find a place in the determination of annual value, prospective decrease ought to do the same; and a man coming into possession for life of a row of houses in London, the actual net rental of which was then very high, might claim the right to insist on the probable fall in value of his house property, as situate in a quarter then going out of fashion. It is not easy to conclude that the legislature contemplated these hypothetical bases of value worked out by calculations both complicated and uncertain, and still less so to conclude that they should have left all this to be conveyed (in a strictly and remarkably well drawn act) by the special words 'annual value.' The truth is, that anything like exact justice between the Crown and the successor, forcing him on the one hand to pay to the last farthing for all that he receives, and protecting him on the other from paying for anything more than he actually enjoys, can only be obtained by some system which should provide for the incidence of the tax at the time when the increase or decrease in value takes place, so that instead of the succession being dealt with, and its value for tax ascertained once for all at the time of the successor becoming entitled, the account would be kept ever open, and the tax would be increased or reduced *pari passu* with the rise and fall in the annual value

ever since been wholly unoccupied and unproductive, and that during no part of the time has any income or annual profit been derived from it." Upon these admissions, I am of opinion that the property, the respondent's interest in which is alleged to be a succession, had no assessable value at the time of the respondent becoming entitled, and that the Crown is not entitled to any duty. I shall, therefore, move your Lordships that the decree of the Court below be affirmed, and that the petition of appeal be dismissed, with costs.

LORD WENSLEYDALE.—My Lords, the question in this case, which is very important, arises upon an information on the Revenue side of the Exchequer, on the Succession Duty Act, 16 & 17 Vict. c. 51. The somewhat loose and inaccurate form

of the succession. This would attain perfect adjustment of taxation to benefit, but it would be in practice perfectly intolerable. And the legislature have, as it seems to me, wisely avoided anything of the kind, and to have been content to tax improved values in land, and the lucrative possession of land used for building, in the hands of those who succeed to land then so used. Some attempt was made in the argument to contend that the legislature had in fact provided for this intermittent method of levying the tax, and reference was made to section 37. for that purpose, which speaks of a successor who has not obtained the whole of his succession at the time of the duty becoming payable. But the learned Solicitor General, whose masterly argument threw all possible light on the intendment of these various clauses, hardly ventured to take his stand on this section 37, which, when carefully read, is obviously framed to meet a totally different case. I am, in the result, clearly of opinion that the words 'annual value' mean the actual present annual value of the land at the time of the succession; that such actual annual value must be measured (except in cases where *mala fides* can be successfully imputed) by the money benefit which the successor annually derives from the land, or which he is capable of deriving from it, in the condition and used for the purposes to which the land is then devoted. The facts agreed to by both parties in reference to the land in question in this case are very peculiar. It is difficult to conceive of any land at Liverpool that it was not capable of being used productively for any purpose during ten years before Lord Sefton came to his succession, and continued in that state until seven years after his succession, when portions were sold for building. But with the correctness of these facts we have nothing to do. I am bound to accept them as proved. The result, therefore, of the conclusions which I have above arrived at, as applied to this case, will be that if the land had really no annual value at the time of Lord Sefton's succession, he is discharged from duty in respect thereof."

in which the information is drawn, at first sight raised some little doubt what was the precise question meant to be raised. Upon carefully considering the statements of facts in the information, I have come to the conclusion that it is meant to be stated that the land had no annual value at the time that the present respondent succeeded to it, and the question for us to decide is, whether in that case the present Earl of Sefton is liable to succession duty. The information states the death of the late Earl of Sefton on the 2nd of August 1855; that the respondent sold a part of the land in question in 1862, and a further part in the same year, in respect of which the Crown claims succession duty; that the Crown and the respondent agreed that the land was not capable of being sold or let profitably as building land; that at the time of the respondent succeeding it was not capable of being used productively for agricultural or other purposes, and had been for ten years unoccupied and unproductive, and that no income or annual profit had been derived from it up to the time when the sale took place. That would leave the question unanswered, whether it could be made productive of some annual profit with ordinary care. But the information goes on to state that the respondent sent a notice that the land in question was wholly unoccupied and unproductive, and not capable of yielding income fluctuating or otherwise, and that, therefore, the respondent was not liable to pay duty. And, again, in April 1862, a notice was sent that the land in question was wholly unoccupied and unproductive, and not capable of yielding income fluctuating or otherwise, and that, therefore, he was not liable to succession duty. And the information states that those statements so made were according to the facts. We must, therefore, take them, I think, to be so. It seems that the result of these statements in the information is, that at the time of the succession taking place on the death of the father, the annual value of the waste land in question was nothing. The land produced no rent, and was incapable of yielding any, if ordinary care was taken to make it as productive as it could be reasonably made; and the question then for your Lordships is, whether, the annual produce during the first year of the succe-

sion being nothing, any succession duty is payable? I think it is not.

The very able opinions of the Lord Chief Baron and Mr. Baron Wilde, who have discussed the question most fully, have satisfied me that the calculation of the succession duty which is to be on successions according to their value (by section 10), and is to be calculated by section 21. at the value of an annuity equal to the *annual value* of the property, and payable from the date of the successor becoming entitled thereto in possession in eight equal half-yearly instalments, the first to be paid twelve months next after the successor has become entitled to the *beneficial* enjoyment of the real property. The beneficial enjoyment means no more than in his own right, and for his own benefit, not as trustee for another. If the property is, then, of no annual value whatever, there is no basis whereon to make any calculations. If the land increased afterwards in value by the exertion and employment of the capital of the successor in improving his own property, it is out of the question to suppose that such increase of value should be taxed. That never came in any degree from the predecessor. If the property should increase by the advancing prosperity of the neighbourhood, or by wholly accidental circumstances, as the discovery of minerals, such increase of value does not appear to have been in the contemplation of the legislature. Neither its increase nor diminution after the succession took place seem to have been thought of by the legislature. This part of the case has been most ably discussed, and very satisfactorily to my mind, by two of the Judges below, and particularly by Sir James Wilde, who has entered more fully into it. All that the act says is, that the taxation in this particular case of land simply is to be according to the *annual* value, not the *whole* value of the *corpus* of the land. For land of fluctuating value—for land producing casual profit, as timber and for mines—the act has made special provisions. For land alone, simply, the only mode of taxing is a percentage, varying in amount with the remoteness of relationship, and in the clause imposing the duty expressly it is to be according to the *annual value*, beginning at the period of first enjoyment, and payable annually, the first portion at the end of the first year.

Martin, B. argues that it cannot be supposed that the legislature could have meant to leave valuable land, much more valuable land than the best land used in agriculture, untaxed. But no proposition can be more clear than that, however likely it may be that such land should not be omitted, the subject cannot be taxed unless there are words clear enough to impose it. There must be clear words. There certainly are none of that character. It is clear that nothing but *annual value* is taxed. It was admitted, in the very able argument of the Attorney General, that whenever it is to be actually taxed, and in the 21st section, which enacts the time of calculation, no other time for its commencement is contemplated than the beginning of the succession; and if there is no annual value there is none to calculate from, and what the legislature requires cannot be done.

But it is contended that the moment annual value begins to arise the calculation ought to begin. Is this to be the case? Is the waste land to be taxed if it becomes valuable ten or twenty years afterwards? Is there to be a distinction between those cases in which it becomes annually profitable, although by the industry or capital of the successor himself, or in part from the same cause? Are the eight half years to be dated from such an event however remote? Is there to be no inquiry whether that increased value is so caused in some degree by the successor's own capital or industry? Is there to be a fresh date for each additional improvement in several years so as to have continual succession duties as to each part? I consider that the legislature never contemplated such a succession of taxes, which it would be difficult to ascertain and fairly to adjust; but that they meant what they have said as imposing the duty with respect to land simply to fix it for the whole period of each succession once for all, and that according to one fixed criterion, the annual value of the land at the time at which the succession begins. There is no provision whatever made for any future calculations beginning from another period than the first period, than the first year of the succession, and if there is no annual value, then there is no duty. If there be any subsequent increase of value from any cause, the Crown will have the benefit of such increase on subse-

quent successions. As to the case suggested by my noble and learned friend the Lord Chancellor, where land has no value at the time when the succession begins, but is capable of being sold and so producing an annual value on the interest of money, I do not think it necessary to give any opinion, as it does not arise in this case.

The Lord Chancellor, in the course of the argument, suggested for consideration, whether the interpretation clause, which enacts that the term "succession shall denote any property chargeable with duty under this act," does not assist the Crown in this case. I do not feel sure in what way this enactment in the first section can be of use to the Crown. There is no doubt that the word "succession" does denote in the act a succession liable to duty, and the act provides for the mode of levying each duty; but it does not follow that everywhere, when that term is used, it has an addition to be made to it by construction, of a mode of levying it in another mode, if that provided is insufficient, as no doubt the legislature mean the tax to be levied by eight half-yearly portions of the tax, beginning at the commencement of the succession; but you cannot, by virtue of the definition, add another beginning at a different time, when that mode of levying is inapplicable. Therefore, I concur entirely with the motion of my noble and learned friend the Lord Chancellor.

LORD CHELMSFORD.—My Lords, in determining the question of the liability of the defendant to the payment of succession duty, we must take the facts as they appear upon the face of the information, in which there is an admission that "the several statements contained in the notice and letters set forth are according to the fact." Now, by the notice delivered to the Commissioners of Inland Revenue accompanying the defendant's account for assessment, it is stated that the plots of land as to which the question arises are "wholly unoccupied and unproductive, and not capable of yielding income, fluctuating or otherwise." The Board of Inland Revenue, acquiescing too readily in this statement, informed the defendant that if, after any interval from the late Earl's death, he should derive income or profit from the land, he would be expected to deliver a further

account, in order that the succession duty might then be calculated according to the value.

Now, whatever was the state of the land at the time of the succession, whether profitable or profitless, this mode of viewing the claim of the Crown was equally erroneous. Upon reference to the statute it will appear that the time when the question arises whether duty is to be paid, and, if payable, upon what value, must be determined, once for all, when the succession falls, and cannot be left for future ascertainment. If at the time when the successor becomes entitled to the property it is utterly valueless and incapable of realizing any annual profit, the liability to duty is not to be left open to the possible contingency of its thereafter becoming valuable, but must depend altogether upon its actual present condition. If it possesses any value upon which the duty may be calculated, there can no more be any future estimate upon its improvement in value than there could be a return of duty upon the deterioration of the property after the proper duty payable when the succession fell had been ascertained and paid. This appears to me to be clear from a consideration of some of the sections of the act. The 10th section enacts, "that there shall be levied and paid in respect of every such succession aforesaid according to the value thereof the following duties." These words necessarily refer to the preceding part of the act, where the meaning of the word "succession" is explained. The interpretation clause (section 1.) states, that in the construction and for the purposes of the act the term "succession" shall denote any property chargeable with duty under this act. These words seem to be intended to embrace every description of property which in its own nature would be chargeable with duty, although from some accidental circumstance connected with it at the time when the succession falls, it might happen not to be capable of or liable to assessment. If they were construed to apply not merely to property of a kind to be *prima facie* liable, but to such as from some present circumstance temporarily affecting it happens not to be in a condition to be the subject of an estimate for duty, there would be a conflict between the meaning of the interpretation

clause and of the 2nd section. This latter section enacts, that "any beneficial interest in property or in the income thereof," (by which I understand a beneficial enjoyment in contradistinction to holding as trustee) "shall be deemed to confer a succession."

This succession arises upon the death of some person dying in possession or expectancy. Therefore the 10th section making every succession previously mentioned and explained liable to duty according to the value thereof, such value must necessarily be estimated at the time of the devolution of the property to the successor, even if there had been no other provisions than those in the act. But the 20th section places the matter beyond doubt, for it enacts that the duty imposed by the act shall be paid "at the time when the successor or any person in his right, or on his behalf" (words pointing to the case of a trust estate, and further explaining the words "beneficial interest" in the 2nd section), "shall become entitled to the succession." The 20th section having provided for the period when the duty is to be paid (obviously meaning by the words "is to be paid," *becomes due*), the 21st section enacts in what manner it shall be assessed, and at what times it shall be payable. Now, the interest of the successor is to be considered to be of the value of an annuity equal to the annual value of the property. There is no other mode provided for calculating the duty. If, therefore, when the successor becomes entitled in possession to his succession (being the point of time at which alone the duty imposed is to be ascertained in the manner prescribed by the act), the property has no value, how can it possibly be made the subject of an assessment for duty either then or at any subsequent period? I do not think that any of the sections referred to in the argument countenance the idea that the ascertainment of the duty to be paid can be postponed to any period after the death of the predecessor. The 37th section, providing for cases where a successor shall not have obtained the whole of his succession at the time of the duty becoming payable (that is, when he becomes entitled in possession to his succession), clearly does not mean where he shall not have realized the whole value of his succession, but where the property,

having devolved upon him by right, he has been kept out of some portion of it. In this case he is to be charged only with the value of the property or benefit of which he gets possession at the time of the succession; but specific provision is made for his being chargeable with duty on the property afterwards obtained by him; as to which some doubt might have arisen unless the case had been thus specially provided for.

The provisions of the 39th section are wholly inapplicable to the present case. They apply only where the value of a succession "shall not be fairly ascertainable under any of the preceding directions." That is not the case with the land in question, for it is admitted by the information that it has been ascertained to be of no annual value whatever. The 45th section, requiring the successor in the case of real property to give notice to the Commissioners "when any duty in respect thereof shall first become payable," might, by the use of the word "first," introduce a little doubt, and aid the argument, that unproductive property becoming productive would be liable to duty, and that consequently the Crown would be entitled to notice in such an event. But it appears to me that this word meets with its proper application in such sections as the 23rd and 24th with respect to timber and advowsons, and the 25th with respect to beneficial leases, which are instances of exceptions from the general rule contained in the 20th section as to the liability to duty at the time when the successor becomes entitled in possession to his succession.

It was thrown out, in the course of the argument, that from the words in the information, "the land in question was not capable of being sold or let profitably as building land," it might be inferred that it would have realized some amount at the time of the defendant becoming entitled to the succession, although it might probably be sold or let more advantageously at some future period; and it was contended that if the land had a saleable value at the time when the succession fell to the defendant, it might be charged with succession duty. The difficulty would be in what manner the amount of duty to be paid would, under these circumstances, be arrived at. It can hardly be supposed to have been

the intention of the legislature that a valuable succession of this description should escape assessment altogether; and yet there would be no annual value to furnish a basis for the only mode of calculating the duty prescribed by the act. Instead of considering "the interest of the succession" (in the words of the 21st section) "to be of the value of an annuity equal to the annual value of the property," it would be necessary to ascertain the amount for which the land would sell and then make that amount the assumed purchase-money of an annuity to represent the duty. It appears to me that the 23rd and 24th sections, as to timber and advowsons "comprised in the succession," rather favour the view that for land yielding no annual value, but capable of immediately realizing a value by sale, the succession would be liable to succession duty. I do not understand that these subjects of property would have been exempt from duty, but for the special provisions respecting them. The language of the sections assumes that they would have been chargeable at once as "comprised in the succession." The rule as to the time and mode of charging the duty was introduced in case of the successor who, from the nature of the property, might possess it as a valuable part of the succession and yet derive no profit from it for many years.

I cannot help thinking that if the Crown had not acted upon an erroneous notion of the defendant's possible liability to duty at some future period, it would have been found that his land was not altogether valueless, and that the question might have been raised as to its liability to duty upon the marketable value as building land. But I must act upon the admission in the information that the plots of land in question were wholly unoccupied, and not capable of yielding income, fluctuating or otherwise; and upon that ground alone, I have come to the conclusion that the defendant was not chargeable with duty when he became entitled to his succession, and that he cannot be charged at any time afterwards. I therefore think that the judgment of the Court of Exchequer is right, and that it ought to be affirmed.

Decree affirmed; and appeal dismissed, with costs.

1865. { HEMSTREAD v. THE PHOENIX GAS
 April 27. { COMPANY.
 HEMSTREAD AND WIFE v. THE
 SAME.

Practice—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 40.—Consolidation of Actions—Husband and Wife—Joinder of Claims by Both with Claims by Husband.

The Court refused to interfere with an order made by a Judge (under the 40th section of the Common Law Procedure Act, 1852,) for consolidating two actions, in one of which the husband claimed damages for injury done to his house and trade, while in the other both the husband and wife claimed for injury to the wife, and the husband also claimed for consequential damage to himself.

In the first of these actions, the plaintiff sought to recover damages for injury done to his house and trade by an explosion of gas, caused by the negligence of the defendants. The defendants pleaded on the 19th, and issue was joined on the 22nd of April 1865.

In the second action, the plaintiff in the first action and his wife claimed damages for severe injuries inflicted on the wife by means of the explosion, the husband also claiming damages for the loss of his wife's society and services, &c., and for the medical expenses incurred by reason of the explosion.

On the 4th of April, and before pleading in the second action, the defendants took out a summons to consolidate the two actions, and Pigott, B. thereupon made an order for their consolidation under the 40th section of the Common Law Procedure Act, 1852, which enacts that "In any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated, if the Court or a Judge shall think fit: provided, that in the case of the death of either plaintiff, such suit so far only as relates to the causes of action, if any, which do not survive shall abate."

Lyell now moved to rescind this order, on the following grounds.—First, that the 40th section of the Common Law Procedure Act, 1852, was intended to apply to cases only where the plaintiff claimed damages resulting to himself in consequence of the injury done to his wife, in respect of which claims the husband must, before the statute, have brought a separate action for the consequential damage sustained by him,—this appears from the first Report of the Common Law Commissioners(1); and, secondly, that the order itself was informal, because in the first action issue had been joined, while in the second no plea had been delivered, so that the effect of consolidating them would be to postpone the first in order that issue might be joined in the second.

The COURT (2) refused to interfere with the order, holding that the 40th section of the Common Law Procedure Act applied to these actions; and, as to the objection on the score of informality, intimating that the defendants should be put under terms if necessary.

1865. }
 May 3. } MARTIN v. GRIFFITH.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134.)—Composition-Deed—Parties—Composition payable on Signing Deed.

A composition-deed, made between the defendant of the first part and the undersigned J. F., one of the creditors of the defendant, and also all the other undersigned creditors of the defendant of the second part, after reciting that the defendant was unable to pay his several creditors the full sum of 20s. in the pound, but was able and willing to pay each and all of them, on signing the deed, the composition of 5s. in the pound, and that the defendant had applied to the several parties of the second part to receive and take the composition of 5s. in the pound, payable on signing the

(1) See page xi of the Report, and Day's Common Law Procedure Acts, p. 43.

(2) Pollock, C.B., Martin, B. and Pigott, B.

deed, in full satisfaction and discharge of their several respective debts, which the parties of the second part had agreed to accept in full satisfaction and discharge, proceeded in consideration thereof to release the debts:—Held, that the deed was invalid, and not binding on the non-assenting creditors, as by the terms of the deed the composition was to be paid only to the creditors who signed, therefore those who assented were in a better position than those who dissented.

Declaration, first count, on a promissory note for 50*l.* by payee against maker, and second count for interest.

Plea, that after the last pleading in this action and after the 11th of October 1861, the defendant was indebted to the plaintiff and divers other persons, and thereupon a deed hereinafter particularly set forth relating to the debts and liabilities of the defendant and his release therefrom, bearing date the 8th of March 1864, was made and entered into by and between the defendant, the person in the deed named as Albert Gribble, of the first part, and John Fryer in the said deed named, and also all the other creditors of the defendant whose names were there undersigned and hereinafter set forth, of the second part, and which said deed, signed and attested as hereinafter mentioned, was and is in the words and figures following, that is to say, —This deed, made the 8th of March 1864, between Albert Gribble, of Collumpton, in the county of Devon, attorney-at-law, of the first part, and the undersigned J. Fryer, of No. 2, The Mint, in the city of Exeter, schoolmaster, one of the creditors of the said A. Gribble, and also *all the other undersigned creditors* of the said A. Gribble, of the second part, the said J. Fryer and all the other undersigned creditors of A. Gribble, being a majority in number representing three-fourths in value of the creditors of the said A. Gribble, whose debts respectively amount to 10*l.* and upwards, and being hereinafter described as the several parties hereto of the second part. Whereas, from divers causes, the said A. Gribble is unable to pay his several creditors the full sum of 20*s.* in the pound, but is able and willing to pay each and all of them, on signing this deed, the composition or compensation of 5*s.* in the pound. And whereas

the said A. Gribble hath applied to the several parties hereto of the second part to receive and take the said composition or compensation of 5*s.* in the pound, payable on signing the deed, in full satisfaction and discharge of their several respective debts, claims and demands on him which the several parties hereto of the second part have agreed to accept in such full satisfaction and discharge as aforesaid, and in consideration thereof do hereby respectively release the said A. Gribble of and from all debts, claims and demands due from the said A. Gribble to them respectively. Provided always, that the execution hereof by any or either of the several parties hereto of the second part shall not in any way prejudice or discharge their right to retain for their own use and benefit against all persons whatever any security or securities, whether legal or equitable, which are now held by any or either of them, and which may have been deposited or given by the said A. Gribble in respect of any debt, claim or demand not compounded for or compensated under and by virtue of this deed, and shall not in any way prejudice or discharge their right to receive under or sue upon any such security or securities as against all other persons than the said A. Gribble. The plea then averred that a majority in number, representing three-fourths in value, of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards did in writing assent to and approve of the said deed, and the execution of the said deed by the defendant was attested by a solicitor, and within twenty-eight days from the day of execution of the said deed by the defendant the same was produced and left (having been first duly stamped) at the office of the Chief Registrar of the Court of Bankruptcy for the purpose of being registered, and together with such deed there was delivered to the said Chief Registrar an affidavit by which the defendant had a majority in number, representing three-fourths in value of the creditors of the defendant whose debts amounted to 10*l.* and upwards had in writing assented to and approved of the said deed, and that the deed did before the registration thereof bear such ordinary and *ad valorem* stamp duties as were provided by the

1865. { HEMSTREAD v. THE PHOENIX GAS
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Practice—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 40.—Consolidation of Actions—Husband and Wife—Joinder of Claims by Both with Claims by Husband.

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On the 4th of April, and before pleading in the second action, the defendants took out a summons to consolidate the two actions, and Pigott, B. thereupon made an order for their consolidation under the 40th section of the Common Law Procedure Act, 1852, which enacts that "In any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated, if the Court or a Judge shall think fit: provided, that in the case of the death of either plaintiff, such suit so far only as relates to the causes of action, if any, which do not survive shall abate."

Lyell now moved to rescind this order, on the following grounds.—First, that the 40th section of the Common Law Procedure Act, 1852, was intended to apply to cases only where the plaintiff claimed damages resulting to himself in consequence of the injury done to his wife, in respect of which claims the husband must, before the statute, have brought a separate action for the consequential damage sustained by him,—this appears from the first Report of the Common Law Commissioners(1); and, secondly, that the order itself was informal, because in the first action issue had been joined, while in the second no plea had been delivered, so that the effect of consolidating them would be to postpone the first in order that issue might be joined in the second.

The COURT (2) refused to interfere with the order, holding that the 40th section of the Common Law Procedure Act applied to these actions; and, as to the objection on the score of informality, intimating that the defendants should be put under terms if necessary.

1865. }
 May 3. } MARTIN v. GRIBBLE.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134.)—Composition-Deed—Parties—Composition payable on Signing Deed.

A composition-deed, made between the defendant of the first part and the undersigned J. F., one of the creditors of the defendant, and also all the other undersigned creditors of the defendant of the second part, after reciting that the defendant was unable to pay his several creditors the full sum of 20s. in the pound, but was able and willing to pay each and all of them, on signing the deed, the composition of 5s. in the pound, and that the defendant had applied to the several parties of the second part to receive and take the composition of 5s. in the pound, payable on signing the

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deed, in full satisfaction and discharge of their several respective debts, which the parties of the second part had agreed to accept in full satisfaction and discharge, proceeded in consideration thereof to release the debts:—Held, that the deed was invalid, and not binding on the non-assenting creditors, as by the terms of the deed the composition was to be paid only to the creditors who signed, therefore those who assented were in a better position than those who dissented.

Declaration, first count, on a promissory note for 50*l.* by payee against maker, and second count for interest.

Plea, that after the last pleading in this action and after the 11th of October 1861, the defendant was indebted to the plaintiff and divers other persons, and thereupon a deed hereinafter particularly set forth relating to the debts and liabilities of the defendant and his release therefrom, bearing date the 8th of March 1864, was made and entered into by and between the defendant, the person in the deed named as Albert Gribble, of the first part, and John Fryer in the said deed named, and also all the other creditors of the defendant whose names were there undersigned and hereinafter set forth, of the second part, and which said deed, signed and attested as hereinafter mentioned, was and is in the words and figures following, that is to say, —This deed, made the 8th of March 1864, between Albert Gribble, of Collumpton, in the county of Devon, attorney-at-law, of the first part, and the undersigned J. Fryer, of No. 2, The Mint, in the city of Exeter, schoolmaster, one of the creditors of the said A. Gribble, and also *all the other undersigned creditors* of the said A. Gribble, of the second part, the said J. Fryer and all the other undersigned creditors of A. Gribble, being a majority in number representing three-fourths in value of the creditors of the said A. Gribble, whose debts respectively amount to 10*l.* and upwards, and being hereinafter described as the several parties hereto of the second part. Whereas, from divers causes, the said A. Gribble is unable to pay his several creditors the full sum of 20*s.* in the pound, but is able and willing to pay each and all of them, on signing this deed, the composition or compensation of 5*s.* in the pound. And whereas

the said A. Gribble hath applied to the several parties hereto of the second part to receive and take the said composition or compensation of 5*s.* in the pound, payable on signing the deed, in full satisfaction and discharge of their several respective debts, claims and demands on him which the several parties hereto of the second part have agreed to accept in such full satisfaction and discharge as aforesaid, and in consideration thereof do hereby respectively release the said A. Gribble of and from all debts, claims and demands due from the said A. Gribble to them respectively. Provided always, that the execution hereof by any or either of the several parties hereto of the second part shall not in any way prejudice or discharge their right to retain for their own use and benefit against all persons whatever any security or securities, whether legal or equitable, which are now held by any or either of them, and which may have been deposited or given by the said A. Gribble in respect of any debt, claim or demand not compounded for or compensated under and by virtue of this deed, and shall not in any way prejudice or discharge their right to receive under or sue upon any such security or securities as against all other persons than the said A. Gribble. The plea then averred that a majority in number, representing three-fourths in value, of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards did in writing assent to and approve of the said deed, and the execution of the said deed by the defendant was attested by a solicitor, and within twenty-eight days from the day of execution of the said deed by the defendant the same was produced and left (having been first duly stamped) at the office of the Chief Registrar of the Court of Bankruptcy for the purpose of being registered, and together with such deed there was delivered to the said Chief Registrar an affidavit by which the defendant had a majority in number, representing three-fourths in value of the creditors of the defendant whose debts amounted to 10*l.* and upwards had in writing assented to and approved of the said deed, and that the deed did before the registration thereof bear such ordinary and *ad valorem* stamp duties as were provided by the

Bankruptcy Act, 1861, in that behalf; and at the time of the execution of the deed the plaintiff was a creditor of the defendant in respect of the claim herein pleaded to, within the meaning of the Bankruptcy Act, 1861, and all conditions precedent had been performed, and having been performed, the plaintiff became and was bound by the deed as if he had been a party to it and had duly executed the same.

Meadows White, in support of the demurrer.—The deed set out in the plea is clearly bad, and is not binding on the non-assenting creditors. It is stated to be a deed made between the debtor and the undersigned creditors only, and not with all the creditors, and the creditors who assent are in a different position from those who do not assent. If the plea had contained no averment of a tender of the composition-money, it would have been clearly bad—*Fessard v. Mugnier* (1), but that defect is cured by the amendment (2). The deed, however, is invalid because it is made only with the creditors who execute, and does not provide any means for the payment of the composition to those creditors who do not execute.

[*BRAMWELL, B.*—This deed is bad on the authority of *Walter v. Adcock* (3).]

Yes; and also on the authority of *Ilderton v. Castrique* (4) and *Ilderton v. Jewell* (5). In the last case, *Crompton, J.*, in his judgment, at p. 150, says, "The act of parliament means that the provisions of the deed shall not be confined to any class of creditors. It seems to me to be the same thing if you expressly exclude some of the creditors, or say those only shall get the composition who sign the deed. Though it is not now necessary to have a *cessio bonorum*, the payment of the composition must be so regulated that there should be a provision for the payment to all the creditors. The real objection to this deed is, that

there is no provision made for all the creditors. The deed is a deed between the debtor and those creditors who execute it." *Blackburn, J.* did not assent to affirm the judgment in that case, but in the subsequent case of *Dingwell v. Edwards* (6), at p. 165, that learned Judge stated that there was no ground for his doubt. In this last case the Court differed as to the construction to be put upon the deed, but they were unanimous that if the composition was limited to be paid to the creditors who should execute it, the deed was bad. Now, in the present case the composition-money is only payable to those creditors who sign the deed. Signing the deed is a condition precedent to the payment of the composition, and this objection is fatal to the deed.

[*MARTIN, B.*—The case is directly within the Lord Chancellor's judgment in *Ex parte Cockburn* (7).]

The COURT then called on—

G. Tayler to support the plea.—It is not necessary that a deed, in order to be valid and within the Bankruptcy Act, 1861, should be a deed made between the debtor and all his creditors; it is a perfectly valid deed if it does not exclude any creditors from its benefits. This point was decided in *Clapham v. Atkinson* (8). The deed in that case was between the debtor of the one part and the undersigned creditors of the debtor of the other part; there the deed was held to be valid, and the present deed is precisely similar. *Williams, J.* in that case, in delivering the judgment of the Court, said: "The plaintiff did not sign the deed; but he is bound thereby if the deed fulfilled the conditions imposed by section 192. of the Bankruptcy Act, 1861, and the following sections. We are of opinion that it does. It is within the words of section 192, being a composition-deed between the debtor and his creditors; and it is not shewn that any of the required conditions mentioned in section 192. of the statute have not been observed. The parties intended that the deed should be within that section, as it states the signing creditors to be the re-

(1) 84 Law J. Rep. (N.S.) C.P. 126.

(2) *Tayler* had applied to the Court for leave to amend the plea on an affidavit stating that the defendant had tendered the composition-money, and the Court granted the application.

(3) 81 Law J. Rep. (N.S.) Exch. 380; s.c. 7 Hurl. & N. 541.

(4) 82 Law J. Rep. (N.S.) C.P. 206; s.c. 14 Com. B. Rep. N.S. 99.

(5) 83 Law J. Rep. (N.S.) C.P. 148; s.c. 16 Com. B. Rep. N.S. 142.

(6) 83 Law J. Rep. (N.S.) Q.B. 161; s.c. 4 B. & S. 738.

(7) 83 Law J. Rep. (N.S.) Bankr. 17.

(8) *Ante*, Q.B. 49.

quisite majority in number and value. One objection was, that the deed was made with the creditors who signed, and not with all; but all the creditors have the option of coming in and signing. Therefore the objection, on this ground, fails." It is true the present deed states that the parties of the second part should receive the composition of 5s. in the pound, "payable on signing the deed"; but the words "on signing" refer only to the time of the composition being payable; it means, on the debtor's signing the deed, not on the creditor's signing it, the composition should be paid. Upon this construction, the deed is one made between a debtor and those creditors who execute, but made for the benefit of all his creditors; and such a deed is valid according to all the authorities. Here the defendant has had the composition tendered to him; he is therefore in as good a position as those creditors who have signed. *Hudson v. Barclay* (9) shews that the statute does not require that the deed should be tendered to every creditor for his signature. Blackburn, J., in delivering the judgment of the Court of Exchequer Chamber, says: "The Court (that is, the Court below) impliedly repeat that a creditor has a right to have a deed presented to him for execution, which, when executed by him, will put no burthen upon him to which he ought to be subjected. To this we cannot assent. There is no provision in the statute, nor is there anything in the nature of the transaction to render it essential that the creditors who are to be bound by the deed should have an opportunity to execute the deed at all. It may often happen that three-fourths of the creditors assent to the instrument before notice of it is given to some creditor, either because his residence is not known, or it may be to one who is not asked to sign, because it is thought he would certainly refuse; yet surely such a creditor would be bound as much as any other."

[BRAMWELL, B.—Suppose a man's debt is disputed, what step is he to take to get his composition?]

If the debtor does not tender the composition, then the creditor can sue for the original debt, but if he make the tender

then the creditor can get the composition.

[PIGOTT, B.—*Dingwell v. Edwards* (6) is an express authority against you.]

There the Court were equally divided. And in that case the deed contained a covenant to pay the composition, which however was limited in its operation to those creditors who assented to the instrument.

[BRAMWELL, B.—In ordinary composition deeds a tender and refusal does not discharge the debt; there must be a payment of the composition money into court to make the plea good. I think you will find it has been so held in *Cooper v. Phillips* (10).]

White was heard in reply.

POLLOCK, C.B.—I am of opinion that our judgment ought to be for the plaintiff. I think this case is so clear, and so distinctly within the Lord Chancellor's decision in *Ex parte Cockburn* (7), which has been so frequently referred to, that I do not think it necessary to do more than to say that in my judgment this case is concluded by the judgment given in that case. That case was decided in a Court not merely of co-ordinate jurisdiction with this Court, but a Court peculiarly acquainted with subjects of this nature. I am quite free to admit that I think an opposite conclusion might have been come to on the ground that the statute made all the difference, and prevented the rule of law that has been alluded to, and which is the foundation of the decision in *Ex parte Cockburn* (7) from applying. But I think we are bound by the Lord Chancellor's decision. He has acted upon a view of the law which undoubtedly has been recognized for a century. I may say, that if a deed be made *inter partes*, no person can sue upon it who is not a party. Here the defendant is entitled to nothing unless he signs the deed. That is not what the statute intended. The statute intended that all the parties to the deed should be upon the same footing whether they signed the deed or not. Those who signed the deed and those who did not sign it are not in the same position, and I think that makes this deed void, and that therefore the plaintiff is entitled to our judgment.

MARTIN, B.—I did not understand Mr.

White as urging the objection that this was a deed *inter partes*, and that the non-assenting creditors could not sue upon it. But it seems to me that upon the other question—what is the true meaning of this deed—there must be judgment for the plaintiff. Mr. Tayler has argued that the words “payable on signing,” mean on the signing by the debtor, but to give them that meaning would be to violate all the grammatical principles of the English language, and read the words in a sense quite different from that which they express. That, I dare say, has very often been done for the purpose of supporting these deeds. But this deed seems to express, as clearly as words can, that the creditor is to sign the deed, and that then and there upon the spot he is to be paid his composition-money, and that his signature—that is, the signing the deed by the creditor—is a condition precedent to his getting the money: that is the true meaning of these words. The language of the Lord Chancellor in the case referred to is as plain and distinct as it possibly can be, and what he says is: “To render a deed of composition and release binding on the minority of the creditors who have not executed or assented to, or approved of it in writing, it is necessary that the non-assenting creditors should stand under the deed in the same situation and with the same advantages as . . . the creditors forming the majority.” That is in the first judgment. In the second he says: “As I explained on a former occasion, in my view of the statute, a deed to bind creditors who have not executed it must be a deed which places the parties who execute and the parties who have not executed it precisely on an equal footing in point of law.” Now, whether that is expressed in direct language in the statute or not, I am sure I know not; but it is clearly to be implied from it. It would be the greatest injustice that by possibility could be that the assenting creditors should be in a condition to make better terms for themselves than for the non-assenting creditors. If the statute enables these assenting creditors to bind others, common and ordinary justice would certainly render it necessary that the parties who by assenting to the deed can bind others who do not assent to it should not put themselves on a better

footing than those others. That being so, the very words of this deed provide that the parties who do not assent shall get nothing. That is a plain and direct provision in this deed. I also agree with my Brother Pigott that the late case of *Dingwell v. Edwards* (6) and the case of *Ilderton v. Jewell* (5), in principle are just the same, and it seems to me that the plaintiff is entitled to judgment.

BRAMWELL, B.—I am of the same opinion. I believe that the case of *Ilderton v. Jewell* (5) is in point. That is almost enough to say upon the matter. I am not sure that there may not be some case in point the other way. But still I think *Ilderton v. Jewell* (5) is plainly in point. I cannot help making one remark, that the law upon these matters, and also the cases, are in a very unfortunate condition. I think it ought to be remembered it is more easy to follow an act of parliament than the cases that build it up.

PICOTT, B.—I am of the same opinion. I think this deed is a deed which is a very crude document, to say the least of it. I very much doubt whether the framer of it himself quite knew whether he intended to include all the creditors, or only those of the second part. It is enough to say that, reading the deed, it is clear upon the plainest construction of the language that the parties are only to get their composition on signing the deed. On that supposition those who do not sign are not entitled to it according to the case of *Dingwell v. Edwards* (6). It is quite enough therefore to decide this case upon that authority. I may, however, speaking for myself, say I think it an unpleasant duty to have to sit and give judgment upon cases of this kind, where we are asked to support these deeds, or overturn them, on the most technical objections of form, without the least regard to the substance of the matter. I still hope that a very short form of deed may be brought before the legislature and sanctioned as binding on all parties; for all the community have a great interest in having this matter settled; and not by continuing litigation making it more unsettled every day.

Judgment for the plaintiff.

1865. }
 April 26. } GARDOM v. LEE AND OTHERS.

Vendor and Purchaser — Conditions of Sale—Deposit—Interest—Expenses of Investigating Title.

The plaintiff purchased land of the defendants subject amongst others to the following conditions of sale: Fourth, that within twenty-one days from the date of the sale the vendors should deliver an abstract of title to the purchaser; seventh, that if any purchaser make any objections or requisitions in respect of the title within thirty-five days from the day of sale, the vendors shall be at liberty at their election either to answer such objection or to rescind the sale on repaying the deposit without interest, and without incurring any liability to pay any of the expenses for investigating the title; eighth, that all rights of the vendors to hold the purchaser to have waived all objections or requisitions not made within the time specified as aforesaid, and such right of the vendors to rescind the contract shall not be deemed to be waived or in any manner affected or prejudiced by any negotiation as to any objections or requisitions or attempt to obviate or comply with the same. The sale took place on the 30th of July 1861, and a deposit of 100*l.* was paid to the vendors' solicitor. The abstract of title was not delivered until the 2nd of November. On the 8th of November the vendees' solicitor wrote to the vendors' solicitor, stating that the vendors, who were trustees, in his opinion "had no power to sell, and that it was not worth while going into the title"; he also wrote, on the 28th, desiring "to know whether the vendors would rescind the contract or insist upon specific performance." On the 30th of November the vendors' solicitor answered, "That he was satisfied that they had power to sell, and that his clients would expect the vendee to complete the purchase." The vendees thereupon incurred expenses in investigating the title, and it turned out that the trustees had no power to sell, and they, on the 21st of December 1861, declined to complete the purchase, and claimed to be paid interest on their deposit and the expenses of investigating the title. A further correspondence was continued until the 17th of November 1862:—Held, on these facts, that the vendors could not elect to rescind

the contract under the seventh condition, and that there was no negotiation within the meaning of the eighth condition, and that therefore the vendee was entitled to recover interest on the deposit and the expenses of investigating the title.

This was a special case, stated by consent of the parties and in pursuance of an order of Channell, B.

By his last will and testament, duly executed, and dated on the 14th of November 1860, W. Wildgoose, of Morley Street, Birmingham, devised and bequeathed all his real and personal estate whatsoever and wheresoever unto J. Lee, of Crick, near Derby, and G. C. Curtis, of Highgate, near Birmingham, their heirs, executors and administrators, upon trust for his wife, Hannah Wildgoose, during her life, and for that purpose to permit her to have the use and enjoyment of such part thereof as should not produce income, and to permit her to receive the income of such part as should produce income, and upon her decease upon trust, as soon as conveniently might be, to convert the whole of his said estate into money, and for that purpose to sell such parts as should not consist of money or securities for money either by public auction or private contract, with liberty from time to time to buy in any part thereof at any auction, and to rescind or vary the terms of any contract for sale that might have been entered into, and to convey such parts of the said estates as from time to time should be sold in such manner as the respective purchasers thereof should direct; and he declared that such purchasers respectively should be exonerated from all responsibility in respect of the application of the monies paid by them to the trustee or trustees for the time being of his said will, and the trustees were to stand possessed of the monies arising from such sales upon trust to invest the same on securities as therein mentioned, and to pay the annual income in equal moieties to testator's son and daughter for their respective lives, and after their death the trustees were to stand possessed of the trust funds for the issue of the son and daughter in equal shares as therein mentioned.

W. Wildgoose, the testator, departed this life shortly after the execution of his said

will, without having revoked or in anywise altered the same.

Hannah Wildgoose is still living, and likewise the testator's son and daughter.

On the 30th of July 1861, J. Lee, G. C. Curtis, and Hannah Wildgoose put up for sale by public auction, in four lots, under the conditions of sale hereinafter mentioned, certain land in the county of Derby, which had passed to them by the said devise.

The clauses in the conditions of sale, which are material, are the following :

3rd. That each purchaser shall immediately after the sale pay a deposit in the proportion of 10*l.* for every 100*l.* of his purchase-money into the hands of the vendors' solicitor, and sign an agreement for payment of the remainder on the 31st of October 1861, at the office of the vendors' solicitor, at which time and place the purchase is to be completed, and if from any cause whatever the purchase shall not be completed on the said 31st of October 1861, the purchaser shall pay interest on the remainder of his purchase-money after the rate of 5*l.* per cent. per annum from that day until the purchase shall be completed, and shall from the same day be entitled to the rents and profits thereof. All outgoings payable by the landlord up to the said 31st of October will be discharged by the vendors.

4th. That within twenty-one days from the date of the sale the vendors shall, at their own expense, make and have ready for delivery at the office of their solicitor to the several purchasers or their solicitors, an abstract of the title of the vendors to the several lots.

6th. That each purchaser shall make his objections and requisitions, if any, in respect of the title to the lot bought, and send the same to the vendors' solicitor within thirty-five days from the day of sale, and all objections and requisitions which shall not be made within the time specified shall be taken to be waived.

7th. That if any purchaser make any objections or requisitions in respect of the title to the lots within thirty-five days from the day of the sale as aforesaid, the vendors shall be at liberty at their election either to answer such objection and comply with such requisitions, or to rescind the contract for sale on repaying the deposit alone, with-

out interest for the same, or for any other part of the purchase-money, and without incurring any liability to pay to such purchaser any of the expenses for investigating the title or otherwise.

8th. That such rights as aforesaid of the vendors to hold the purchaser to have waived all objections or requisitions not made within the time specified as aforesaid, and such right of the vendors to rescind the contract as aforesaid shall not be deemed to be waived, or in any manner affected or prejudiced by any negotiation as to any objections or requisitions or attempt to obviate or to comply with the same respectively.

The plaintiff became the purchaser of lots 2. and 3. at the price of 49*l.* per acre for lot 2, containing 15 a. 1 r. 15 p.; of 42*l.* per acre for lot 3, containing 8 a. 0 r. 7 p., and paid a deposit of 100*l.* in respect thereof, and signed an agreement for the payment of the remainder under the 3rd condition of sale.

The following is the copy of the covenant of purchase, which was signed by the plaintiff and by Mr. Brooks, the agent authorized by the defendants : "Be it remembered, that at a sale by auction, this 30th of July 1861, of the property mentioned in the above-written particulars, W. Gardom, of Bakewell, shoemaker, was the highest bidder for and was declared the purchaser, subject to the above-written condition, of lots 2. and 3. in the particulars annexed, at the price of 49*l.* per acre for lot 2, and 42*l.* per acre for lot 3, and has paid into the hands of Mr. Jessop, the vendors' solicitor, the sum of 100*l.* by way of deposit and in part payment of his said purchase-money, and hereby agrees to pay to the vendors at the above-named office of Mr. Jessop, on the 31st of October next, the remainder of the purchase-money. As witness our hands."

The particulars referred to as above written and annexed contained a full and sufficient description of the lots 2. and 3. respectively.

On the 8th of August 1861, and again on the 12th of September in the same year, Mr. Taylor, the plaintiff's solicitor, applied by letter to Mr. Jessop, the defendant's solicitor, for the abstract of the defendant's title; but from difficulties which arose in obtaining some of the necessary deeds, the

defendants were unable to furnish the abstract until the 2nd of November 1861, on which day Mr. Jessop delivered the same to Mr. Taylor.

After the delivery of the abstract Mr. Taylor wrote the following letter to Mr. Jessop: "November 8th, 1861. Wildgoose's sale.—I have not yet perused this abstract, but I have just been glancing over the sheets and am struck with the last testator's will, whereby he devises to trustees in trust for his wife for life and then to sell. You say in a note she is living and will join in the conveyance: how do you make out the power of sale has arisen? P.S.—Of course this query is merely preliminary, and is not to prejudice our right to make complete requisitions afterwards, but it does not seem to me worth while going on further, unless my present view that there is not as yet any power of sale be successfully combated."

After this letter some further correspondence took place between Mr. Taylor and Mr. Jessop upon the question, whether the trustees had power to sell, and on the 28th of November Mr. Taylor wrote the following letter to Mr. Jessop: "I am obliged for the copy-will, and regret I can see nothing in it enabling a sale, except the express power of sale which, notwithstanding the cases to which you refer and my further consideration of the matter, I must still contend does not come into force with its incidental authority to give receipts until after the widow's death. Under these circumstances, my client wishes to withdraw from the purchase. Please let me know as soon as you can whether you rescind the contract and return the deposit or whether you insist on specific performance by us. In the latter event I will within a reasonable time send you formal queries and requisitions on the whole title; but as yet I have not gone into the general title, not thinking it right to incur that expense, when apparently an insuperable objection lies on the surface."

To this letter Mr. Jessop replied as follows: "November 30th, 1861.—I am satisfied that we have now power to sell, and will thank you to send me your queries on the title, as my client will expect yours to complete the purchase."

After this letter the plaintiff's solicitor

went into an examination of the title and laid the abstract of title before counsel to advise on the purchaser's behalf, and the deeds were compared with the abstract. After the plaintiff's solicitor had obtained counsel's opinion, he sent, on or about the 31st of December 1861, to the defendants' solicitor certain requisitions and observations on the title and the right of the defendants to sell, the fifth of which was copied from the opinion of his counsel on the point to which it refers, and was as follows: "The attempted sale in the lifetime of Hannah, the widow of W. Wildgoose, the testator of 1860, is wholly unauthorized. She cannot by her concurrence accelerate the period of sale, nor would the concurrence of the son and daughter remove the objection, as the contingent interests of their unborn issue cannot be bound; as against such issue the proposed sale and conveyance would be a plain breach of trust, in which of course the purchaser would be involved. This is too clear to admit of any discussion."

The plaintiff's solicitor wrote a letter accompanying these requisitions, stating that it became his duty on the part of the plaintiff to decline proceeding further with the purchase, and requesting that the deposit should be returned with interest and his expenses paid.

The defendants' solicitor did not at first yield to the objection as to the right to sell and convey, and some correspondence took place, and the matter stood over till the 1st of September 1862, when the plaintiff's solicitor again wrote to defendants' solicitor, requesting that the matter might be closed without further delay, and inclosing his bill of costs, and requesting payment of it, and a return of the deposit and interest.

On the 11th of November 1862, Mr. Jessop and Mr. Taylor had a personal interview, and at that interview Mr. Jessop objected to the plaintiff's demand for interest on the deposit and costs. On the 17th of November 1862, Mr. Jessop wrote a letter to Mr. Taylor, stating his willingness to pay back the deposit without interest and costs, and that on hearing from Mr. Taylor that he would be satisfied with this, he would send him a cheque for the amount. Some further correspondence took place, in which the plaintiff's solicitor insisted on his right

to recover the deposit with interest and costs, and the defendants' solicitor denied the right to interest and costs, and stated on such claim being abandoned he would at once send a cheque for the deposit. The writ was issued in the present action on the 5th of December 1862. Since the declaration was delivered the 100*l.* deposit has been repaid, and no question is to be raised concerning such deposit, nor does the plaintiff seek for damages by reason of the non-delivery of an abstract in due time.

It is admitted that the defendants did in fact make and deduce such title to the property purchased by the plaintiff as they had, and that they were willing, so far as they had power, to convey such property to the plaintiff, and were ready to procure the concurrence of the testator's widow and of his son and daughter in such conveyance.

The defendants contend that they did not by the conditions of sale bind themselves to make a good title to the property or warrant that they had a good title to sell the same. That upon the facts above stated as to the making and rescinding of the contract, the plaintiff is not entitled to recover interest on his deposit or costs.

The plaintiff contends that by the contract and conditions, the defendants were bound to shew that they had a good title and right to convey the property to the plaintiff, subject to the power of rescinding the contract given to the vendors by the condition. And that upon the facts stated the defendants were not entitled to rescind and did not rescind the contract according to the conditions, and that the plaintiff is entitled to recover interest on his deposit and costs.

The question for the Court is whether, under the circumstances stated, the plaintiff is entitled to recover interest on the deposit and the costs of investigating the title or either of them. If the Court should be of opinion that the plaintiff is entitled to recover the said interest and costs or either of them, then the defendants agree that judgment shall be entered against them by confession or otherwise, as the Court may think fit, with costs. And if the Court should be of opinion that the plaintiff is not entitled to recover the interest and costs or either of them in this action, then the plaintiff agrees that the judgment shall and may

be entered against him of *vol. proe.*, or otherwise as the Court may think fit, and that judgment shall be entered accordingly, with costs of defence.

It is agreed that if the judgment is entered for the plaintiff, the damages shall be assessed at 7*l.* 13*s.* 6*d.* for the said interest, and 15*l.* for the said costs, and that judgment shall be entered for either or both of the said sums, as the Court may direct.

Hayes, Serj. (Fitzjames Stephens with him), for the plaintiff, contended that as the abstract of title was not delivered within the twenty-one days after the sale, and the objections and requisitions were not made within the thirty-five days, owing to the default of the vendors to deliver the abstract of title, the vendors could not rescind the contract under the seventh condition; and that the facts did not shew any negotiation to obviate the objections to the title or to comply with the requisitions made; that therefore the plaintiff was entitled to recover interest on his deposit and also the expenses he had incurred in investigating the title. He cited *Tanner v. Smith* (1) and *Morley v. Cooke* (2).

Lush, for the defendants, contended that the period of thirty-five days mentioned in the seventh condition was a limitation of time in favour of the sellers, and inasmuch as the sellers had not delivered the abstract of title in time, the purchaser might have refused to receive it, but having accepted the abstract he had waived all objection to its not having been delivered within the thirty-five days. That the eighth condition was inserted in the conditions of sale for the purpose of meeting the objection that if a negotiation with respect to an objection to title were prolonged beyond the time limited by the conditions for rescinding, the vendor lost the right to rescind; and he contended on the facts that there was a negotiation within the meaning of the eighth condition, and that the vendee was only entitled to a return of his deposit.

POLLOCK, C.B.—I am of opinion that the plaintiff is entitled to the judgment of the Court. This is a case which the Court are called upon to decide under circum-

(1) 10 Sim. 410.

(2) 2 Hare, 106.

stances that the parties apparently did not contemplate, and for which they have made no provision. The seventh condition of sale points to the period of thirty-five days within which any objections are to be made, and if the objections are made within that period, the vendors are to be at liberty to either answer the objection and comply with the requisitions or rescind the contract; and the eighth condition, to a certain extent, enables them to do both, that is, first to try to comply with the requisitions, and if they cannot, then to rescind. That is the true construction of the seventh and eighth conditions taken together. I think it was well pointed out by my Brother Pigott in the course of the argument that in the present case these two conditions did not apply because there was no negotiation, but a dispute: the vendee saying the objection he had made was a good one, the vendors saying it was not a good objection. If the vendors had by any correspondence proposed instead, that some indemnity should be given, or that some other mode of complying with the requisitions and getting rid of the objection should be adopted, it would come within the eighth condition. I do not think Mr. Lush has answered that by saying "We stand upon our right, on the part of the vendors, to enforce the contract." The other side also stand upon their right, and insist that their objection is good, and that they have a right to throw up the contract. The parties then went on corresponding and trying to persuade each other, and each insisting that he was right and the other wrong. Mr. Lush argues that that is a negotiation within the eighth condition; I do not agree with him on that point. Too long a period has elapsed certainly to enable the vendors to rescind; and if we are to suppose the time is waived, I do not see my way clearly to know how it was extended, or how, being waived for one purpose, it was not waived for another. Upon the whole, it seems to me, and the ground upon which I give judgment for the plaintiff is this,—giving the fullest effect to the seventh and eighth conditions in favour of the vendors, it comes to this: by the seventh condition they are to comply with the requisitions or rescind the contract; by the eighth they are allowed not to do that immediately, but to endeavour

to arrange and to comply with them if they possibly can. I think the case of *Tanner v. Smith*(1) applies the moment vendors say "We are right; we do not mean to do any more. You say you are right, and you do not mean to do any more. We therefore hold you to the bargain." I think after that they cannot rescind. For these reasons it appears to me that judgment should be for the plaintiff.

BRAMWELL, B.—I am of the same opinion. I cannot help thinking that this is a very plain case. It seems to me that the seventh condition is a very intelligible and reasonable one, and so is the eighth condition, if a reasonable limit is put on it. A man undertakes to sell an estate; it turns out from some objection made that he cannot sell; he reserves to himself the liberty to say if the contract is not as represented, here is your deposit. That will be the state of things upon the seventh condition only. It might well be he would desire to say, I am entitled to remove the objection, or I think I can point out that it is unfounded, and I can obviate it by some equivalent or compensation, and I propose to negotiate. But then, upon that objection, in order that it might not be said I am bound without any attempt to remove or supersede an objection of this sort, the eighth condition is put in; and if there had been anything of the kind here, I should say the eighth condition would reserve the right of rescission, as my Lord has pointed out. But the parties do not negotiate as to the objections or requisitions, or attempt to obviate them, but the defendants stand upon their rights and say, Your objection is an ill-founded one; we shall not negotiate with you; we assure you it is unfounded. It seems that a condition of this description, with the meaning the defendant's counsel puts upon it, would be an unreasonable one, as is shewn upon this particular case, because the plaintiff's solicitor says there is an objection upon the surface, and before we go any further I point it out at once. What say the defendants? We insist it is no objection. The plaintiff's solicitor very wisely does what is objected to; he says, Well, if that is so, I shall make my requisitions to the title. I shall have to stand upon my rights, and I may as well have as many strings to my bow as possible. The result is, he is put to expense in consequence. I think that in

reason and good sense the defendants have lost the power of rescission, and the plaintiff is entitled to recover in this action. There is a difficulty which I must advert to, and it is this : the defendants do not at the last moment offer to rescind, and I am by no means sure that they may not at this moment say we never offered to rescind, and we hold you the plaintiff to your bargain ; bring an action against us for not complying with the contract, or file a bill to enforce specific performance. However, upon the whole, I think our judgment should be for the plaintiff.

PROCTER, B.—The plaintiff brings an action for the interest on his deposit and the costs necessarily incurred in investigating the title. The defendants urge their right to rescind the contract ; then the question is, whether they have a right to rescind under the circumstances, and whether they have rescinded. Now, there really is no difficulty in the construction of the seventh and eighth conditions of sale. It is perfectly plain to me that the sellers may at their election either rescind or negotiate with a view to remove an objection. The eighth condition says, if you attempt to remove the objection by negotiation you shall not be thereby deemed to have waived the right to rescind. Now, upon that the purchaser makes an objection *in limine*, and he makes it in the most business-like way, and accompanies it with this statement, "My client therefore wishes to withdraw from the purchase." That is what he says in his letter of the 28th of November 1861. What is the answer of the sellers ? In a letter of the 30th of November, their solicitor says, "I am satisfied we have power to sell ; we will thank you to send the queries on the title, as my clients will expect yours to complete the purchase." Is that a negotiation to remove the objection, or is it not, in point of fact, an election to hold a man to his bargain ; an election, in other words, not to rescind the contract upon the part of the vendors, but to hold the vendee to the contract ? I think the plaintiff is entitled to recover the whole of the amount he claims.

Judgment for the plaintiff.

1865. }
May 1. } IRBOTSON v. PRAT.

Nuisance—Firing Rockets—Frightening Grouse.

To a declaration alleging that the defendant, with intent to frighten away grouse from the plaintiff's land, fired and exploded rockets and fireworks so as to be a nuisance, the defendant pleaded that he committed the supposed grievance in order to prevent the plaintiff from shooting and killing grouse which had been enticed by the plaintiff from land of the defendant, and also in order to prevent the plaintiff from enticing other grouse which might be enticed by him from the defendant's land :—Held, that the plea was no answer to the action.

Declaration—First count, that the plaintiff was possessed of land, yet the defendant, well knowing the premises, on divers days unlawfully and with intent to drive and frighten away grouse and other game, then lawfully being in and upon the land of the plaintiff, from and off and away from the land of the plaintiff to certain other lands, and to prevent the plaintiff from hunting, shooting, killing and taking the said game on his land, fired, exploded and projected, and caused to be fired, exploded and projected, certain offensive, injurious, noxious, terrifying and dangerous rockets, fireworks, missiles, projectiles and combustibles, and made and caused to be made divers loud, jarring, annoying and disturbing noises close to and over the land of the plaintiff, so as to be and the same were a nuisance and a grievous disturbance to the plaintiff in his lawful and quiet occupation and enjoyment thereof, and thereby also the plaintiff's horses and cattle, which were then lawfully in and upon the land of the plaintiff, were then greatly alarmed, terrified and rendered wild, unmanageable and furious, and impelled to run and rush violently in and about and over the land of the plaintiff, and into certain bogs and quagmires therein, and against and over the walls, banks and fences of the land of the plaintiff, and to break down and destroy such walls, banks and fences of the plaintiff, and to escape out of the land of the plaintiff, and to go at large ; and by reason of

the premises, the said horses and cattle sustained great injury and damage, and became and were rendered wild, dangerous and unmanageable, and thereby also divers large numbers of grouse and other game, then lawfully being in and upon the land of the plaintiff, were scared and frightened and driven off and away from the land of the plaintiff, which otherwise the plaintiff might and would have shot, hunted, killed and taken, and the plaintiff was otherwise also greatly disturbed and damnified in the lawful and quiet occupation and enjoyment of his land.

The second count was in trespass.

Second plea, as to so much of the 1st count as relates to the said grouse, the defendant says that before the time of the committing of the said supposed grievances in the first count mentioned, his Grace the Duke of Rutland was seised in fee of certain land abutting on and next adjoining the land of the plaintiff in the first count mentioned, and was entitled to the exclusive right of shooting, killing and taking grouse on his land; and the said Duke before the committing of the said supposed grievances had gone to great expense in getting up and preserving great numbers of grouse on his lands, as the plaintiff well knew, and the defendant says that just before the committing of the said supposed grievances the plaintiff fraudulently and wrongfully and with intent to lure and entice the said grouse away from the said lands of the said Duke on to the lands of the plaintiff, and to obtain for himself the benefit of the expense so incurred by the said Duke as aforesaid, laid and placed on the land of the plaintiff near to the lands of the said Duke quantities of corn and other substances on which grouse feed, and thereby then lured and enticed the said grouse in the first count mentioned, and was about to lure and entice other grouse away from and out of the land of the said Duke on to the lands of the plaintiff, and was then and there about to shoot and kill the said grouse; wherefore the defendant, as the servant of the said Duke and by his command, in order to prevent the plaintiff from shooting and killing the said grouse so lured and enticed as aforesaid, and from luring and enticing the said other grouse as aforesaid, committed the said grievances

in this plea pleaded to, doing no more than was necessary for the purpose aforesaid.

Demurrer and joinder in demurrer.

Baylis, in support of the demurrer.—

The question is, whether when a person has a qualified right to game on his own land, another person is justified in disturbing the game by means which amount to a nuisance, as by sending up rockets, firing guns, and throwing stones. It is clear that the defendant cannot so act. The plea is bad on two grounds: first, because it does not cover the whole declaration; it is confined to the first count "so far as relates to the grouse." The wrongful act is sending up the rockets, the consequence of that act is frightening the grouse. The declaration alleges, by reason of the wrongful acts of the defendant the plaintiff's horses and cattle were alarmed and terrified, and grouse and other game were scared and driven off, so that, in truth, the plea is a plea to damages only so far as relates to the grouse. Secondly, the plea is no answer to the declaration. The plaintiff has a qualified right to the game; whilst they are on his land they are his property. A man enticing away game from his neighbour's land to his own land is guilty of no unlawful act. Such an act is perfectly lawful. In the case of *Keeble v. Hickeringill* (1), Holt, C.J. puts this case: "One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new." The action was held there not to lie. "But suppose Mr. Hickeringill should lie in the way with his gun and fright the boys from going to school, and their parents would not let them go thither, sure that schoolmaster might have an action for the loss of his scholars." *Carrington v. Taylor* (2) is also in point for the plaintiff; it was held in that case, that firing at wild fowl so near to a decoy as to make the birds there take flight, was evidence of a wilful disturbance of and damage to the decoy for which an action is maintainable by the owner. There is a great distinction between enticing grouse to come to a man's land and disturbing grouse and frightening them from a man's land. The act of putting down corn to entice them is a lawful act;

(1) 11 East, n. 574.

(2) Ibid. 571.

the act of firing guns to frighten them away is an unlawful act.

[BRAMWELL, B.—In *Chasemore v. Richards* (3) the plaintiff was possessed of a spring underground which supplied his well. The defendant dug a well on his land, and the plaintiff's spring in consequence dried up. The only remedy the plaintiff had was to dig his well deeper and so retain the water if he could.]

Yes; and here the Duke ought to offer better inducement to the grouse to remain; he ought to feed them better. In *Read v. Edwards* (4) it was held to be actionable for a man to allow his dog, knowing him to be accustomed to chase and destroy game, to be at large in the neighbourhood of a large wood which the dog entered and did the damage complained of, and Willes, J., in delivering the judgment of the Court, says, "As to the property damaged being game, we think this is no answer to the action, because the law recognizes in the proprietor of land a qualified right to game whilst it is upon the land." So in *Sutton v. Moody* (5), the Court say, "If one start a hare in my close and kill her there, it is my hare; otherwise if he hunt her into the ground of a third person, then it is the hunter's." *Blades v. Higgs* (6) and *The Queen v. Pratt* (7) are to the same effect.

Wills.—It may be admitted, on behalf of the defendant, that there is a qualified right to game, because then it appears more clear that the plaintiff has done wrong in enticing away the defendant's grouse. In *Keeble v. Hickeringill* (1), at p. 574, Holt, C.J. says—"Suppose the defendant had shot in his own ground: if he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing and a wrong." So here, to entice away the defendant's grouse on purpose to damage him is a wrong; the plea alleged that the act was fraudulently done, and also that what the defendant did, was done to prevent other grouse from being enticed over to the plaintiff's land. Here is an attack on the

defendant's possessory right; it is conceded, on the other side, that the grouse are the defendant's as long as they are on the defendant's land, and all that the defendant has done is to protect that right and prevent that right from being invaded, and to protect his possessory right the defendant has a right to fire guns and send up rockets on his own land. The plaintiff does the first act, and according to the allegation in this plea he does it with the intent to damage his neighbour, and on general demurrer it is admitted he does it with the intent alleged. The plea is therefore good.

[MARTIN, B.—You cannot distinguish this case from the case cited from 11 *East*. The declaration is good and the plea is bad.]
Baylis was not heard in reply.

POLLOCK, C.B.—We are all of opinion that in this case the declaration is good and that the plea is bad. The declaration complains of an act being done which is apparently injurious and done for the purpose which is attributed to the defendant in the declaration; and supposing there had been no plea pleaded, the declaration would be good. But then the defendant by his plea says, "You have done me some wrong, and I have been endeavouring to redress that wrong by doing some wrong to you." If a man attacks you by force you may defend yourself by force; but you cannot commit some other wrong of a totally different character by way of repairing or avoiding the consequences of the wrong that has been done to you. You must seek redress for that wrong in a lawful and proper way. If a man horsewhips you you cannot libel him; or if he libels you you cannot justify the libel by horsewhipping him to prevent him doing it again. On these grounds it appears to me that, the declaration being good and the plea bad, the plaintiff is entitled to our judgment.

MARTIN, B.—I think the principle of the case of *Carrington v. Taylor* (2) decides this case.

BRAMWELL, B.—I also am of opinion that the plaintiff is entitled to our judgment. The declaration appears to me to be clearly good. It alleges that the plaintiff, being the owner of certain land, the defendant, well knowing the premises, on divers days and times, and so forth, unlaw-

(3) 2 Hurl. & N. 190; s.c. 26 Law J. Rep. (N.S.) Exch. 393.

(4) 34 Law J. Rep. (N.S.) C.P. 31.

(5) 1 Salk. 556.

(6) 13 Com. B. Rep. 844; s.c. 32 Law J. Rep. (N.S.) C.P. 182.

(7) 4 E. & E. 360; s.c. 24 Law J. Rep. (N.S.) M.C. 113.

fully and with intent to drive and frighten away the grouse and other game then lawfully being on and upon the said land of the plaintiff to certain other lands, and to prevent the plaintiff from hunting, shooting, &c. and so on, fired rockets and made a noise. The defendant pleads a plea which admits the declaration to be true, and then sets up the right to do the thing complained of, for the purpose which the declaration attributes to the defendant; that is to do the act for the purpose of frightening away the game. What is the reason given? The reason given is this: That the game which the defendant frightened away was game which the plaintiff wholly or partially got off from the Duke of Rutland's land—say the defendant's land—the Duke having attracted it there by providing food for it, or taking care of it, and then the plaintiff, improperly attempted to get it on his land by putting down some grain on his land. Then, in order that the plaintiff may not shoot the game which the plaintiff had so attracted, and in order that the plaintiff may have no inducement to go on with such conduct—for that is the only meaning of preventing him from alluring the grouse aforesaid—in order that he should be without inducement for such acts as that the defendant did the thing complained of. It appears to me clearly that the plea is bad, because I see nothing, in point of law, to prevent the plaintiff from doing that which the plea alleges he has done. If the plaintiff has done no wrong, how can there be a justification for the defendant's act? No one can pretend for a moment that any action would lie at the suit of the Duke against the plaintiff. The truth is this: without saying anything as to the propriety of such conduct as this between gentlemen and neighbours, the true remedy, I take it, where a person knows game is attracted away from his land, is to offer them stronger inducements to remain. It is really like the case I mentioned in the course of the argument of *Chasemore v. Richards* (3), where, if a man has the misfortune to lose his spring by another's digging a well, the proper remedy is for him to dig a deeper well.

PIGOTT, B. concurred.

Judgment for the plaintiff.

1865.
April 24, 25;
May 3.

{ THE CHESTERFIELD AND
MIDLAND SILKSTONE COL-
LIERY COMPANY (LIMITED)
v. HAWKINS.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134).—Composition Deed — Parties — Covenant to pay Composition.

A deed of composition was made between certain persons, whose names and seals were subscribed and affixed in the schedule thereunder written, being creditors in their own right solely, or in co-partnership with others, of the debtor, of the first part; the debtor of the second part; and two sureties for securing the composition of the third part; and in which the parties of the second and third parts covenanted with the parties of the first part, and with all the other creditors of the debtor, to pay them a composition of 10s. in the pound on their respective debts:—Held, that as the non-assenting creditors were not parties to the deed, but only covenantees, they could not sue for the composition, and had not an equal advantage with the assenting and executing creditors, and that, therefore, the deed was not valid.

Declaration for calls.

Plea—That before the time of the commencement of this suit, and after the accruing of the causes of action in the declaration mentioned, on the 11th of March 1864, a deed was made between the defendant's creditors of the first part, the defendant of the second part, and B. Wade and J. Crossley of the third part, relating to the debts and liabilities of the defendant and his release therefrom; that such deed was made in accordance with the provisions of the Bankruptcy Act, 1861, in that behalf; and that the conditions in that behalf mentioned in the same act to render the said deed valid and effectual and binding on all the creditors were observed, and thereby the creditors of the defendant, for the considerations therein mentioned, released and discharged the defendant from all debts and liabilities of the defendant to the said creditors respectively, and from all actions and suits in respect thereof.

Replication—That the said deed was and is in the words following :

"This indenture, made on the 11th of March 1864, between the *several persons or parties whose names and seals are subscribed and affixed in the schedule hereunder written, being creditors in their own right solely, or in co-partnership with others, of W. F. Hawkins, of Belper, in the county of Derby, corn and seed merchant, executing, assenting to, or approving of these presents, of the first part, W. F. Hawkins of the second part, and B. Wade and J. Crossley of the third part* : Whereas the said W. F. Hawkins is indebted to the several creditors aforesaid in the several sums set opposite to their respective names in the schedule hereunder written, and is and may be indebted to divers other persons or corporations in divers other sums; and whereas the said W. F. Hawkins being unable to pay in full the sums so owing by him as aforesaid, the said several parties hereto of the first part have lately agreed to accept a moiety of their said respective debts, payable in manner and at the times hereinafter mentioned, in full payment and discharge of such debts respectively, and have agreed to execute to the said F. W. Hawkins such release as is hereinafter contained, and the said B. Wade and J. Crossley have agreed to guarantee the payment of the aforesaid composition in manner hereinafter contained ; and whereas it is intended that these presents shall operate under the Bankruptcy Act, 1861, s. 192; now this indenture witnesseth, that in pursuance of the said agreement, *and in consideration of the premises and of the covenant for payment of the aforesaid composition in manner hereinafter contained, the said several parties hereto of the first part and all other, if any, the creditors of the said W. F. Hawkins, whether persons, partnerships or corporations, do hereby, for themselves respectively and for their respective executors, administrators and successors, and not one of them for the acts and deeds of the others or other of them, but each and every of them doth hereby for himself or themselves, and for his or their own acts, heirs, executors and administrators only, covenant with the said W. F. Hawkins, his executors and administrators, that this present covenant shall operate and enure, and may be pleaded in*

bar as a good and effectual release and discharge of all and all manner of actions, suits, bills, bonds, writings, obligatory debts, accounts, sum and sums of money, judgments, extents, executions, claims and demands whatsoever, both at law and in equity, or otherwise howsoever, which they, or any of them, their or any of their heirs, executors, administrators or successors, now have or hath, or hereafter shall or may have, challenge, claim or demand against W. F. Hawkins, his heirs, executors or administrators, or any of them, for or by means or on account of all and every or any of the debts to them, or any of them respectively, due and owing from the said W. F. Hawkins as aforesaid, or of any interest or commission due or demandable for the same, or for or by reason or on account of any other matter, cause or thing whatsoever in respect of the said debts : Provided always, and it is hereby agreed and declared, that nothing herein contained shall extend to prevent the said creditors, parties to or bound by these presents, or any of them, or their or any of their partner or partners, heirs, executors, administrators, successors or assigns, from enforcing or otherwise obtaining the full benefit and advantage of any charge or lien which they, or any of them, now have or hath upon any estate or effects of the said W. F. Hawkins or any other person or persons, or from suing or prosecuting any other person or persons than the said W. F. Hawkins, his heirs, executors or administrators, who is, are or shall or may be liable or accountable to pay or make good to any of the said creditors all or any part of their said respective debts, either as indorsees or acceptors of any bill or bills of exchange, or promissory note or notes, or as being bound in any bond or bonds, obligation or obligations, or other instrument or instruments, or as being liable or accountable for the payment of any such debt or debts, without having subscribed any bill, note, bond or other instrument whatever, or otherwise howsoever, as if these presents had not been made. And this indenture further witnesseth, that in further pursuance of the aforesaid agreement, and in consideration of the premises, the said W. F. Hawkins doth hereby, for himself, his heirs, executors and administrators, covenant with the parties hereto *of the first part and*

*with all other creditors of the said W. F. Hawkins who are or shall be bound by these presents, severally and respectively, and their several and respective executors, administrators and successors, that the said W. F. Hawkins, his executors or administrators, shall and will pay to the aforesaid creditors, severally and respectively, or their several and respective executors, administrators or successors, the sum of 5s. in the pound upon their several and respective debts so owing by the said W. F. Hawkins, upon or before the 15th of March instant, and the further sum of 5s. in the pound upon the same debts, upon or before the 22nd of August now next, the value of property held as security being first deducted from the said debts. And this indenture further witnesseth, that, in consideration of the premises, the said B. Wade and J. Crossley do hereby, for themselves, their heirs, executors and administrators, jointly, and each of them doth hereby for himself respectively, and for his respective heirs, executors or administrators, covenant with the parties hereto of the first part and with all other the creditors of the said W. F. Hawkins who are or shall be bound by these presents, severally and respectively, and their several and respective administrators and successors, that the said W. F. Hawkins, B. Wade and J. Crossley, or some or one of them, or the executors or administrators of them or some of them, shall and will pay, in manner and at the time aforesaid, the second instalment of the aforesaid composition hereinbefore covenanted to be paid by the said W. F. Hawkins, his executors or administrators: Provided always, that if a majority in number, representing three-fourths in value of the creditors of the said W. F. Hawkins, whose debts shall respectively amount to 10*l.* and upwards, shall not, at the time and in manner in that behalf appointed and enacted by the Bankruptcy Act, 1861, assent to or approve of these presents or execute the same, then these presents, and every clause, matter and thing herein contained shall cease and be void: Provided, lastly, and it is hereby declared and agreed, that these presents, and the paramount object, intent and meaning thereof, are and shall be deemed and taken to be for the equal benefit and advantage of all the creditors of the said W. F. Hawkins,*

as well those who execute or assent to or approve of these presents as those who do not, and that all such creditors shall stand, as nearly as possible, upon an equal footing; and the generality of this proviso shall not be restricted by any clause, matter or thing hereinbefore appearing."

And the plaintiffs say that they did not make or assent to the said deed.

Rejoinder—That all conditions, matters and things provided and required by the Bankruptcy Act, 1861, to be observed, performed and fulfilled, in order to render the said deed as valid and effectual and binding on all the creditors of the defendant as if they were parties to and had duly executed the same, were observed, performed and fulfilled, and the said deed had, before the commencement of this suit, become and was and still is as valid and effectual and binding on the plaintiffs as if they were parties to and had duly executed the same.

Demurrer to the rejoinder, and joinder in demurrer.

Cohen, in support of the demurrer.—There are three objections which render the deed invalid, and therefore not binding on the non-assenting creditors. First, the deed is not made between the debtor and all his creditors, but only between the debtor and the creditors whose names and seals are subscribed and affixed in the schedule thereunder written, and it recites that the debtor is indebted to those creditors in certain sums, in the schedule to the deed mentioned. Secondly, there is no proviso in the deed that it shall be void, if default be made in payment of the composition-money, and the release is made, not in consideration of the payment of the composition, but is expressly stated to be in consideration of the covenants by the debtor and the surety. Thirdly, the plea was pleaded at a time when the composition-money was not yet payable, and it does not and could not state that the composition had been paid or tendered; yet at the same time the plea is not pleaded by way of equitable defence. With regard to the last point, it is quite clear that the plea affords no legal defence unless it avers a payment of the composition or a tender of the money—*Cumber v. Wane* (1), *Fessard v. Mugnier* (2). In *Clapham v.*

(1) 1 Smith's Lead. Cas. 245.

(2) *Ante*, C.P. 126.

Atkinson (3), the plea was pleaded by way of equitable defence. With regard to the second point, no doubt it will be contended on the other side that this is not an ordinary composition-deed; and that inasmuch as it contains no proviso that the deed shall be void in case of the non-payment of the composition, and as the release is expressly stated to be in consideration of the covenants by the debtor and surety, therefore it operates as an immediate unconditional release. It must be admitted that there is no reason why a creditor may not take as an accord and satisfaction a covenant by the debtor and a covenant by the surety; and it is conceded that it appears from the terms of the deed that the parties intended it should operate as an immediate and unconditional release, the creditors simply relying on the covenants by the debtor and surety. But still the question remains, whether it is reasonable to allow a majority of creditors to compel a minority to release and forfeit their debts absolutely, and to rely only on the covenants of the debtor and the surety. It may perhaps be said, that if the deed operates equally as to all the creditors, it is for the majority of creditors, and not for the Court, to determine whether it is reasonable. The main objection to the deed is the first. Now, this deed is so framed that the debts are absolutely released, and do not revive on non-payment of the composition, and it therefore follows, that the only remedy of the creditors who are parties to the deed is, by suing the debtor and surety on the deed itself. It is clearly established by the more recent cases, that a deed may be valid under section 192, though not made between a debtor and all his creditors, provided it clearly appears that it was intended to apply to all the creditors, and also that it gives the same or substantially the same remedies and advantages to all the creditors alike. This is stated to be the necessary condition of a valid composition-deed by the Lord Chancellor, in his judgment in *Ex parte Cockburn* (4); at page 19 he says, "To render a deed of composition and release binding on the minority of the creditors

who have not executed or assented to or approved of it in writing, it is necessary that the non-assenting creditors should stand under the deed in the same situation and with the same advantages as the creditors forming the majority. The 192nd section enacts, that the creditors who have not assented are to be bound as if they were parties to and had duly executed the deed. It follows that the provisions of the deed must be such as will apply to all the creditors equally, and without distinction or difference." This deed does not give equal advantages and remedies to those who are parties and those who are not. What is the position of the creditors who are parties to the deed? Their debts are released whether or not the composition be paid; but if it be not paid, they can sue the debtor and surety on the deed, and both will be estopped from denying the existence and amount of those creditors' debts. What now is the position of those who are not parties to the deed? Why, in the event of the composition not being paid they could not sue at all.

[MARTIN, B.—The deed contains an absolute release, and a covenant by the debtor and sureties with "all the creditors who are or shall be bound" to pay the "aforesaid creditors" a composition of 10s. in the pound.]

No doubt the covenant is entered into with all the creditors, but the deed is made only with the creditors whose names are subscribed to the schedule to the deed, and not with "all the creditors." The non-assenting creditors are not parties to the deed, and they cannot sue; this follows from an old and well-established technical rule of law, that a person who is not a party to an indenture cannot possibly sue on a covenant contained in the deed, even though he has executed the deed, and the covenant be made expressly with him and no other person.

[MARTIN, B.—Is not the strict rule of law overridden by the special agreement between the parties? Is it not a rule which depends upon the construction of the deed? Is it so stringent that if it appears on the face of the instrument that it is the intention of the parties to it that the covenantees should sue, that they cannot do so?]

(3) 4 B. & S. 780; s. c. *ante*, Q.B. 49.

(4) 33 Law J. Rep. (N.S.) Bankr. 17.

It is an inflexible rule of law that no one can sue upon an indenture except he be a person named as a party in the indenture, or included in a class named in it. It is not enough that a person should be a covenantor. This point was considered in *Ex parte Cockburn* (4); at p. 20 the Lord Chancellor says, "It appears from this statement of the deed that the creditors who have not executed the deed, and those who are not named in the schedule, are placed by the deed in a situation very inferior to that of the majority of the creditors. To the latter the composition is paid down in hand, whereas the former have to rely upon the covenant. But, further, it is clear that the creditors who are not named and described in the schedule and have not executed the deed could not sue upon the covenant of the debtor. The covenant is with the parties to the deed of the second and third parts, and as the deed is between parties, no person who is not a party could sue upon the covenant. This clearly follows from the settled principles of law which are illustrated by the cases cited in the argument." All the authorities on the point are collected in *Addison on Contracts*, p. 946, where the law is thus stated: "Whenever a deed was expressed to be made between certain persons named in the premises of the instrument or described therein as the contracting parties, those persons only and their privies claiming through them by blood, representation or otherwise, could take advantage of the deed by way of action. It mattered not that the deed was made for the exclusive benefit or use of other individuals named therein, and contained covenants with them for the performance of certain duties; if they had not been made parties to the contract they could not sue thereon, although they might have sealed and delivered the deed in common with those who were formally described as parties to the instruments." And the cases cited in the note to *Gilby v. Copley* (5), *Berkeley v. Hardy* (6), *Lord Southampton v. Brown* (7) and *Metcalf v. Rycroft* (8) support the text. It is also laid down in *Com. Dig.* tit. 'Fait' (D 2.), "So a party to a deed

cannot covenant with one who is a stranger to the deed—*Per Holt, Carth. 76.*" The distinction in this respect between an indenture and a deed-poll is pointed out in *Gardner v. Lachlan* (9). A party not named in a deed cannot recover by means of it, if it be a deed between parties. A deed-poll might be so constructed as to give a person a right of action against the party who executed it; but where there is a deed between parties, it is a settled rule that no person can bring an action on it except a party or those who claim through him. No doubt, if a certain class of persons be named as a party to a deed, any one comprised in that class is entitled to sue according to his interest, although he is not mentioned specially in the instrument—*The Sunderland Marine Insurance Company v. Kearney* (10). So in *Davidson on Conveyancing*, p. 101, it is stated, "Covenants in an indenture entered into with persons not parties confer no right of action on such persons (though an action may be maintained by a party to an indenture against one who is not a party, but executes the deed), except that if the covenant relate to *hereditaments* and be contained in an indenture made since the 1st of October 1845, such a covenant may be sued on by a person not a party." Here it is quite clear that the covenants do not relate to realty, and the statute 8 & 9 Vict. c. 106. s. 4. does not apply. One argument, however, in favour of the plaintiffs may be drawn from the fact of legislative interference, and that is, that the rule of law was so stringent that it required a positive enactment to vary it. But it may be said that this rule of law is generally applicable to indentures, and does not apply to composition-deeds; that the non-assenting creditors are made parties to such deeds by virtue of the Bankruptcy Act, 1861. But this is not so. Section 192. enacts, that the deed shall be as valid, effectual and binding on all the creditors "as if they were parties to and had executed the same"; it does not enact the converse proposition, that it shall be as valid, effectual and binding on the debtor, and shall give all creditors the same rights of

(5) 8 Lev. 138.

(6) 5 B. & C. 355.

(7) 6 Ibid. 718.

(8) 6 M. & S. 75.

(9) 8 Sim. 123-126; s. c. 5 Law J. Rep. (N.S.) Chanc. 332.

(10) 20 Law J. Rep. (N.S.) Q.B. 417; s. c. 16 Q.B. Rep. 925.

action as if they had executed and were parties to the same. *Ex parte Cockburn* (4) and *Benham v. Broadhurst* (11) are expressly in point. In the latter case, Crompton, J., in delivering the judgment of the Exchequer Chamber, says, "The present deed, it will be observed, is made between the debtor and the executing creditors only, who take a covenant to themselves respectively and individually. There is no covenant by the debtor with the non-assenting creditors, or with any trustee for them, on which they or the trustee can sue. They have not, therefore, equal protection with the executing creditors, and the foundation of our judgment is, that here the non-assenting creditors have not an equal right to sue,—an equal right which is considered in effect an equivalent to so much property." The deed is not made between the debtor and all creditors who may assent, so that it cannot be said that by assenting they can make themselves parties to the deed and obtain the benefit of the covenant. Again, there is an essential difference between the position of creditors whose debts are admitted in the schedule and those creditors whose debts are not admitted. This was one of the points in *Ex parte Cockburn* (4), and the Lord Chancellor in his judgment (p. 20) says, "Again, the creditors whose names and debts are not set forth in the schedule are under a great disadvantage in this respect, namely, that there is no admission by the debtor of the debts due to them respectively. Even, therefore, if any one of such creditors could now come in and execute the deed and sue upon the covenant, he would be under the necessity of proving the fact and amount of his debt." The deed contains an absolute release, and there is no *cessio bonorum*, no relief in bankruptcy, no remitter to the old debt in case of the non-payment of the composition, but a mere right of suing on the deed; and it ought, therefore, to be perfectly manifest that one creditor has no advantage over the other creditors. Here the creditors who have executed the deed have the advantage of suing for their composition, and the existence and amounts of their debts are admitted in the schedule to the deed; the position of the two classes of creditors

are not identical, therefore the non-assenting creditors are not bound, and as against them the deed is invalid.

Mellish (*Raymond* with him), for the defendant.—There is no dispute as to the general rule of law, that no person can bring an action on a deed who is not a party to it, but there may be different modes of applying the rule. If the intention of the parties to the deed be clear that some one else should be a party in addition to those named as parties in the commencement, the rule is not so irreversible that such other person should not be considered a party. Suppose the last clause of the deed had in terms expressly provided for this, could it then be said that the persons named in the commencement should alone be parties? No words could shew more clearly than those in the last clause of this deed that it was the intention of the actual parties that the other creditors should also be considered as parties. The general rule of construction, too, is, that the whole instrument shall be read together; not that the commencement shall govern all the rest. In *Ex parte Cockburn* (4), Lord Westbury seems to have thought that "creditor" was too general a description to make a man a party to a deed; but though the case has been cited frequently, it has never been acted on in a court of law. *Stone v. Jellicoe* (12) and *Deuhurst v. Jones* (13), where "creditors" was held to be a sufficient description, are in conflict with *Ex parte Cockburn* (4). All the cases cited on the other side come within the category of those where the question is, whether the agent or trustee is to sue. No case goes the length of saying that, where it is intended that other persons besides the actual parties are to have all the advantages of being parties, the mere circumstance of their not being mentioned in the commencement is to override the plainly expressed intention. *Berkeley v. Hardy* (6), per Holroyd, J., leaves the question open as to what is necessary to make a man a party. So *Cook v. Child* (14) and *Metcalf v. Rycroft* (8). In *Spitzer v. Chaffers* (15), which was a case decided on the Bankruptcy Act, 1849,

(12) *Ante*, Exch. 11.

(13) 3 H. & C. 60; a. c. 33 Law J. Rep. (N.S.) Exch. 294.

(14) 2 Lev. 74.

(15) 33 Law J. Rep. (N.S.) C.P. 7.

(11) *Ante*, Exch. 61.

Erle, C.J. said, "It is not necessary that all the creditors should sign the deed; if it were, section 224. of that act would be inoperative," and in *Dingwell v. Edwards* (16) the creditors are simply described as such, no particular mention of them being made in the schedule. Blackburn, J. there speaks of a deed which "does not expressly or by necessary inference include all" the creditors. Secondly, on the true construction of the 192nd section, the person who appears on the face of the deed to have been intended to be a party is a party by virtue of the statute. If he is to be "bound by" the deed, he is also to take advantage of it. The words of the section are "it shall be as valid and effectual," &c. as well as "it shall be binding," and this is equivalent to saying that the creditors shall be parties whether they execute or assent to the deed or not. As to the deed being bad because there is no provision for its becoming void on the failure of payment of the composition, the objection might avail if the agreement was that on payment it would be accepted in satisfaction; but that is not so, for there is an immediate release of the debtor from all claims, the remedies against the sureties being reserved, which is perfectly reasonable.

Cohen, in reply.—The argument on the other side as to intention would apply to every case of a deed unskilfully framed. Here the release is in consideration of the covenant, and there is no proviso that, if default be made in payment, the deed shall be void. In the other cases it does not matter whether the creditor can sue or not, because if the composition be not paid, the deed is void, and the creditor can sue for the original debt.

(He was then stopped by the Court.)

Cur. adv. vult.

MARTIN, B. now (May 3) delivered the judgment of Pollock, C.B. and himself.—The question in this cause is the now very common one, whether a composition-deed is effectual to bar a non-assenting creditor? An objection to it is taken upon the case *Ex parte Cockburn* (4), which seems to us to be fatal. *Ex parte Cockburn* (4) was twice argued, and two deliberate judgments

were delivered by the Lord Chancellor upon it, and he lays down in the most plain and direct terms, "that a deed to bind creditors who have not assented must be one which places the creditors who do assent and the creditors who do not assent precisely upon an equal footing in point of law." The scope of the present deed is, that the creditors should release the debtor, and that in consideration thereof they should have covenants by the debtor and two sureties to pay a composition of 10s. in the pound by two instalments of 5s. each at future days, and unless the non-assenting creditors have secured to them these covenants and legal rights of action upon them, then according to the above rule they are not bound. Now, it is true that the words of the covenants themselves are such as to embrace not only the assenting creditors but the non-assenting ones; but a technical rule of law is invoked on behalf of the plaintiffs.

A technical rule is one which is established by authority and precedent, which does not depend upon reasoning or argument, but is a fixed, established rule, to be acted upon, and only discussed as regards its application; in truth, it is "the law." The alleged rule is, that where a deed is made *inter partes*, no one except parties properly so called can sue upon a covenant contained in it, and the contention on the part of the plaintiffs is, that the parties to this deed are such of the creditors as have executed or assented to or approved of it, and those only, and that non-assenting creditors are not parties, and inasmuch as they cannot maintain actions upon the covenants to pay the composition, which in truth is the only legal right created by the deed in lieu of the released debts, they are not upon an equal footing in point of law with the assenting creditors. The rule and distinction as to deeds *inter partes* and deeds not of that character is very old, and is to be found in the ancient legal authorities, but it is impossible to state or illustrate it more clearly than is done by Lord Tenterden in his book on *Shipping*, p. 170. This is part of the original text. The book has gone through, I believe, a dozen editions, several edited by Lord Tenterden himself, and the original passage is still continued. He states the rule to be

(16) 4 B. & S. 738; s. c. 33 Law J. Rep. (N.S.) Q.B. 161.

a technical one, and thus illustrates it: "If a charter-party under seal is expressed to be made between certain parties, as between A. and B, owners of a ship whereof C. is master, of the one part, and D. and E. of the other part, and purports to contain covenants with C, nevertheless C. cannot bring an action in his own name upon the covenant, and this even although he sealed and delivered the instrument; but if the charter-party is not expressed to be made between parties, but is written thus, 'This charter-party indented witnesseth' it is otherwise." He adds, "This latter is the most proper form." In the case of *Berkeley v. Hardy* (6) the same rule is laid down, and in the judgment it is stated to be a long-established technical rule, and one believed to be peculiar to the law of England.

The deed now in question is made between the several persons whose names and seals are subscribed and affixed in the schedule, being creditors executing, assenting to or approving of these presents, of the first part; the defendant, the debtor, of the second part; and the two sureties of the third part. The parties, therefore, who alone can sue are the creditors executing or assenting to or approving of the deed; and inasmuch as the plaintiffs dissent from and disapprove of it, and seek to recover the entire debt of 20s. in the pound, they cannot sue; and if so, they are not upon an equal footing with the executing or assenting creditors, who can. It was contended, on behalf of the defendant, and during the argument I was inclined to think so, that the rule was one of construction only, and must yield to the plainly expressed intention of the covenants; but I am now satisfied this is not the true nature and character of the rule, and that it is one of positive law. It was also forcibly contended that the rule had no application to a deed whose operation was created, as regards the plaintiffs, not by their agreement to it, but by an act of parliament. I would have lent a willing mind to this argument had I not felt constrained by the case *Ex parte Cockburn* (4). But the Lord Chancellor there affirms the application of the rule to composition-deeds, and states that when a composition-deed is made *inter partes*, creditors not named or

described cannot sue. He adds, the covenants are with the parties to the deed of the second and third parts, and as the deed is between parties, no person who is not a party can sue upon them. This (he adds) clearly follows from the settled principles of law. The objection, therefore, seems to me fatal, and if it is to be overruled, in my judgment, it must be overruled by a Court of error. I have read the report of the case of *Benham v. Broadhurst* (11), in error, and I think that the Court of Exchequer Chamber in their judgment, as delivered by my Brother Crompton, adopt this view. Speaking for myself, I very much regret our decision. It seems to me that the deed is a fair and reasonable one, and its object is only defeated by a technical objection.

BRAMWELL, B.—I concur in the judgment of the Court. My Lord and my Brother Martin say that *Ex parte Cockburn* (4) is in point. I accept their view of that case, and therefore I concur. They being of opinion that *Ex parte Cockburn* (4) is in point, it is not worth while that I should critically examine the judgment in that case. I concur also for another reason. I do not think it becoming in any Court to say of the judgment of another Court of co-ordinate jurisdiction that they must decline to accept it as an authority, which I should have to do, if I refused to be bound by the decision in *Ex parte Cockburn* (4).

Judgment for the plaintiff (17).

1865.
May 3.

} GURRIN v. ROPERA.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134.)—Composition-Deed—Parties.

A composition-deed was made between certain persons, whose names were subscribed and seals affixed in the schedule thereunder written, on behalf of themselves and all and every other the creditors of the defendant of the first part, and the defendant of the second part, which, after reciting that the defendant was indebted to the said persons

(17) Pigott, B. was at chambers.

parties thereto of the first part in the several sums set opposite to their respective names in the said schedule thereunder written, and was also indebted to other persons in divers sums of money, and being unable to discharge his said debts in full, had agreed to pay a composition of 5s. in the pound, such payment or composition to be made and paid to all and every the creditors of the defendant, whether executing the deed or not, to be paid and payable on the 22nd of September 1865, and to be in full discharge of all and every the debts due and owing at the time of the executing of the said deed, provided that the said parties of the first part thereby did accept the said composition and release the debts:—Held, that the non-assenting creditors were not bound, as the release was absolute, and the deed did not provide any means by which these creditors could obtain their composition.

Declaration on a bill of exchange for 18l. 10s., drawn by the plaintiff and accepted by the defendant; and also for goods sold and delivered, and goods bargained and sold, and for money due on accounts stated.

Plea.—That after the accruing of the plaintiff's claim, and after the 11th of October 1861, the defendant was indebted to the plaintiff and divers other persons in divers sums of money, and thereupon and whilst he was so indebted a deed, bearing date the 22nd of September 1864, was made and entered into, by and between the several persons whose names were and are subscribed and seals affixed in the schedule thereunder written, being respectively, either individually or in co-partnership with others, creditors of the defendant, on behalf of themselves and all and every other the creditors of the defendant, of the first part, and the defendant of the second part, relating to the debts and liabilities of the defendant and his release therefrom; whereby,—after reciting that the defendant was indebted to the said several persons parties thereto of the first part, in the several sums of money set opposite to their respective names in the said schedule thereunder written, and was also indebted to other persons in divers sums of money, and being unable to discharge his said debts in full, had agreed to pay a composition of 5s.

in the pound; such payment or composition to be made and paid to all and every the creditors of the defendant, *whether executing the said deed or not*, to be paid and payable on the 22nd of September 1865, at the office of Mr. E. Lewis, 22, Great Marlborough Street, and to be in full discharge of all and every the debts of the defendant due and owing at the time of the executing of the said deed,—in pursuance of the said agreement, and in consideration of the payment by the defendant to his said several creditors of such composition as aforesaid, they, the said several persons parties thereto of the first part, for themselves and their several and respective partners, did thereby accept the said composition in full satisfaction and discharge of their respective debts, and did by the said indenture release and for ever quit claim unto the defendant, his heirs, executors and administrators, all and all manner of action and actions, suit and suits, debts and sums of money, accounts, costs, reckonings, agreements, judgments, extents, executors' claims and demands whatsoever which they, the said several persons parties thereto of the first part and their several and respective partners, then had or at any time theretofore had, against the defendant; and it was thereby, lastly, agreed and declared that the said indenture was intended to operate and should (so far as lawfully might be) operate as a deed of composition within the provisions of the Bankruptcy Act, 1861, and that so soon as a majority in number, representing three-fourths in value of the creditors of the defendant, should have executed or in writing assented to the said indenture, it was intended that the same should be registered in the Court of Bankruptcy, under the 192nd section of the said act, in order that the defendant might obtain the protection of the Court as provided by the 198th section. That a majority in number representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10l. and upwards, did in writing assent to and approve of the said deed and execute the same, and the execution of the said deed by the defendant was attested by an attorney, and within twenty-eight days from the day of the execution of the said deed by the defendant the same was

produced and left (having been first duly stamped) at the office of the Chief Registrar of the Court of Bankruptcy for the purpose of being registered, and was duly registered as aforesaid; and together with such deed there was delivered to the said Chief Registrar an affidavit by the defendant that a majority in number representing three-fourths in value of the creditors of the defendant, whose debts amounted to 10*l.* and upwards, had in writing assented to and approved of the said deed, and also stating (as the fact was) that no property or credits of the defendant were comprised in the said deed, and that the said deed did before the registration thereof bear such ordinary and *ad valorem* stamp duties as were provided by the Bankruptcy Act, 1861, in that behalf. That at the time of the execution of the said deed the plaintiff was a creditor of the defendant in respect of the claim herein pleaded to, within the meaning of the Bankruptcy Act, 1861, and had due notice of the said deed, and the plaintiff always could and might have executed the same and have had the benefit thereof as a creditor of the defendant, and still can and may do so; and all conditions having been performed and all things having happened necessary in that behalf, the plaintiff became and was, and is, bound by the deed as if he had been a party thereto and had duly executed the same.

Demurrer and joinder in demurrer.

Gough, in support of the demurrer.—The deed is not binding on the non-assenting creditors. It contains no covenant to pay the composition, but an absolute release; and it does not place the creditors who assent and those who do not assent on the same footing.

[BRAMWELL, B.—*Ex parte Cockburn* (1) and *Benham v. Broadhurst* (2) are authorities that the deed is invalid to bind the non-assenting creditors.]

White Meadows, in support of the plea.—The deed provides that at a particular place and on a particular time a composition will be paid to all the creditors, those who execute and those who do not; it is, therefore, manifestly intended to operate

for the benefit of all the creditors. *Clapham v. Atkinson* (3) decides that it is not necessary that all the creditors should be parties to the deed, if it gives them all the same rights and the same remedies.

[MARTIN, B.—This deed contains no covenant to pay the composition; how are the non-assenting creditors to get it?]

It is not necessary to the validity of the deed that it should contain a covenant to pay the composition. There was no such covenant in *Clapham v. Atkinson* (3). He referred to *Garrod v. Simpson* (4), *Wells v. Hacon* (5), *Good v. Cheeseman* (6) and *Norman v. Thompson* (7).

[BRAMWELL, B. referred to *Evans v. Pouis* (8).]

Gough, in reply, pointed out that the release was absolute, and that the plea contained no averment of tender, nor was the amount of composition paid into court.

MARTIN, B.—I think if a non-assenting creditor sued upon the deed, he would be met with a demurrer. I think this deed is bad, on the authority of *The Chesterfield and Midland Silkstone Colliery Company v. Hawkins* (9). It seems to me that the non-assenting creditor has no action upon this deed. It is very difficult to see what his rights are.

PICOTT, B.—It is difficult to see what rights the non-assenting creditors have under this deed, or how they can be enforced. Unless the debtor volunteered to pay 5*s.* in the pound, they would get nothing.

POLLOCK, C.B. and BRAMWELL, B. delivered no judgment.

Judgment for the plaintiff.

(3) *Ante*, Q.B. 49; s.c. 4 B. & S. 730.

(4) *Ante*, Exch. 72.

(5) 33 Law J. Rep. (N.S.) Q.B. 204; s.c. 5 B. & S. 196.

(6) 2 B. & Ad. 323.

(7) 4 Exch. Rep. 755; s.c. 19 Law J. Rep. (N.S.) Exch. 193.

(8) 1 Exch. Rep. 601.

(9) See *ante*, p. 121.

(1) 33 Law J. Rep. (N.S.) Bankr. 17.

(2) *Ante*, Exch. 61.

1865. }
 April 21. } BURBIDGE v. MORRIS.

Joint-Stock Company—Projected Company—Liability of Director—Preliminary Expenses.

The defendant authorized his name to be inserted as a director in the prospectus of a joint-stock company, limited. The prospectus was sent to the defendant, who suggested alterations in it. The secretary gave orders to the plaintiff to advertise the prospectus, which was done at an expense of 236l. The company was never registered:—Held, in an action by the plaintiff against the defendant, to recover the expenses of the advertisements, that the defendant, by consenting to act as a director, had not authorized the secretary of the company to pledge his credit, and that he was not liable to the plaintiff.

Declaration for work done and materials provided, and for money paid for the defendant, and money due on accounts stated. The defendant pleaded, except as to 2l. 16s. never indebted, and payment of that sum into court. The plaintiff accepted the money paid into court, and joined issue on the first plea.

The cause was tried, at the London Sitings after last Hilary Term, before Martin, B. and a special jury. The action was brought to recover the sum of 236l. 4s. for advertising a prospectus of the Trelech Lead Mining Company, Limited. It appeared from the plaintiff's evidence, that he was an advertising agent, and that the defendant was a solicitor carrying on business at Carmarthen. That about the month of April 1864, one Reid was the promoter of a company called the Trelech Lead Mining Company, Limited. That a person named Greenhill was appointed secretary, and that John Lewis and the defendant had authorized Sanders, the captain of the mine, to put down their names as directors, and Greenhill had done so on Sanders's authority. That Greenhill sent for the plaintiff and asked him to advertise the company, and at the same time shewing him a prospectus. Plaintiff inquired whether all the directors named in it had consented to act, and was assured by Greenhill that they had. The plaintiff, however, stated to Green-

hill that as the directors were all strangers to him, and the cost of advertising might be considerable, he should like to have, as it was his invariable custom, some one to look to directly for the amount of his account, as the directors might repudiate their liability: thereupon Reid said he would be personally responsible, and gave the plaintiff a letter to that effect. That Greenhill, as the secretary, from time to time gave orders for advertising the company, and the plaintiff caused the advertisement to be inserted as directed.

On the 9th of April, Greenhill, the secretary, wrote to the defendant as follows—
 "By book-post I send you, as requested by Capt. Sanders, of the Trelech mines, two prospectuses, in which you will perceive your name appears as one of the directors of the new company. A meeting of the directors will shortly be called at the above address, at which your presence would be very desirable if you can possibly make it convenient to attend. Yours, &c.

"J. R. Greenhill."

To which the defendant replied as follows—

"Carmarthen, April 11, 1864.

"Trelech Mining Company, Limited.

"Sir—You have inserted my name as one of the directors as L. E. W. Morris. You must get this altered, as no one knows me in this county otherwise than by the name of Lewis Morris, you had therefore better alter it immediately. You had also better describe Mr. John Lewis as timber-merchant, as he is best known by that description. You had better insert the advertisement in the *Welshman* newspaper, published in this town, immediately, as they will make favourable mention of the company when they see Mr. Lewis's and my name. I am &c.

"Lewis Morris."

It was also proved that the defendant had acted as, and had once attended at a meeting of, directors in London.

The projected company was not successful, as a sufficient number of shares were not subscribed for, and it was never registered.

Reid became a bankrupt, and Greenhill being unable to pay the amount of the plaintiff's bill, he brought this action against the defendant.

At the conclusion of the plaintiff's case, the learned Judge was of opinion that there was no evidence that the defendant authorized Greenhill to pledge his credit, nor was there any evidence of the defendant's liability. He therefore directed a nonsuit to be entered.

H. Giffard moved for a rule to set aside the nonsuit, and for a new trial on the ground of misdirection.—He contended that the defendant's letter of the 11th of April to Greenhill was a positive authority from the defendant to hold him out as a director, and to render him liable for such things as were necessary to the formation of the company. He cited *Maddick v. Marshall* (1).

[MARTIN, B.—Some years ago the evidence given at the trial would have been sufficient to make the defendant liable. It was formerly held that any evidence that the provisional director knew that his name was published as one of the committee, or that he had attended meetings, was sufficient to render him liable for preliminary expenses, but the House of Lords (2) have decided the contrary.]

POLLOCK, C.B.—I think that there ought to be no rule. There are certain questions which I think ought always to be left to the jury, but the present case involved a question of law, and was for the Judge. The defendant was not a director, but he was to become a director when the company was established. The case *Mr. Giffard* relied on was very different from the present: there the directors by a resolution ordered the company to be advertised. There is no such evidence in this case. I think my Brother Martin was quite right in directing a nonsuit.

BRAMWELL, B.—I also think that my Brother Martin was right, and that the rule should be refused. I confess I think it is right, in actions like this, that the plaintiff should not recover, because the difficulty as to who should be liable is easily removed by the plaintiff taking the

trouble to inquire who were the persons who intended to pledge their credit and become responsible. It is a strange thing that men will not make such inquiries beforehand. I am told by men of business, that if they put too many questions on taking an order, they would not do any business. Well, I say then, do not do any business. I have not the least doubt in the world that the defendant never had the slightest intention of pledging his credit, and that he never intended to say to anybody, "You may advertise the company upon my responsibility. Employ this man." And yet it is said there is sufficient evidence to render him liable. In my judgment there is not. The case cited by *Mr. Giffard* is very different from the present. In that case the defendant was held to be liable because there was an order of the board of directors to advertise the company, and when the plaintiff asked the secretary whether he had such an order from the directors, he could truly answer, Yes, he had; and he shewed the plaintiff the authority. But in the present case the facts are these: Somebody in London is getting up a company; somebody is doing everything that is necessary for the purpose of forwarding the object of the promoters; somebody, perhaps the secretary or the solicitor who expected to make some profit out of the undertaking, asks the defendant if he will be a director; the defendant assents, he takes no share in getting up the company, no part in advertising it; but when the prospectus is sent to him he writes to the secretary, "Get my name altered," I am better known as *Lewis Morris*, "you had better insert an advertisement in the *Welshman*." To my mind that is not any evidence that he intended the secretary to pledge his credit. I think the whole tenor of the letter is one of wonder and surprise at the mode in which the prospectus was drawn up, and this shews that the persons who ordered the advertisement were acting without the defendant's knowledge or authority.

PIGOTT, B.—I also think that the nonsuit was quite right. The evidence certainly shews the getting up of the company, and shews that the company was to be incorporated, and that the defendant in-

(1) 17 Com. B. Rep. N.S. 323.

(2) It is presumed that the learned Judge referred to *Hutton v. Thompson*, 3 H.L. Cas. 161. See also *Norris v. Cottle*, 2 H.L. Cas. 647.

tended to be a director; and it also shews that the defendant knew that the proposed company was being advertised, and that after the advertisements were inserted he made some suggestions respecting them to the secretary; but to my mind there is not a tittle of evidence to shew that he intended to pledge his credit or that he believed that his credit was being pledged, nor has he done anything which could authorize the secretary to pledge his credit to the plaintiff.

MARTIN, B.—The truth is, this question has been concluded, I may say, fifteen years ago. The point has been decided by the House of Lords. In the present case, a company was projected and the defendant was in the position of what was formerly called a "provisional director." He was to be a director if the scheme succeeded and the company was registered. The point as to whether under such circumstances the defendant is liable for preliminary expenses has been decided over and over again. It was decided very recently in the Exchequer Chamber, and some years ago in the House of Lords. It is quite clear that in this case there is no evidence that the defendant ever gave any one any authority to pledge his credit. Then, there is a letter written by the defendant to the secretary; the question is, is that letter any evidence to go to the jury that the defendant meant to pledge his credit for the advertisements? It is not the slightest evidence. It amounts to nothing more than the defendant saying, "You have put down my name wrong, alter it; put it down right, and I will not object to your inserting the advertisement in the *Welshman*." That letter was not written to the plaintiff; it was never communicated to him. I see nothing in that letter authorizing the secretary to pledge the defendant's credit. It was not written with that intention. The hardship on the plaintiff is apparent rather than real. There is no ground for the claim, and therefore the nonsuit was right.

Rule refused.

1865. } THE UNION BANK OF MAN-
May 1. } CHESTER (LIMITED) v. BEECH.

*Guarantie — Principal and Surety;
Discharge of, by Release of the Principal
Debtor.*

The defendant covenanted with the plaintiffs that, in consideration that the plaintiffs would give credit to one Taylor, he would be surety to the extent of 100l. for any sum which might from time to time be owing by Taylor. The deed provided that no indulgence, time, credit or forbearance given or shewn to, or security taken from, or composition with Taylor, should be any discharge of any liability under the deed, or should release the defendant from observing the provisions thereof. Taylor entered into a deed of composition with his creditors under the Bankruptcy Act, 1861, which contained an unconditional release, which the plaintiffs executed.—Held, on the authority of Cowper v. Smith (1), that the composition-deed was no defence to the plaintiffs' claim for 100l., as by the terms of the guarantee the surety was not discharged by the release of the principal debtor.

The declaration stated that, by deed, made on the 9th of July 1863,—after reciting that one T. Taylor had opened a current account with the Union Bank of Manchester (Limited), and had been and was accommodated by, and was then indebted and under liabilities to the said bank, and that he might have occasion from time to time thereafter to overdraw his account with the said bank, and to be accommodated by the said bank in any of the other modes in which bankers are in the habit of accommodating their customers, and the said T. Taylor, either alone or together with some other person or persons, might thereby or from some other cause, be from time to time indebted to the said bank, and that the defendant had, at the request of the said T. Taylor and for the satisfaction of the said bank, agreed to enter into the covenants thereafter contained,—the defendant did covenant and agree with the said bank, their successors and assigns, that

(1) 4 Mee. & W. 619.

he would on demand by the said bank, or by one of the attornies of the said bank, or by the manager, sub-manager or any director of the said bank for the time being, well and truly pay, or cause to be paid to the said bank, all and every such sum and sums of money as shall at any time thereafter for the time being be due to the said bank from the said T. Taylor, his executors or administrators, either separately or jointly with any person or persons, on the balance of account for money paid, lent or advanced by the said bank unto or for the use, or at the request of the said T. Taylor, his executors or administrators, either separately or jointly with any other person or persons, or upon or in respect of any bills of exchange or promissory notes drawn or accepted, indorsed or negotiated by the said T. Taylor, or which he, his executors or administrators, either separately or jointly with any other person or persons, might be liable to pay, together with discount, interest, postage of letters, common and other charges, and according to the usage and course of business, or upon any other account whatsoever. And it was by the said deed provided that not more than the sum of 100*l.* should be recoverable or receivable under or by virtue of the said deed, but that the said deed should be a continuing security to the amount of 100*l.* for the sum of money which for the time being shall be owing as aforesaid to the said bank, notwithstanding any settlements of accounts or discharge of the subsisting balance due at any time to the said bank, or any other matter or thing whatsoever; and it was by the said deed provided and declared that *no indulgence, time, credits or forbearance given or shewn to or security taken from, or agreement to give, or shew indulgence, time or forbearance to or composition with the principal debtor or debtors, whose debt or debts might be for the time being secured by the said deed, should be any discharge of the debts or of any liability under or by virtue of the said deed, or otherwise howsoever, or should release him from observing or performing the conditions and provisions therein contained, notwithstanding that the defendant, either separately or jointly with any other person*

or persons, might not be privy to, or might refuse consent, or might object to, or protest against the giving or shewing such indulgence, time, credit or forbearance, or the making of such agreement or composition; and the said bank might in all respects deal with the principal debtor or debtors for the time being, his or their executors, administrators and assigns, at their discretion, without discharging any such liability as last aforesaid, or releasing the defendant from observing or performing the conditions and provisions therein contained or any of them. That after the making of the said deed there became and was due and owing from the said T. Taylor to the plaintiffs, on such balance of account as aforesaid, a large sum of money, exceeding the sum of 100*l.*; that such demand as is by the said deed provided, was made upon the defendant, and that all things had been done and had happened and existed, and all times had elapsed, and all conditions had been fulfilled, necessary to entitle the plaintiffs to be paid by the defendant the sum of 100*l.*, yet the defendant had not paid the same.

Plea—That after the accruing due by the said T. Taylor to the plaintiffs of the said balance in the declaration mentioned, and before the commencement of this suit, the plaintiffs, by deed, released the said T. Taylor from the said balance, and all claims and demands in respect thereof.

Replication—That the deed in the plea mentioned was a deed of arrangement for the benefit of creditors, and was an indenture, made the 27th day of July 1864, between T. Taylor, thereafter called the said debtor, of the first part, and J. G. T. Child, of &c., thereafter called the said trustee on behalf of the creditors of the debtor, of the second part, and the creditors of the said debtor, hereinafter called the said creditors of the third part. That after reciting that the said debtor was indebted to his creditors in several sums of money which he was unable fully to discharge, and had therefore agreed to execute the conveyance and assignment thereafter contained, the deed witnessed that the debtor granted and assigned to the trustee all his

real, leasehold and personal estate, and all other property, to sell and dispose of the same, and to stand possessed of the money which should arise and be received under the deed, in trust to apply and administer the same for the benefit of the said creditors in like manner as if the debtor had been duly adjudged a bankrupt. And the deed further witnessed, that in consideration of the conveyance and assignment hereinbefore contained, the said creditors did release and for ever discharge the said debtor, his heirs, executors and administrators, from all and singular the debts, sums of money, bonds, bills, notes, accounts, reckonings, costs, charges, damages, expenses, judgments, executions, actions, suits, claims and demands whatsoever, either at law or in equity, which they the said creditors respectively now have or hath, or shall or may or otherwise could or might hereafter have, claim, challenge, or demand of, from or against the said debtor, his heirs, executors or administrators, or his or their lands or tenements, goods or chattels, estate or effects, or any of them, for or by reason or on account of debts, claims, or demands of them the said creditors, or any of them, now due or owing from the said debtor, and all interest and arrears of interest for or in respect of the same several debts, claims and demands, or any of them, or for or by reason of any other matter or thing whatsoever relating thereto. And the plaintiffs say that they did not release the said T. Taylor otherwise than by executing the said deed.

Harington, in support of the demurrer, admitted that, at first sight, *Couper v. Smith* (1) was in point, but he contended that it might be distinguished on the ground that, in the present case, the guarantie related to an account current which was constantly varying in amount, whereas in the former case the debt was an ascertained sum.

Cleasby (*R. G. Williams* with him) was not called upon to argue.

POLLOCK, C.B.—The case, which has been very properly mentioned to the Court by Mr. Harington, is an express authority that the release of the principal is no discharge of the surety, where the

surety has expressly contracted that he shall continue liable. The only question is, whether there is any distinction between that case and the present. I think there is none.

BRAMWELL, B.—I do not see what distinction there is between the present case and *Couper v. Smith* (1). The only distinction pointed out is, that in that case there was a guarantie for a fixed sum for goods sold and delivered; here there was a guarantie for a current account. I cannot see that that makes any difference. The question is one of contract; the surety is not affected by what took place between the principal and his creditors; he has expressly contracted that his liability shall continue.

Judgment for the plaintiffs.

1865. }
May 8. } *GRINDLEY v. BOOTH.*

Injunction—Action for Nuisance—Costs
—*Common Law Procedure Act, 1854*
(17 & 18 Vict. c. 125.)—*Common Law Procedure Act, 1860* (23 & 24 Vict. c. 126).

Where the plaintiff in an action for a nuisance, under section 82. of the Common Law Procedure Act, 1854, obtained an order for an injunction, ex parte, which was silent as to costs, and the writ issued to restrain the nuisance, and also, under section 32. of the Common Law Procedure Act, 1860, for the payment of the costs,—Held, that the plaintiff ought not to be allowed to proceed to recover the costs of the injunction before the trial.

This was a rule calling on the plaintiff to shew cause why all further proceedings on a writ of injunction, issued under an order of *Pigott, B.*, made on an *ex parte* application, should not be stayed until after the trial of the cause.

The facts appeared to be that the plaintiff brought the action for a nuisance occasioned by the defendant boiling horse-flesh for dogs near the plaintiff's dwelling-house. Immediately after the declaration was delivered the plaintiff applied to the learned Judge at chambers for an injunction under

section 82. of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which enacts, "that it shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to a Court or a Judge for a writ of injunction to restrain the defendant from the repetition or continuance of the wrongful act complained of, . . . and such writ may be granted or denied by the Court or Judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such Court or Judge shall seem reasonable and just. . . . Provided always, that any order for a writ of injunction made by a Judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the Court on application made thereto by any party dissatisfied with such order." The Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), by section 32, enacts, that in all cases in which a writ of mandamus or injunction is issued under the provisions of the Common Law Procedure Act, 1854, such writ shall, unless otherwise ordered by the Court or a Judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing and serving such writ, and payment of such costs may be enforced in the same manner as costs payable under a rule of Court are now by law enforceable.

The learned Judge in making the order for an injunction neither imposed terms nor mentioned costs. A writ of injunction was thereupon issued and served upon the defendant, which commanded him to pay the costs in conformity with the Common Law Procedure Act, 1860.

Notice of trial was given for Shrewsbury Assizes, but the plaintiff countermanded it. Two days after the notice of countermand the defendant took out a summons before Erle, C.J., calling on the plaintiff to shew cause why the order and writ of injunction should not be set aside. That learned Judge, doubting whether he had power to entertain the application, ordered that all further proceedings should be stayed until after the first four days of Easter Term.

The Court having granted a rule nisi, *Staveley Hill* now shewed cause.—The plaintiff's affidavits shew that there is a most unbearable nuisance, and this appears to be admitted by the affidavits on the other side. The form of the rule is unusual, and if made absolute its effect will be to set aside the injunction.

[POLLOCK, C.B.—The defendant complains of the delay. How long is the injunction to be in force? Why did not the plaintiff try the cause?]

The delay is explained by the affidavits to have arisen from the illness of a surgeon, who was a material witness.

Underhill, in support of the rule.—The defendant merely wished to suspend the operation of the injunction until after it shall have been ascertained by a verdict whether a nuisance did exist.

[POLLOCK, C.B.—Assume that a nuisance does exist, if this rule be made absolute the defendant may recommence the nuisance.]

The object of the present application substantially is to obtain relief from the payment of costs. If the jury find a verdict for the defendant, although he will be successful in the action, yet he will have been restrained from carrying on his business and made to pay the costs of an injunction to which the plaintiff was not entitled. The rule may be so moulded as not to allow the nuisance to be resumed, but to leave the costs in abeyance until the cause has been tried.

Per Curiam (1).—It would certainly be a hardship on the defendant to compel him to pay these costs, when perhaps the jury may find a verdict in his favour. The rule may be made absolute in the terms suggested by Mr. Underhill.

Rule absolute to stay all further proceedings in respect of the costs of the writ of injunction, until after the cause has been tried.

(1) Pollock, C.B., Martin, B. and Pigott, B.

1865. }
 April 26. } OAKLEY v. MONCK.

Landlord and Tenant—Expiration of Lease—Holding over—Tenancy from Year to Year.

Where a tenant is allowed to hold over after the expiration of his lease, it is a question of fact for the jury on what terms he continues to hold.

Where a tenant for life granted a lease, containing (among others) a covenant that the lessor should, at the expiration of the term, pay and allow for all fruit-trees upon the premises planted by the lessee at a fair valuation, and at the expiration of the term the lessee held over as tenant from year to year, and on the death of the tenant for life the tenant from year to year continued the occupation of the land, paying the same rent to the remainderman, the latter being ignorant of the existence of the covenant,—Held, that the receipt of rent by the remainderman, under the circumstances, was no evidence of a holding over under the terms of the lease.

This action was brought, by the plaintiff, as administrator of the estate and effects of Henry Oakley, who died intestate.

The plaintiff declared—For that the defendant demised to the said Henry Oakley, and the said Henry Oakley became and was tenant to the defendant, of a close of land of the defendant, upon the terms, amongst others, that the defendant should, at the determination of the said tenancy, pay and allow the said Henry Oakley, his executors or administrators, for all fruit-trees and shrubs then growing and being in or upon the said demised premises which should have been planted by the said Henry Oakley, his executors or administrators, at a fair valuation, to be made by two indifferent persons, one to be chosen by each party, and, in case of their disagreement, by a third person, to be chosen by them jointly, whose decision should be conclusive and binding upon each of the said parties; and that the said tenancy was duly determined after the death of the said Henry Oakley, and at the time of the said determination of the said tenancy there

were certain fruit-trees and shrubs growing and being in and upon the said demised premises, which had been planted by the said Henry Oakley in his lifetime, and by the plaintiff, as administrator as aforesaid, since his death, and every condition has been performed, and everything has happened and occurred to enable the plaintiff to bring this action; yet the defendant did not pay and allow, and has not paid and allowed the plaintiff, as administrator as aforesaid, for the said fruit-trees and shrubs, at such valuation as aforesaid, but has wholly refused so to do.

And, also, for that the defendant demised to the said Henry Oakley, and the said Henry Oakley became and was tenant to the defendant of the said close in the first count mentioned, upon the said terms, amongst others, in that count mentioned, and that the said tenancy was duly determined after the death of the said H. Oakley; and at the time of the said determination of the said tenancy there were certain fruit-trees and shrubs of great value growing and being in and upon the said demised premises, which had been planted by the said Henry Oakley in his lifetime, and by the plaintiff, as administrator, since his death; and every condition has been performed, and everything has happened and occurred, to enable the plaintiff to bring this action, and the plaintiff has been always ready and willing to choose on his part an indifferent person to make a fair valuation of the said fruit-trees and shrubs, and requested the defendant to appoint on her part an indifferent person to make such valuation, and to ascertain the value of the said fruit-trees and shrubs, according to the terms of the said tenancy, and a reasonable time for the defendant so to do had elapsed before the commencement of this suit; and yet the defendant did not nor would appoint such indifferent person on his part as aforesaid, and has always wholly refused so to do, whereby, and by reason of the premises, the plaintiff, as administrator as aforesaid, has been prevented from ascertaining the fair valuation of the said fruit-trees and shrubs, and has incurred great costs and expenses in seeking to enforce the said terms of the said tenancy in that behalf, and hath been otherwise injured.

The defendant pleaded that she did not demise to the said Henry Oakley the said close upon the terms alleged.

This cause came on for trial, before Crompton, J., at Cambridge, when a verdict was found for the plaintiff for the amount claimed, subject to the opinion of the Court on the following

CASE.

(1) In the year 1826 one W. Stephens the younger was, under the will of one Richard Stephens, tenant for life of the *locus in quo*, with remainder to his eldest son and other issue in fee tail; and in default of such issue, to the defendant for life, with certain remainders over.

W. Stephens the younger had a power to lease the *locus in quo*, under the following clause in the said will:

"I do hereby further declare that it shall be lawful for any person who, by virtue of this my will, shall be tenant for life in possession of the hereditaments and premises lastly hereinbefore devised or entitled to the rents and profits thereof, and who shall have attained his or her age of twenty-one years, to demise or lease the hereditaments and premises lastly hereinbefore devised, or any part or parts thereof, to any person or persons whomsoever for any terms of years, not exceeding twenty-one years, to take effect in possession, and not in reversion, at the best yearly rent that can be reasonably had for the same, without taking any fine or foregift for the making thereof, and so that there be contained in every such lease a condition of re-entry for non-payment of the rent thereby to be reserved, and so that the lessee or lessees execute a counterpart thereof, and thereby covenant for the payment of the rent."

W. Stephens the elder had no interest in the *locus in quo*, and died in the year 1829.

(2) By a lease, dated the 9th of December 1826, W. Stephens the elder and W. Stephens the younger jointly demised unto the said H. Oakley the *locus in quo* for the term of twenty-one years, at a yearly rent of 14*l.* 14*s.* In this lease is contained the following clause: "And also that they the said lessors, their heirs or assigns, or their or his incoming tenant, shall and will at the expiration, or other sooner determina-

tion of the said term of twenty-one years, pay and allow the said H. Oakley, his executors or administrators, for all fruit-trees and shrubs then growing and being in or upon the said demised premises, which shall have been planted by the said (1) H. Oakley, his executors or administrators, at a fair valuation, to be made by two indifferent persons, one to be chosen by each party, and, in case of their disagreement, by a third person, to be chosen by them jointly, whose decision shall be conclusive and binding upon each of the said parties.

3. During the continuance of the lease the lessors abated the rents reserved from 14*l.* 14*s.* to 11*l.*

4. The said lease expired at Michaelmas, 1847. Upon the expiration of the lease the said H. Oakley applied to the said W. Stephens the younger for a fresh lease of the *locus in quo*, on the same terms as before. The said W. Stephens the younger said, "There is no occasion for another lease, you can go on from year to year;" nothing further was said about terms. A piece of land was at that time added, and the rent altered from 11*l.* to 13*l.*, which last sum continued to be paid yearly until Michaelmas, 1850, when the piece of land which had been added was taken from the holding and sold by the said W. Stephens the younger to a waterworks company. The subsequent payment of rent was at the rate of 11*l.* a year.

5. The said W. Stephens the younger died in April 1856, without issue, and when the limitation to the defendant Mrs. Monck for life enured, nothing passed between the said H. Oakley and the defendant as to the terms on which the occupation was to continue; but he paid the rent to the defendant at the rate of 11*l.* a year ending each Michaelmas.

6. The said H. Oakley died intestate in the year 1859, when the plaintiff took out letters of administration to his estate and effects. Nothing was said between the plaintiff and the defendant as to the terms of occupation; but the plaintiff likewise

(1) During the argument it was agreed that the case should be amended by stating that H. Oakley and the plaintiff were nurserymen, and that the trees had been planted by them in the way of their trade as nurserymen.

paid rent to the defendant at the rate of 11*l.* a year ending each Michaelmas.

7. In March 1862 the defendant gave to the plaintiff a notice to quit at the ensuing Michaelmas. As the defendant did not require the *locus in quo* till the spring of 1863, the plaintiff was allowed to continue in possession after Michaelmas 1862 and during the ensuing winter.

8. In February 1863 the plaintiff called the attention of J. B. Monck, the son of the defendant, to the clause set out in the lease of 1826. Until then neither the defendant nor her son was aware of the existence of such clause.

9. On the 24th of February 1863 the defendant received the following notice, signed by the plaintiff and W. H. Lawrence: "Whereas, by indenture of lease, dated the 9th of September 1826, and expressed to be made between W. Stephens the elder, therein described as of Padworth, in the county of Berks, common brewer, and W. Stephens the younger, therein described as of Reading, common brewer, of the one part, both now deceased, and H. Oakley, therein also described as of Reading aforesaid, gardener, also now deceased, of the other part, a certain piece of ground in the parish of St. Mary, in Reading, containing by admeasurement 2*a.* 3*r.* 8*p.*, more or less, bounded as in the said indenture particularly mentioned, and now known as the Brunswick Nursery, in Reading aforesaid, and now in my occupation, was, with the appurtenances, except as therein is excepted, demised unto the said H. Oakley, his executors, administrators and assigns, from the 29th of September then instant, for the term of twenty-one years thence next ensuing, determinable nevertheless, as is therein mentioned, at the rent therein reserved; and in the said indenture is contained, among other matters and things, a covenant on the part of the said H. Oakley, his executors or administrators, with the said W. Stephens the elder and W. Stephens the younger, his heirs, executors, administrators and assigns, that they the said W. Stephens the elder and W. Stephens the younger, their heirs or assigns, should have the option or privilege of purchasing all erections and buildings, or any of them, which, at the expiration or other sooner determination of the said term,

should stand or be upon the said demised premises, and which should have been put up by and at the expense of the said H. Oakley, his executors or administrators, at a fair valuation, to be made in manner therein mentioned, upon giving to the said H. Oakley notice in writing of their or his wish so to do, two calendar months before the expiration or other sooner determination of the said term; and if no such notice should be given, the said H. Oakley, his executors or administrators, shall be at liberty, and he and they were thereby empowered, to take down and remove such erections and buildings for his or their own use and benefit; and also a covenant on the part of the said W. Stephens the elder and W. Stephens the younger, their heirs, executors, administrators and assigns, with the said H. Oakley, his executors and administrators, that they, the lessors, their heirs or assigns, or their or his incoming tenant, should at the expiration or other sooner determination of the said term, pay and allow the said H. Oakley, his executors or administrators, for all fruit-trees and shrubs then growing and being in or upon the said demised premises, which should have been planted by the said H. Oakley, his executors or administrators, at a fair valuation to be made by two indifferent persons, one to be chosen by each party, and in case of their disagreement by a third person, to be chosen by them jointly, whose decision should be conclusive and binding upon each of the said parties; and whereas the said premises were held by the said H. Oakley up to the time of his death as yearly tenant, but upon the same terms and conditions as were contained in the said lease; and at the death of the said H. Oakley, I took the said premises as his administrator upon the like conditions, and the same are now held by me, the undersigned W. Oakley, as administrator of the said H. Oakley, as yearly tenant, but subject to the same provisos, covenants and agreements reserved and contained by and in the said indenture of lease; and the goods and effects now being upon the said premises belonging to me are subject to a bill of sale given by him to W. H. Lawrence, of Green Street, in the borough of Cambridge, attorney's clerk, and dated the 19th of July 1860 and filed the 20th

of the same month; now I, the said W. Oakley, on behalf of myself and by the direction of the said W. H. Lawrence, do hereby give you notice that, under and by virtue of the said covenants, I claim compensation for the fruit-trees, shrubs, and other things now being in or upon the said premises, the amount of such compensation to be ascertained by a valuation of the same as aforesaid; and pursuant to the covenant contained in the said lease, I have, with the concurrence of the said W. H. Lawrence testified by his signing this notice, appointed Stephen Hunt, of Woolhampton, in the county of Berks, nurseryman, as the valuer on my behalf to make the valuation of the effects now being upon the said premises under the covenants hereinbefore referred to; and I hereby require you forthwith, upon the service upon you or some or one of you of this notice, to appoint some person to be the valuer on your behalf, in accordance with the terms of the covenants hereinbefore referred to, to make such valuation jointly with the said Stephen Hunt; and I hereby give you further notice that, unless you forthwith upon the service of this notice on you or some or one of you, nominate some person on your behalf to concur with the said Stephen Hunt in making such valuation as aforesaid, I shall take such steps as may be necessary to complete the said arbitration and valuation, as witness," &c.

10. The defendant did not appoint a valuer, and the plaintiff in the month of March 1863 appointed two persons to the office, who valued the stock submitted to their notice at a particular sum. The whole of the stock so submitted to valuation had been planted by the said H. Oakley or by the plaintiff during their respective occupations as aforesaid.

11. In the month of August 1863 the plaintiff was ejected by county court process from the *locus in quo*.

12. In the month of October 1863 the stock on the *locus in quo* was sold by auction by the direction of the defendant and realized at the sale 175*l.* 15*s.*, less 22*l.* 9*s.* for auctioneer's expenses. The balance still remains in the hands of the auctioneers.

13. It is agreed between the parties that a copy of the lease of 1826 shall form a part of this special case. Also, that the

Court shall be at liberty to draw any inference of fact, or find any facts which in the opinion of the Court a jury ought to have drawn or found. The question for the opinion of the Court is, whether, amongst the terms of the tenancy determined by the said notice to quit, was engrafted the covenant in the lease of 1826, or a term to the same effect, obliging the defendant to take the stock in the *locus in quo* at a valuation. If the Court shall be of opinion that such a term did attach to the tenancy between the plaintiff and the defendant, then the said verdict shall be affirmed, and the Court shall say on what principle the damages shall be assessed, the amount of damages to be settled out of court. But if the Court shall be of opinion that no such term did attach to the tenancy between the plaintiff and the defendant, then the verdict shall be entered for the defendant.

O'Malley (*Markby* with him), for the plaintiff, contended that the tenant by holding over after the determination of his lease, and continuing a tenant from year to year, held over subject to all the terms of the lease, so far as they were consistent with a tenancy from year to year; and that the payment of rent to the remainderman and his acceptance of it shewed that it was the clear intention of the parties that the relation of landlord and tenant should continue on the terms of the lease. He cited *Roe v. Ward* (2) and *Wardall v. Usher* (3). He also contended that the fact that the remainderman was ignorant of the terms of the lease was immaterial, that he was bound to know his own title, and that he could not be permitted to avail himself of his ignorance to the prejudice of the defendant, and to say that because he did not examine his own title. He cited *Doe d. Martin v. Watts* (4).

Keane (*Douglas Brown* with him) contended that the question was one of fact for a jury, and that the Court, having power to draw inferences from the facts, were in the position of a jury—*Hyatt v. Griffiths* (5); that it was absurd to suppose that the

(2) 1 H. Bl. 97.

(3) 3 Scott, N.R. 508; s. c. 10 Law J. Rep. (N.S.) C.P. 316.

(4) 7 Term Rep. 83.

(5) 17 Q.B. Rep. 505.

remainderman, who was only tenant for life, ever intended that the tenancy should continue upon terms most onerous to herself; that no jury would ever find that because the defendant, the tenant for life, received rent from the plaintiff without any notice of the terms under which he held, the defendant was bound to buy whatever trees the plaintiff might leave, the defendant having no option in the matter. He cited *Doe d. Prudeauz* (6).

O'Malley, in reply, referred to *Walker v. Godé* (7).

POLLOCK, C.B.—We have already intimated that we are all of opinion that our judgment ought to be for the defendant. It was established by *Walker v. Godé* (6) that the question is one of fact for the jury. In that case my Brother Martin differed from my Brother Bramwell and from Sir James Wilde, who at that time was a member of this Court. The difference of opinion arose upon the very same point. In that case I observe my Brother Martin said, "I regret the difference of opinion which exists, because I feel the judgment of the majority of the Court will create a new source of litigation in very many cases, and a question for a jury, which would frequently be a temptation rather to decide upon feeling and prejudice than on reason and truth, a matter always to be regretted, and, if possible, avoided." I agree with my Brother Martin that as much as possible we ought to keep certain questions entirely within the province of the Court, and not leave them to the jury. As, for instance, the question of reasonable and probable cause in an action for malicious prosecution is a question which had better always be kept in the hands of the Court, though I am aware that a great authority, Lord Denman, always maintained it was a question for a jury, and that he adhered to that opinion notwithstanding the known opinions of every other member of the Bench. At the same time, it cannot be denied that the jury do frequently decide that which the Court cannot decide so well, and that their findings are highly beneficial. But on

the present occasion what we have to decide is a question of fact, and we ought not, I think, to find that a tenant for life coming into possession ought to be bound by the covenants of his predecessor merely because he has received rent; there ought to be more than that; there ought to be some evidence that the person in remainder whom it is proposed to bind by the covenants had some knowledge of their existence. I need not repeat that I think a great hardship would arise if we held that a tenant for life by coming into possession and receiving rent, amounting it may be only to a few pence or a few shillings, is thereby rendered liable to pay more than 100*l.* for that which is no benefit to her at all. I think we ought to decide, viewing it as a question of fact to be found by us, that unless there were more evidence of assent on her part than in the present case, she is not bound by the covenants; not being bound by the covenants, the plaintiff, who sues upon the covenants, is not entitled to recover, and the defendant is entitled to judgment.

BRAMWELL, B.—I am of the same opinion. In this case, it seems to me upon the state of facts that the plaintiff, or his intestate, being nurserymen, might have removed the trees in question. They were trade fixtures, and as such might be removed, and so they might have been if the lease had been granted without the clause in question. It may be that as the lessor has thought fit to enter into such an agreement, the annual tenancy between him and the nurseryman was continued upon the same terms. However, we need not trouble ourselves to consider whether he would have been liable to such a covenant as this. It may be assumed, even after the commencement of the annual tenancy, that the original lessor would have been liable to pay for these trees according to his covenant. Then arises the title of Mrs. Monck, the defendant. She does not claim under the lessor, but she is tenant for life, under the will of the testator, and therefore not bound by any of the lessor's agreements not made in pursuance of the power. It is said that the occupation goes on, the payment of rent goes on; and that is all we know about it, except that as a matter of fact she did not know of the

(6) 10 East, 158.

(7) 6 Hurl. & N. 594; s. c. 30 Law J. Rep. (N.S.) Exch. 172.

stipulation of the first tenant for life, and therefore did not intend to be bound by it, and there is no undertaking on her part to pay for these trees. Then it is further said, because she lets the plaintiff continue at the same rent, she, by implication, undertakes to pay for the trees. To my mind nothing could be more unreasonable. Because the tenant would have had a right to remove the trees as long as he continued the business of a nurseryman. If he turned the place into a private garden, he would have had no right to remove the trees. When she succeeded, the condition of things would be the same, and yet, if she was liable as tenant for life, she would be bound to pay for them when the tenant went out, and then the succeeding tenant for life might say to her representatives, "It is true that the defendant has paid for the trees, but you must leave them in the garden, because they are no longer trade fixtures, and we shall not pay you." So the defendant would have to pay nearly sixteen times the annual rent of the premises, of which at her death her representatives would not be reimbursed a penny. It seems to me that, whether we treat this as a matter of law or fact, we may say that there is no evidence that she agreed to the tenancy continuing on the terms of paying for these trees. There is no evidence, because it should be borne in mind that this is not a natural or ordinary or common covenant or agreement; the natural and ordinary agreement is, that a person shall have a right to remove trees which he has planted. I am, therefore, of opinion, whether I treat this as a matter of law or fact, it ought to be determined in favour of the defendant.

PIGOTT, B.—I am of the same opinion. There is no doubt that a tenancy from year to year is created by the receipt of rent under the circumstances in question. Then the question is, whether the stipulation for taking the trees and paying for them at a valuation at the end of the term is a stipulation annexed by implication. If so, it is because there is an implied agreement. But what is the implied contract? It is to be implied from the presumed assent of the parties. Is there any evidence of any assent of Mrs. Monck? It is conceded that she knew nothing about it; she

had no means of finding it out, and was not informed of it. It might as well be said that if the deceased tenant for life agreed to pay a guinea a piece for those trees, she would be bound by such agreement.

Judgment for the defendant.

1865. } BOSTOCK v. JARDINE AND
May 10. } ANOTHER.

Contract—Principal and Agent—Failure of Consideration—Money Had and Received.

*The plaintiff instructed the defendants, who were brokers, to purchase for him 50 bales of cotton, and paid to the defendants 800*l.*, part of the purchase-money. The defendants made a contract in their own names for the purchase of a much larger quantity, viz., 300 bales, on account of the plaintiff and other principals:—Held, in an action for money had and received, that the plaintiff was entitled to recover back the money paid, as the defendants had not made a contract on which the plaintiff could sue as a principal.*

This action was commenced on the 24th of December 1864, and the declaration contained the common counts for money received by the defendants for the use of the plaintiff, for interest, and for money due on accounts stated; the particulars claimed 800*l.* for money received, and 10*l.* 11*s.* for interest from the 19th of September 1864.

The pleas were, the general issue, payment and set-off; upon which issues were joined.

The cause was tried, at the Liverpool Spring Assizes, 1865, before Mellor, J. and a special jury, when evidence was given to the following effect: The defendants carried on business as brokers at Liverpool, and in July 1864 were instructed by the plaintiff to buy for him 50 bales of cotton. The plaintiff dealt as a speculator. On the 9th of July, in their own names, they entered into a contract in writing with certain persons trading under the name of Marriott & Co. for the purchase of 300 bales of Surat cotton, guaranteed fair new

Oomrawattee, and on board the *Duncairn*, then homeward bound from Bombay. A clause was inserted providing that in case of any dispute arising out of the contract the matter should be referred to two respectable brokers for settlement, who should decide as to quality and the allowance, if any, to be made; it was further stipulated that the 300 bales should be delivered in merchantable condition to the buyer, and that the damaged, if any, should be rejected provided they could not be made merchantable. The defendants on the same day sent the plaintiff notice that they had bought for him 50 bales of Surat cotton at 23½d. per lb., and informed him accurately of the terms in their contract with Messrs. Marriott, except that they did not intimate to him that the 50 bales were to be taken from a larger number. The defendants bought the remaining 250 bales on behalf of other principals. It was shewn to be customary among cotton-brokers in Liverpool, when buying for a principal who purchases on speculation, to deal in their own names. The vessel *Duncairn* reached Liverpool on the 7th of September, having a cargo of 500 bales. Shortly after her arrival the plaintiff paid to the defendants the sum of 800*l.* and accepted an undated bill for 1,100*l.* drawn by them. The cotton proved to be of inferior quality and mixed with short staple; of this the defendants informed the plaintiff subsequently to the payment of the 800*l.* On the 27th of September the plaintiff gave the defendants notice that he wished the 50 bales to be rejected, as they were bad, to which on the next day they replied, stating that by the contract of the 9th of July he was bound to submit the question of the quality of the cotton to arbitration. Arbitrators were accordingly appointed by the vendors and by the defendants respectively. It was determined by them that all the mixed bales in the cargo of the *Duncairn* should be rejected, and an allowance of ½d. per pound on the contract price should be made on the remainder. Of this arrangement the defendants gave the plaintiff notice. The arbitration was proceeded with, Messrs. Marriott and the defendants having agreed to reject 63 out of the 500 bales; the arbitrators rejected 79 others, making 142 rejected bales; of the remainder the pro-

portionate part for the plaintiff was 35, on which an allowance of ½d. per lb. was to be made. This decision was arrived at on the 27th of November, and the arbitrators' certificate was dated the 6th of December. Meanwhile a correspondence, commencing on the 2nd of November, took place between the plaintiff and the defendants, in which the former required the latter to reject all the bales, and ultimately to return the 800*l.*; he refused to submit the matter to arbitration or to accept the 35 bales. After the arbitrators had given their decision, the defendants, under threat of legal proceedings, paid over to the vendors the 800*l.* which they had received from the plaintiff. Ultimately the 35 bales were re-sold, by Messrs. Marriott, at 14½d. per lb. after the action was commenced. It was proved that the defendants could have obtained 15 other bales, which would have made up the number of 50 that they were to deliver to the plaintiff. On these facts the learned Judge directed a verdict for the plaintiff for the sum of 792*l.*, being the 800*l.* paid to the defendants less the brokerage, and reserved leave to move to enter a nonsuit or verdict for the defendants, the Court of Exchequer having power to draw inferences of fact which a jury would have found if they had been put to them.

Edward James (April 21) obtained a rule calling on the plaintiff to shew cause why the verdict found for the plaintiff should not be set aside and a verdict for the defendants or a nonsuit entered, on the ground that, on the facts proved, the plaintiff was not entitled to a verdict.

Brett (Herschel with him) now shewed cause.—This is an action to recover a sum of money paid by a principal to his brokers, to enable them to carry out a contract which at the time of such payment he believed them to have entered into on his account; in truth, no such contract as he contemplated had ever been made, or, at least, if it had ever existed it wholly failed; the contract pursuant to which the 800*l.* was paid was, that they should enter upon a contract on which he could sue as principal. The defendants never made such a contract; the plaintiff is therefore entitled to retain the verdict, the consideration for the 800*l.* having failed.

The COURT here called on *Edward James (Baylis with him)*.—The instructions to the defendants were, that they should buy cotton for the plaintiff, not that they should make a contract for the plaintiff; it is not the less the plaintiff's contract because the defendants when buying for him bought also for other persons. The plaintiff did not say, "Make for me a contract on which I can sue;" he has repudiated a contract made for him; his remedy is by an action for negligence against the defendants. When an authority given to an agent has been partially acted on by him, so that he has incurred a responsibility, it cannot be revoked. The declaration being for money received for the plaintiff's use, he cannot recover unless there has been a complete failure of consideration.

[POLLOCK, C.B.—The question is, was there a contract at all? The plaintiff could not come forward and sue the sellers: how can it be said that there is a contract according to the plaintiff's instructions? MARTIN, B.—Blackburn, J., on the last occasion when he went the Northern Circuit, nonsuited a plaintiff who, having been instructed to buy 20 shares in a company, bought 50 instead. POLLOCK, C.B.—If a man, from whom a broker acting for several persons has bought goods in his own name, could be sued by that broker's principals, he would be liable to several actions instead of one. It is different from a case where a man knows himself to be contracting with an agent acting for several principals, and consequently is aware of his liability to be sued by more persons than one. Have you any authority to shew that in the latter case which I have alluded to the contractor can be sued by the principals? I never heard before of such a point.]

It is a novel point; there was evidence that the defendants acted according to the usual course of their business.

[POLLOCK, C.B.—There was no evidence of a custom (it was not left to the jury) that a man who sells 500 articles to a broker buying in his own name can be sued by one principal in respect of one of the 500 articles; by another in respect of two, and so on. If the jury had found that there was such a custom, I should have said that its absurdity and inconvenience made it bad.]

POLLOCK, C.B.—I believe we are all of opinion that the plaintiff is entitled to recover back the money, and that therefore this rule must be discharged. To me, when the rule was moved, the point was quite new. I do not recollect any such case before. My Brother Martin remembers a decision upon the subject, and I own I should have expected no other when the point did arise. The defendants were authorized to buy a certain quantity of cotton for the plaintiff; instead of complying with their instructions, they bought a much larger quantity for the plaintiff and divers other people, and the plaintiff was prevented from coming forward and protecting his own rights. I think, therefore, that though a contract was made, it was not the contract the plaintiff authorized the defendants to make; and therefore, as he paid the money on the faith that a contract had been entered into, which turns out never to have existed, he is entitled to have it returned.

MARTIN, B.—I am of the same opinion. This is an action to recover back the sum of 800*l.*, and the plaintiff must make out that there was no consideration whatever for paying it, or that the consideration entirely failed; one of these alternatives he must establish to entitle himself to succeed. The consideration for paying the 800*l.* was a contract supposed to have been made on the 9th of July, "for 50 bales of Surat cotton, at 23½*d.*" I understand that what the plaintiff thought he was about to contest at the trial was, whether or not the clause contained in the contract between Messrs. Marriott and the defendants, providing that if a dispute arose the matter should be referred to two respectable brokers, was binding upon him. Upon this point I do not wish to give any opinion, though my impression is the plaintiff would have been bound by the proviso. But what was the consideration for the money? What was the contract? If no such contract ever existed as the defendants had been authorized to enter into, there was a total failure of consideration. It is perfectly clear that it never did, because the contract of the 9th of July, between the defendants and Messrs. Marriott, was for the purchase of 300 bales of Surat cotton. Suppose Jardine & Co. had become bankrupt, and Bostock thought fit to enforce the contract, he must have failed at common

law because it was no agreement to purchase the 50 bales at all, but, on the contrary, one for 300 bales; and even if the contract could have been sued on by the plaintiff at common law, it is clear, under the Statute of Frauds, it absolutely and necessarily must fail; and therefore Messrs. Jardine never did deliver to Mr. Bostock, any consideration for the money; they totally and absolutely omitted to do so. In my judgment the consideration entirely fails, because no contract such as the plaintiff contemplated was ever made by the defendants; and he is entitled to recover for money received.

PIGOTT, B.—I am of the same opinion, and for the same reasons that have been so fully stated by my Brother Martin and the Lord Chief Baron; and I need not repeat them.

Rule discharged.

1864. }
Nov. 21. } THE ATTORNEY GENERAL v.
1865. } GELL.
May 5. }

Succession Duty—16 & 17 Vict. c. 51.
s. 2.—“Entitled upon the Death of any Person.”

The 2nd section of the Succession Duty Act applies not merely to cases where the title accrues at death, but also to cases where the title has accrued before the act, but is made an interest in possession at once, or after an interval on a death occurring after the act.

P. G., the testator, devised certain property to his daughter for life if she survived her then husband, and after her death to such child or children by a second husband as she should appoint, and to them equally in default of appointment. If his daughter died before her then husband, or without having children by a second husband, then the trustees were to convey the estate to the use of E. S. C. Pole for life, with remainder to such child of E. S. C. Pole, other than the eldest, (if more than one) as he should appoint, and for default of appointment to his second and other sons in tail. The testator further directed that the rents and profits of his estate during the joint lives of his daughter and her then husband should accumulate for

twenty-one years if the daughter and her then husband should so long live, and be added to the corpus, and if they lived beyond twenty-one years then during the remainder of the joint lives the rents and profits should be paid to the person or persons who would have been entitled to the corpus if the daughter were dead without a child by her then husband. E. S. C. Pole died on the 19th of January 1863 without making any appointment, and the defendant was his second son. The twenty-one years expired on the 25th of January 1863:—Held, that the defendant was a person who had become beneficially entitled to the income of property upon the death of a person dying after the commencement of the Succession Duty Act, within the meaning of section 2. of that act, and that the Crown was entitled to succession duty.

Information filed by the Attorney General for succession duty as follows :

1. The object of this information is to obtain payment of the duty which has become payable to Her Majesty in respect of the succession of the above-named defendant in the real and personal property devised and bequeathed by the will of Philip Gell, Esq., deceased, as hereinafter stated.

2. The said Philip Gell, Esq., formerly of Hopton, in the county of Derby, but now long since deceased (and who is hereinafter referred to as the testator), by his last will and testament, in writing, dated the 17th of February 1839, and duly executed as by law is required, appointed Edward Sacheverell C. Pole, Esq. and J. Crusoe the younger, gentleman, to be trustees and executors of his last will, and after making divers specific and pecuniary bequests (including a life annuity of 300*l.* a year) and giving to his gamekeeper T. Taylor a life annuity of 20*l.* payable out of his real estate in the township of Hopton, the testator devised and bequeathed unto and to the use of the said E. Sacheverell C. Pole and J. Crusoe the younger, their heirs, executors, administrators and assigns, all his real and personal estate upon certain trusts in the said bill mentioned, and which are, in effect, as follows: (that is to say) upon trust to convert all his personal estate (except as therein mentioned) into money, and thereout to

pay his debts and funeral and testamentary expenses and a certain legacy thereinbefore mentioned, and to purchase and appropriate sufficient stock to answer the said annuity of 300*l.*, and to apply the surplus of such money, and also the stock so purchased and appropriated after the determination of the said annuity, and all other money falling into his general personal estate, to the like uses as the overplus of the rents of his real estate, and the accumulations thereof were thereafter directed to be applied, with power (if necessary) to raise money out of his real estate in aid of his personal estate, for the purposes aforesaid. And upon further trust during the joint lives of W. P. Thornhill, the husband of his only surviving child Isabella, and of the said Isabella his wife, to apply the rents of his real estate in keeping down interest upon mortgages and paying off the principal, and to accumulate the surplus and place it out at interest, together with any surplus of his personal estate, until an eligible purchase could be found of manors or hereditaments in England as near to Hopton as might be, with a direction that the same when purchased should be conveyed and settled to the uses of his will, and that in the mean time the interest of the money applicable to purchases should be applied in the same manner as the rents of the property so to be purchased would be applicable. And he declared that it was his will and intention that all the income of his real estate as well original as purchased, and all the income of his real surplus personal estate, and of all other the property vested for the time being in the trustees of his will should accumulate by way of compound interest during the joint lives of the said W. P. Thornhill and Isabella his wife, subject, nevertheless, to the proviso of cesser thereafter contained, and should with all accumulations thereon respectively be laid out in such purchases of manor and hereditaments as aforesaid, and should in the mean time be considered as converted into real estate; and the testator directed that immediately after the death of either of them the said W. P. Thornhill and Isabella his wife, all his real estate, both original and purchased, should be subject to the trusts thereafter declared, that is to say, in case his said daughter Isabella should survive the said W. P. Thornhill, he directed

his said trustees, after paying the interest upon any existing mortgages, and subject to the said annuity of 20*l.* (if continuing), to pay the residue of the rents of his estate from the decease of the said W. P. Thornhill, and thenceforth during the natural life of his said daughter Isabella, unto and for the benefit of his said daughter for her separate use without power of anticipation; and in case she should marry again, and should leave any child or children by any after-taken husband surviving her, the testator empowered his said daughter by deed or will to appoint and dispose of his real estate unto and amongst such child or children in such manner as she should think fit, and directed his said trustees to convey his said real estate to the use of the child or children of his said daughter, by any such after-taken husband, equally amongst them if more than one, as tenants in common in tail, with cross-remainders over amongst them in tail. And in case his said daughter Isabella should die in the lifetime of the said W. P. Thornhill, or in case there should be a failure of all her children by her after-taken husband, to whom cross-remainders in tail were thereinbefore directed to be limited, then and in either of those cases the testator directed his said trustees to convey his real estate unto and to the use of the said E. Sacheverell C. Pole, or his assigns, during his life, with remainder to the use of any one or more of his child or children, (except his eldest son,) unless being his only child, as he should by deed or will appoint; with remainder after the decease of the said E. Sacheverell C. Pole, as to all such part of the said real estate as should not be disposed of by him in manner aforesaid, unto the use of the second and every other son of the said E. Sacheverell C. Pole, (except his eldest son,) severally and successively in remainder one after another, and the heirs of their several and respective bodies in manner in the said will mentioned, with other remainders over, to which it is unnecessary for the purposes of this suit more particularly to refer. And the testator directed that the person who should become entitled to the possession of the said real estate under the directions thereinbefore contained, should within the space of three calendar months after coming into such possession, take upon himself the surname and use and bear the arms of Gell. And the will

contains a proviso in the following terms, that is to say, "Provided always, and I direct and declare, that in case, at the expiration of the term of twenty-one years from the day of my decease, the said W. P. Thornhill and my said daughter Isabella Thornhill shall both be living, then and in such case the accumulation of the rents, issues and profits of the real estate hereinbefore devised and of the real estate purchased by my said trustees or trustee under the directions herein contained, and all other the accumulations hereby directed shall cease; and such rents, issues and profits, or the overplus thereof, after payment of the interest of any mortgages or other incumbrances then remaining a charge thereon, and all other the income of the estate and effects subject to be invested in the purchase of hereditaments under the trusts of this my will shall from and after the expiration of the said term of twenty-one years, and thenceforth during the remainder of the joint lives of the said W. P. Thornhill and my said daughter Isabella, or the overplus thereof, after keeping down the interest on all mortgages and all other outgoings or incumbrances, be paid by my said trustees or trustee for the time being to and for the benefit of the person or persons who for the time being under the directions hereinbefore contained would have been entitled to such rents, issues and profits and income in case my said daughter Isabella were then dead, without having had any child by any after-taken husband as aforesaid. But, nevertheless from and immediately after the decease of the said W. P. Thornhill, in case my said daughter Isabella shall survive him, my said trustees or trustee for the time being shall pay to and for the separate use of my said daughter, the said rents, issues and profits thenceforth during her life according to the trust and direction in her favour hereinbefore contained; and the said real estates, as well original as purchased under the directions hereinbefore contained, shall be subject to such trusts over as hereinbefore directed in favour of her issue by any after-taken husband, and to all such trusts in remainder over as aforesaid, the directness as to the said property lastly hereinbefore contained to the contrary thereof notwithstanding, it being my will and intention only to prevent the income of my property from being paid to

my said daughter Isabella during the life of W. P. Thornhill, in case they should jointly live beyond the term for which accumulation is by law permitted, and to provide for the payment thereof in the mean time to the persons entitled in remainder, but not further to affect her interests or those of my other devisees in case she should happen to survive the said W. P. Thornhill," as by the said will or the probate or an office copy thereof will more fully appear.

3. The testator made a codicil to his said will dated the 31st of December 1841, and thereby bequeathed certain pecuniary legacies, but did not otherwise alter the disposition of his real and personal property made by his said will; and on the 25th of January 1842 the testator died, and his said will and codicil were shortly afterwards duly proved by the executors thereof in the Prerogative Court of the Archbishop of Canterbury.

4. The said Edward Sacheverell Chandos Pole died on the 19th day of January 1863, after the time appointed for the commencement of "The Succession Duty Act, 1853," without having in any manner exercised the power of appointment in favour of his children given to him by the said will, and leaving the above-named defendant, his second son, surviving him, who upon the death of his said father became beneficially entitled by reason of the disposition made by the said will as hereinbefore stated to the real and personal property comprised in such disposition subject to the trust for accumulation in the said will contained, and subject also to the trusts thereby declared in favour of the said Isabella Thornhill, and her child or children by any after-taken husband as aforesaid in the event of such trusts taking effect.

5. The said W. P. Thornhill and Isabella Thornhill are both still living.

6. The term of twenty-one years from the day of the testator's death expired on the 25th of January 1863, and thereupon the above-named defendant (who has assumed the surname of "Gell," pursuant to the direction in the said will in that behalf contained) became entitled to have the rents and income of the real and personal property comprised in the disposition made by the testator's will as before stated, paid to him by the trustees or trustee thereof for the time being

and the same have since then been paid to him by Mr. J. Cruso (who is the surviving trustee of the said will) accordingly, and inasmuch as the defendant is a stranger in blood to the testator, by whom the before-stated disposition was made, a duty at the rate of 10*l.* per cent. upon the value of the defendant's succession has become payable by him to Her Majesty in respect thereof, but he declines to pay the same or any other duty, and denies that any duty is in fact payable.

It was prayed that it might be declared that the defendant was chargeable with duty at the rate of 10*l.* per cent., or at some other rate, in respect of the real and personal property, or the income thereof, to which he had become beneficially entitled under the disposition made by the before-stated will of the testator Philip Gell as aforesaid, and that the particulars of such property or income and the amount of duty payable in respect thereof might be ascertained if necessary under the direction of the Court, and that the defendant might be decreed to pay such duty to the Receiver General of Inland Revenue on behalf of Her Majesty; and that for the purposes aforesaid all proper accounts and inquiries might be taken and made.

The answer of the defendant admitted the statements in the information to be true, but stated that the defendant declined to pay any duty whatever in respect of the interest to which he had become entitled under the disposition made by the said will, and he so declined upon the ground that he was not, within the meaning of the "Succession Duty Act, 1853," a successor in respect of such interest; that he had not become so entitled upon the death of any person dying after the commencement of that act.

The Attorney General, the Solicitor General, Locke and Hanson, for the Crown.—E. Sacheverell C. Pole died on the 19th of January 1863, which was six days before the expiration of the twenty-one years during which the accumulation was to continue. That time expired on the 25th of January 1863, and the defendant became entitled to the immediate possession and enjoyment under the limitations of the testator's will. It is contended, therefore, on behalf of the Crown, and the case comes

directly and distinctly within the express and positive words of the Succession Duty Act, and fulfils every condition that may be necessary to be fulfilled under that act according to the definition of "a taxable succession" contained in the 2nd section. The words of that section are, "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, . . . shall be deemed to have conferred . . . a succession." The facts of this case may be read into the clause with the most perfect facility: "A past disposition of property," viz., that which the testator made on the 17th of February 1839, and which took effect upon his death in 1842, "by reason whereof any person," that is, the defendant, "became beneficially entitled to" the income of that property upon the death of his father, E. Sacheverell C. Pole, who died on the 19th of January 1863, after the act came into operation—not "immediately after"—but "after an interval" of five days, continuing till the term should run out and expire; and not "certainly" but "contingently" upon the continuance of that term during the joint lives of Mr. and Mrs. Thornhill.

[POLLOCK, C.B.—How could the succession be valued?]

As an absolute interest. Every interest, whether a fee simple interest or a fee tail interest, is valued as if it was an estate for life. This interest, therefore, would be dealt with as a life interest; but as there is a clause in the will which would determine its enjoyment in case Isabella should survive her husband, the defendant would be entitled under section 36. to so much of the duty paid by him as would reduce the duty to such an amount as would have been payable by him if such duty had been assessed in respect of the actual duration or extent of his interest. The other side will have to contend that because the defendant's father died, not indeed before the passing of the act, but five days before the period of twenty-one years had expired,

therefore that is not a succession; but it is as if to meet such an argument that these words are inserted in the act, "shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently." If the act was drawn to meet this particular case, it could not have been more accurately framed. Did not the defendant, by the death of his father, become, what he would not have been if his father had lived, entitled to the income of the fund after an interval of five days contingently upon the continuance at that time of the joint lives? And if his father had not so died, he would not have been so entitled. It was upon the death of his father that the interest vested in him as the first person entitled at the end of the term, that father's life being a life which would have stood before him, and which makes his right a right accruing upon that death, whether it took place before or after the end of the twenty-one years. It may also be that the Court will be asked to enter into some subtleties of technical law as to the precise nature of the estate limited by the will, and whether it was or was not to be considered as a remainder *eodem modo et formâ* in a technical sense. But it has been settled by the highest authority that the act is not to be construed by the subtleties of technical law. In *Saltoun v. the Advocate General* (1) Lord Campbell says: "In construing the statute on which this case depends, we must bear in mind that it applies to the whole of the United Kingdom, and that the intention of the legislature must be understood to be that the like interests in property taken by succession should be subjected to the like duties, wheresoever the property may be situated. The technicalities of the laws of England and of Scotland where they differ must be disregarded, and the language of the legislature must be taken in its popular sense." By the law of Scotland, where there is an entailed estate, every successor is supposed, in contemplation of law, to have the whole fee in him, although, for the pur-

poses of enjoyment, he is only tenant for life. It was therefore contended that the person from whom the descent of the fee took place—the feeor, as he is called—was to be regarded as the predecessor, and not the author, of the entail. Lord Campbell, after stating the technical argument, said, "At any rate, let us attend to the correspondence on this subject between Lord Hardwicke and Lord Kames, and to the decision of this House in the celebrated case of *Gordon of Park* (2), and we shall learn that such subtle technical rules are to give way for the purpose of doing justice and fulfilling the intention of the legislature. Without infringing the genuine principles of the Scottish feudal law, which I wish ever to hold sacred unless where they have been relaxed by the legislature, I think that the appellant may be considered in the situation of a remainderman in tail, according to the English law *per formam doni*, to whom I conceive that the donor, and not the last predecessor who held under the first estate tail, would be considered the predecessor." Now, is it not clear from the will that the meaning of its many provisions is, substantially, that at the end of twenty-one years, as the law does not permit the accumulations to exceed that period, the enjoyment shall be accelerated, upon the hypothesis of the death of the daughter, without leaving the described issue, but so accelerated as, if that hypothesis should not ultimately be verified, not to defer her enjoyment according to the previous intention? In *Wilcox v. Smith* (3) the question arose as to the effect of the death of the tenant for life, under an ordinary limitation to A. for life, remainder to his first son and other sons in tail. A. died after the act came into operation, but before it had received the royal assent. Vice Chancellor Kindersley held that the remainderman was liable to pay the succession duty; for though the estate vested in the remainderman at his birth, he did not become beneficially possessed of it until after the act came into operation.

Rolt and *Charles Hall*, for the defendant. —The first question is, who is the person pointed out, either by expression or by

(2) 3 Macq. 675, note (a).

(3) 4 Drew. 40; s. c. 26 Law J. Rep. (n.s.) Chanc. 596.

(1) 3 Macq. 671.

necessary inference, as the first taker of the estate created at the end of the term of twenty-one years during the joint lives of Mr. and Mrs. Thornhill? If the first taker of that estate is named, by expression or by reference, to be the defendant's father, then the question argued on behalf of the Crown arises. But if the defendant is the person so pointed out—if he is actually named as the person who is the first to take upon the end of the term of twenty-one years—*cadit questio*, there is nothing to argue, for it cannot then be said he took upon the death of his father. If the limitation in the will is "at the end of the term of twenty-one years, if Mr. and Mrs. Thornhill shall then be living, I devise my estate to the defendant," then he pays no duty. The testator died before the act came into operation, and the defendant then would not take upon the death of any person whatever. But if the taker of the estate at the end of the term of twenty-one years is the defendant's father, with remainder to the defendant, then the defendant's father having died at a certain time, before the end of the term of twenty-one years, the question would arise, whether the defendant is taking upon the death of an individual after an interval following that death. The scheme of the will appears to be this: First, there is a trust for accumulation during the joint lives of Mr. and Mrs. Thornhill, with remainder over, occurring at the death of either. In the event of the death of Mrs. Thornhill first, it is to go in one direction; in the event of Mr. Thornhill first, it is to go in another direction. Then there is a proviso, by which, in the event of Mr. and Mrs. Thornhill surviving a period of twenty-one years, a new estate is created—it is an estate which begins at the end of the term of twenty-one years, and continues during the joint lives of Mr. and Mrs. Thornhill. Now, who is the person first entitled to that estate? In order to ascertain this you must look at the earlier part of the will, not for the purpose of introducing into the latter part all the limitations introduced into the earlier, but for the purpose of seeing who, under the circumstances existing at the end of the twenty-one years, would be entitled to the estate. It is clear, if this be done, the defendant is the person so entitled; nothing is there given to the

defendant's father. The Crown reads this latter clause as if it stated, "I desire that the estate shall, in that event, go to such and the same persons, and for such and the same estates and interests, as I have hereinbefore directed in respect of my said estates, in case my daughter should die in the lifetime of W. P. Thornhill, or should die without issue after his death." Those are not the words of the will. The words are, "shall from and after the expiration of the said term of twenty-one years, and thenceforth during the remainder of the joint lives of the said W. P. Thornhill and my said daughter Isabella, or the overplus thereof, after keeping down the interest on all mortgages and all other outgoings and incumbrances, be paid by my trustees or trustee for the time being to and for the benefit of the person or persons *who for the time being*, under the directions hereinbefore contained, *would have been entitled to such rents, issues and profits and income in case my said daughter Isabella were then dead, &c.* *Then!*—that means at the end of the twenty-one years. The defendant's father could not then be entitled, because he was dead. No doubt a reference must be had to the previous limitation to ascertain who would be entitled, and at Isabella's death it is clear that the defendant is the person who would be entitled to the estate. Suppose this was the case of a single limitation, and not a series of limitations, not to the defendant for life with remainder over, but "to the person or persons who for the time being would have been entitled," would there be any question as to what the words "for the time being" would mean?—would they not mean a person who at that particular time should be found to be entitled to the rents and profits? Suppose another case, that the rector "for the time being" of a parish twenty-one years hence shall be entitled to receive a capital sum of money, there would be no difficulty in ascertaining that person, because the rector for the time being would be the rector at the end of the term of twenty-one years; or suppose, instead of giving a capital sum to him, the words were "the income of it shall be paid to the rector or rectors for the time being at the end of twenty-one years," it would only be necessary for the Court to ascertain

who is the rector in being at the end of that term, and the income would be payable to him. There is no distinction between that case and the present. Again, suppose a limitation to the second son for the time being of A. B., with remainder to the first and other sons of that second. A. B. has three sons, X., Y., Z. Y. is the second son, who dies before the end of the term of twenty-one years, and consequently at the end of the term of twenty-one years Z. becomes the second son for the time being. The argument for the Crown would go the length of claiming duty because the words "second son for the time being" included Y., and Z. succeeded on the death of Y. A definition of the meaning of these words is given by Lord Westbury in his judgment in *Ellison v. Thomas* (4): "When a future period is referred to, and it is desired to designate a person who fills a particular character at that period, the words 'for the time being' are appropriately used. If several future periods are referred to, the words are again appropriate, and may denote several different persons who may in succession fill the character at such several periods. If I say that when a particular office shall become vacant the appointment shall belong to the Prime Minister for the time being, the words denote one person only, for one period only is referred to; but if, as in the instance put by the Vice Chancellor, I direct a certain sum to be paid annually to the rector of A. for the time being, the words denote the rectors from time to time, because they refer, not to the time of one payment, but to the time of successive annual payments." Next, does the defendant succeed on the death of his father? Here there is an absolute and independent term of twenty-one years running from the testator's death, in no way connected with the defendant's father, but created for a collateral purpose, wholly extrinsic and foreign to the defendant's father, and the limitation in substance is, on the expiration of the term of twenty-one years, or on the death of the defendant's father, whichever of these two events shall last happen, to the defendant; then, if the event that last happened is the term of twenty-one years, the defendant does not, within the spirit

of the Succession Duty Act, take the estate upon the death of any person.

The Attorney General replied.—He referred to the 8th, 20th and 21st sections of the act, and contended that it was a fallacy to suppose that a man does not take a succession on the death of a person unless the person on whose death he takes the succession would himself take under the same disposition; if the death introduces the defendant to the interest which he took, then the act applies.

Cur. adv. vult.

POLLOCK, C.B.—In delivering the judgment of the Court (5), it will be convenient to state the facts that give rise to the question in this case. Philip Gell devised certain property, as follows, to his daughter for life if she survived her then husband, and after her death to such child or children by a second husband (if any) as she should appoint, and to them equally in tail in default of appointment. But if she should die before her then husband, or without having children by a second husband, then the trustees were to convey the estate to the use of Edward Sacheverell Chandos Pole for life, with remainder to such child of Edward Sacheverell Chandos Pole, other than the eldest, if more than one, as he should appoint, and for default of appointment, to the second and other sons in tail. This left the rents and profits during the joint lives of the daughter and her then husband undisposed of. As to these, the testator directed that they should accumulate for twenty-one years if the daughter and her then husband should so long live, and be added to the *corpus*, and if they lived beyond twenty-one years, then during the remainder of the joint lives they should be paid to the person or persons who would have been entitled to the *corpus* if the daughter were dead without a child by her then husband, with a proviso for the daughter's benefit if she survived her husband. The testator died in 1842; the daughter and her husband are still living. Edward Sacheverell Chandos Pole died on the 19th of January 1863, without making any appointment, and the defendant is his second

(4) *Jones, De Gex & Sm.* 18.

(5) *Pollock, C.B., Bramwell, B., Channell, B. and Pigott, B.*

son. The twenty-one years expired on the 25th of January 1863. The question is, whether the succession duty is payable on his interest in the rents and profits after the twenty-one years?

Now here is a passed disposition of property whereby the defendant has become beneficially entitled to the income of property. Has he done so upon the death of a person dying after the commencement of the Succession Duty Act? Edward Sacheverell Chandos Pole has died since that time. The question is, what is the meaning of the words in the second section, "has or shall become entitled to any property upon the death of any person dying after the time appointed for the commencement of the act, either immediately or after an interval, either certainly or contingently"? It seems impossible that the words "become entitled" can mean both have the right and have the enjoyment, and yet there are irresistible reasons to shew that both are meant. First, to shew that it means have the title or right, and not the enjoyment, there is in the first place the word itself "entitled." A man is entitled as soon as he has the right. In the next place, he may be entitled "after an interval"; again, he may be entitled "contingently." Further, by section 20, the duty is payable only where the successor shall become entitled in possession to the succession. On the other hand, "a passed disposition of property, by reason of which a person *has* become entitled on the death of a person dying after the commencement of this act, confers a succession. But in such a case it cannot mean the *accrual* of the title, for that *has* taken place, so that the words must mean here "entitled in possession." Further, if this were not so, the common case of a settlement for life with following interests would not confer a succession on the persons taking the remainder. This cannot have been intended, and indeed is contrary to several cases—*The Attorney General v. Yelverton* (6) and *The Attorney General v. Gardiner* (7). We must hold, therefore, that the section applies not merely to cases where the title accrues at

death, but also to cases where the title has accrued before the act, but is made an interest in possession at once, or after an interval on a death accruing after the act. So that it applies, not only where the death is the cause, but also where it is the occasion of the successor's being entitled to possession "immediately," or "after an interval." But if so, that comprehends the present case. The death of his father did not entitle the defendant in the sense of giving him the title or right, but on that death the defendant became contingently entitled "after an interval" to possession. We must therefore give judgment for the Crown. Mr. Rolt's argument has not been lost sight of. But after all, if our construction of the statute is right, the question is whether the father's death was the occasion of the son's right. We think it was. It may be that the consequence follows that Mr. Rolt pointed out, namely, that if there were a gift for ten years and then to the rector of Dale for the time being, and A. was rector at the beginning of the ten years and died, and B. was rector at the end, that B. would be liable to the succession duty as being entitled on the death of A. It may be so. No doubt that does not seem a case in ordinary parlance of being entitled "on the death" of A.; but there is no other objection to such a law. There is no reason why such a subject of taxation should not be selected. It results in this, that when anybody gains by a death the State shares his benefit.

Judgment for the Crown.

1865. } BROWN v. THE SOMERSET AND
May 10. } DORSET RAILWAY COMPANY.

Arbitration—Award—General Finding—Nominal Damages.

A dispute arose between the plaintiff and the defendants, as to whether a certain carriage archway had been constructed in conformity with an agreement entered into between them. An action having been brought, by an order of Nisi Prius the cause was referred to an arbitrator, who was empowered to direct, if he found for the plaintiff, what should be done to make the carriage archway in conformity with the agreement. The arbitrator found for the plaintiff, without awarding any damages, and directed

(6) 30 Law J. Rep. (N.S.) Exch. 333; s. c. 7 Hurl. & N. 306.

(7) 32 Law J. Rep. (N.S.) Exch. 84; s. c. 1 H. & C. 639.

certain alterations to be made in the archway. The plaintiff signed judgment for the amount of the damages claimed in the declaration:—Held, that the plaintiff was entitled only to nominal damages.

It appeared from the affidavits that the first count of the declaration, after reciting that before and at the time of making the agreement thereafter mentioned, the Dorset Central Railway Company were about to construct a line of railway through certain lands and hereditaments of the plaintiff, and across a certain occupation-road near and leading to a certain mansion-house and pleasure-grounds of the plaintiff, and thereby to occasion damage, averred that it was agreed between the plaintiff and the Dorset Central Railway Company, that in consideration that the plaintiff would agree with the said company to refer to the award of one Henry Arthur Hunt, the amount to be paid to the plaintiff by the said company, by way of compensation for the damage aforesaid, and would also permit the said company, on payment of a certain deposit, to take possession of such portion of the said land and hereditaments of the plaintiff as they were authorized to purchase under the provisions of their act, the said company would (amongst other things) make and maintain a carriage archway of a neat character under the line of the said railway, at a certain place then agreed upon, where the said line was intended to cross the said occupation-road, and would also remove the thatch with which a certain lodge of the plaintiff's was then covered, and roof the same with tiles and slates. Averment of performance of conditions precedent. First breach, that the Dorset Central Railway Company, after the making of the agreement and before the passing of the Somerset and Dorset Company's Amalgamation Act, 1862, constructed a carriage archway in the said place of a rude, unsightly and inelegant character, and not of a neat character, and that the said archway remained from thence hitherto. Second breach, that the Dorset Central Railway Company did not nor would, prior to the passing of the Somerset and Dorset Company's Amalgamation Act, 1862, nor did nor would the defendants afterwards remove the thatch from the said lodge, or cover the

same with tiles and slates. The second count was for trespass to the plaintiff's land, and the declaration claimed 1,000*l*.

The defendants to the first breach alleged in the first count pleaded performance of their agreement in this respect, and to the second, payment into court of 42*l*. 10*s*. To the second count they pleaded not guilty and not possessed.

The plaintiffs replied to the pleas of performance, not guilty and not possessed, by joining issue, and to the plea of payment into court, by accepting the said sum of 42*l*. 10*s*. in satisfaction of the second breach.

The cause was entered for trial at the Dorset Spring Assizes, 1864, when the plaintiff, having abandoned the second count, Martin, B., the presiding Judge, suggested that the matter should be referred, and accordingly Mr. Richard Hall, a surveyor, was appointed arbitrator.

By the order of Nisi Prius referring the cause, it was directed that a verdict should be found for the plaintiff for the claim in the declaration and costs 40*s*., and for the defendants on the trespass count: that the arbitrator, in the event of his finding for the plaintiff, should say what was to be done to make the carriage archway in conformity with the agreement, and should certify in writing when what he ordered to be done was properly carried out. He was empowered to direct that a verdict should be entered for the plaintiff, or the defendant, or a nonsuit entered, as he should think proper; and to him the cause and all matters in difference between the parties thereto were referred.

It was further directed that the costs of the cause should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator.

On the 23rd of May 1864, the arbitrator made his award, which after certain recitals proceeded thus:

"1. I direct that the verdict shall be entered for the plaintiff in the said cause (except as to the trespass count).

"2. In order to make the carriage archway mentioned in the order of reference in conformity to the agreement, I direct the defendants to add a parapet with ashlar stringcourse and coping; also to fix an ashlar coping on wing walls, as shewn on the drawing annexed to this my award; also to take out all points of brickwork, and pro-

perly point the same in good white cement; and I further direct that the above works be properly completed before the 25th day of September next.

"3. I direct that the costs of the reference and of this award be paid by the defendants."

Thereupon the *postea* was drawn up by the plaintiff, and the damages were assessed therein at 957*l.* 10*s.* On the 2nd of January 1865 judgment was signed, and in the following month (February) the plaintiffs' costs were taxed at 237*l.* 16*s.* 8*d.*; the *postea* was shewn to the clerk of the defendants' attornies, who did not object to the amount of the damages. After the taxation the defendants' attornies paid the costs by cheque; the plaintiffs' attornies replied by saying that they would place the amount of the cheque to the credit of the judgment debt, but that they had issued a writ of *fiery facias* for the sum of 1,195*l.* 6*s.* 8*d.* The defendants, on the 2nd of March, took out a summons at chambers, calling on the plaintiff to shew cause why the judgment should not be amended by the addition of words, the effect of which would reduce the damages to a nominal sum, and why the writ of *fiery facias* should not be set aside. Erle, C.J., at the hearing of the summons, refused to amend the judgment, but set aside the writ. The costs of the issues abandoned at the trial, amounting to more than 6*l.*, were paid to the defendants. It was alleged by the defendants, that they had fully and faithfully fulfilled the award; the plaintiffs asserted that some of the stone-work of the archway, from being made of bad materials, had come off, and that the mortar-pointing was falling off. It was also stated that the arbitrator had never certified that what he had ordered to be done had been properly carried out according to the terms of the order of Nisi Prius.

Lopes (April 21) had obtained a rule, calling on the plaintiffs to shew cause why the judgment should not be set aside, with costs, on the ground that it was signed without authority.

Kingdon now shewed cause.—The damages were assessed at the proper amount; for the arbitrator, by finding for the plaintiff generally, in fact awarded him the full amount of his claim. It is not contended that execution ought to issue for the whole

sum; the defendants have not complied with the arbitrator's directions.

[*Lush*, contra.—The archway has been altered.]

It is not to be forgotten that Erle, C.J., though he set aside the writ of *fiery facias*, left the judgment as it was.

Lush (*Lopes* with him) was not called on.

[*MARTIN*, B.—Under no circumstances had the plaintiff power to sign judgment for the residue of the full claim, after deducting the amount paid into court. If the defendants did not comply with the award, his remedy was by an application to this Court: he could not have honestly supposed that judgment was to be entered up for 957*l.* 10*s.*]

Per Curiam (1).—The rule must be made absolute to reduce the damages to 1*s.*, and on payment thereof all proceedings must be stayed.

Rule accordingly.

1865. } YOUNG v. FLETCHER AND
April 27, 28. } OTHERS.

Bankrupt—Act of Bankruptcy—Fraudulent Transfer—"With Intent to defeat and delay Creditors"—*Stopping Trader's Business.*

*A debtor by deed, in consideration of a by-gone debt, of 230*l.* assigned to the defendants certain property amounting to 160*l.* He had other property consisting of an equity of redemption valued at 150*l.*, and book debts to the amount of 50*l.*, of which 22*l.* were good. His debts amounted to 1,100*l.*, of which 600*l.* was due to the defendants, and the residue to other creditors. At the time the deed was executed the debtor was insolvent, and the defendants knew it, and they also knew that if they put the deed in force it would prevent the debtor from carrying on his trade. The deed was put in force by the defendants, and the debtor's trade was stopped:—Held, that the assignment was an act of bankruptcy, as the defendants by putting the deed in force prevented the continuance of the trade, and thereby necessarily defeated and delayed creditors.*

Declaration by the plaintiff as assignee of the estate and effects of Daniel Rushworth,

(1) Pollock, C.B., Martin, B. and Pigott, B.

a bankrupt, on the common money counts, and also for trover for converting the goods of the plaintiff as assignee.

Pleas, never indulted to the common counts, and not guilty and not possessed to the count in trover.

The cause was tried, at the Spring Assizes at Leeds, before Martin, B.

The action was brought to recover the value of certain goods, included in a bill of sale given by Daniel Rushworth, the bankrupt, to J. Fletcher, J. F. Easby and W. Fletcher, three of the defendants, and which goods were seized and sold by G. Poole, the other defendant.

The defendants J. Fletcher, Easby and W. Fletcher, under the firm of Fletcher & Co., carried on the business of coal-merchants, at Silsden, near Bradford.

In 1860 Fletcher & Co. employed the bankrupt Rushworth as an agent to sell coals. In October 1864 Rushworth was indebted to Fletcher & Co. to the amount of 230*l.*, and at the end of that month they applied to him for a bill of sale as a security for his debt. On the 3rd of November the bankrupt executed a bill of sale in favour of Fletcher & Co. At the time the bankrupt executed the bill of sale, his debts amounted to about 1,100*l.*, of which 600*l.* was due to the defendants and the residue to other creditors. His assets consisted of the amount of the goods comprised in the bill of sale, book debts to the amount of 50*l.*, of which only 22*l.* were good, and an equity of redemption valued at 150*l.*, and which he afterwards sold to the defendants for 110*l.* He was then in insolvent circumstances, and his insolvency was known to Fletcher & Co., and J. Fletcher had told several persons that the bankrupt could not pay 5*s.* in the pound. The property comprised in the bill of sale consisted of horses and carts valued at 130*l.* and some household furniture valued at about 30*l.* The bankrupt executed the bill of sale on the express verbal understanding and promise from J. Fletcher, that he would let him have the horses and carts, so that by their use he would be able to redeem himself and pay his other creditors, but on its afterwards turning out that the bankrupt was indebted to the firm in a larger amount than they at first expected, J. Fletcher considered he was absolved from his promise. On the 17th of November the defendant Poole was instructed to seize the property

comprised in the assignment, and on the 19th he seized and advertised a sale. On the 22nd of November he was served with a notice that the bill of sale was an act of bankruptcy, and notwithstanding the notice he proceeded to sell the goods on the 23rd of November. The goods realized 125*l.* A petition for adjudication in bankruptcy against Rushworth was filed on the 28th of November, and on the 10th of December he was adjudicated a bankrupt, and on the 9th of January 1865 the plaintiff was appointed official assignee.

The bill of sale purported to be made between Daniel Rushworth of the first part, Nathan Rushworth of the second part, and J. Fletcher, J. F. Easby and W. Fletcher (called the mortgagees) of the third part. After reciting that the mortgagees had required payment by D. Rushworth of the sum of 230*l.* 7*s.* 1*d.*, which was due from D. Rushworth to the mortgagees, and D. Rushworth being unable without inconvenience to make such payment, and requiring further credit and advances of money, it had been agreed, that in order to secure the said sum of 230*l.* 7*s.* 1*d.*, and the sum or sums of money which should from time to time hereafter become due from him to the said mortgagees on any account whatsoever, not exceeding in the whole with the said sum of 230*l.* 7*s.* 1*d.* the sum of 300*l.*, the said D. Rushworth should execute to the said mortgagees the assignment and security thereafter mentioned, and then in consideration of the sum of 230*l.* 7*s.* 1*d.* being so due from the said D. Rushworth to the said mortgagees, and also in consideration of the premises, and of the further credit intended to be given, and of the further advances of money intended to be made to the said D. Rushworth by the mortgagees, D. Rushworth assigned and transferred unto the said mortgagees all and singular the horses, mares, building materials, cart gears, household furniture, and household effects, and all other the goods, chattels and things and other personal property enumerated in the schedule thereunder written, and all and singular other the household furniture and other effects and things (if any) now being in and about the dwelling-house and premises of the said D. Rushworth, in Westgate, Bradford, aforesaid, and all the estate and interest of him D. Rushworth therein or thereto (except from the

grant and assignment hereby made the necessary wearing apparel of the said D. Rushworth and his family), and also all or any goods, chattels and effects substituted by the said D. Rushworth for those which were enumerated or comprised therein, and all or any other goods, chattels or effects then or thereafter belonging to D. Rushworth, which might be in and upon the dwelling-house, trade or other premises occupied by D. Rushworth at the time of demand of payment of any monies due thereunder, it being thereby agreed that such goods, chattels and effects as should be thereafter brought in and upon the said premises, or any of them, should thereby in pursuance of the assignment thereby made become the property and effects of the mortgagees, and such assignment shall be deemed complete and effectual for the purposes therein set forth without any further or other transfer, delivery of possession, or other act or deed on the part of D. Rushworth.

At the conclusion of the plaintiff's case, the defendants' counsel submitted to the learned Judge, that on the authority of *Smith v. Timms* (1), the plaintiff ought to be nonsuited. The learned Judge, however, declined to nonsuit the plaintiff, and at the conclusion of the defendants' case, in summing up to the jury, said: "The question is, whether the bill of sale given by Rushworth to the firm of Fletcher & Easby is a fraudulent conveyance of his goods and chattels within the meaning of the Bankrupt Act? It has long been held, that if a debtor conveys the whole of his property to a creditor in respect of a pre-existing debt, that is a fraudulent conveyance with intent to defeat and delay his other creditors, because it necessarily has that effect; it takes away and gives to one creditor the whole of his debtor's property and that creditor gets it all, and it essentially prevents any of the other creditors from getting any portion of it. The law has, for many years, stamped such a transaction as being of itself a fraudulent conveyance, within the meaning of the Bankrupt Act. Therefore, if this bill of sale had comprised the whole of the debtor's property, however honest the transaction might be, it would be an act of bankruptcy. It would appear that over and above the

property which was comprised in the bill of sale, the debtor Rushworth had an equity of redemption, which was worth as much as 140*l.* or 150*l.*; he had further book debts due to him, amounting to from 50*l.* to 60*l.*; and he had also a sum of 26*l.* odd, due from the corporation of Bradford. And the question which I propose to leave to you is this: whether, taking into consideration that the debtor Rushworth possessed the property I have mentioned to you, did the property comprised in the bill of sale substantially comprise all the property of the bankrupt available in order to enable him to carry on his trade, and did the defendants know that the consequence of putting the bill of sale into force would be to prevent, and in effect to stop his trade, and to disable him from carrying it on? If you are of opinion that was the true operation of this bill of sale, in my judgment that is an act of bankruptcy, and you ought to find a verdict for the plaintiff. If you find it not to be the fact, then you will find a verdict for the defendant." His Lordship further stated: "The question is, if a debtor, by a conveyance of his property, puts himself in the condition that he cannot carry on his business or his trade, and gives to a creditor the power of putting an entire end to it, so as to prevent his other creditors from getting anything; and if the person who takes a conveyance of this kind knows such to be the consequence of the transaction, in my opinion that is a fraudulent conveyance within the bankrupt law and an act of bankruptcy. If you believe this transaction had the effect and was of the character I have mentioned to you under the circumstances of this bankruptcy, you will find your verdict for the plaintiff." The jury found their verdict for the plaintiff.

Field, in the present term, obtained a rule for a new trial, on the ground of misdirection in not directing a nonsuit, and also in directing the jury, that the deed of the 3rd of November 1864 was an act of bankruptcy in the terms stated by the learned Baron.

Manisty and *Kemplay* shewed cause, and contended that the direction of the learned Judge was right. That whether the deed comprised the whole of the trader's property or not, was a question for the jury, and which the jury had rightly decided by their verdict. That the effect of the deed was

(1) 32 Law J. Rep. (N.S.) Exch. 215; s.c. 1 H. & C. 849.

to defeat and delay the bankrupt's creditors; that there might be cases in which an assignment of a trader's chattels might stop his business without delaying and defeating his creditors; but here the trader was so hopelessly insolvent at the time he executed the deed, and that to the knowledge of the creditors, that the assignment could have no other effect than to defeat and delay his creditors. They cited *Smith v. Timms* (1), *Pennel v. Reynolds* (2), *Graham v. Chapman* (3), *Ex parte Bailey* (4), *Goodricke v. Taylor* (5), *Ex parte Wensley* (6).

Field and Wills, in support of the rule, contended, that, on the authority of *Smith v. Timms* (1), the learned Judge ought to have nonsuited the plaintiff, and that the learned Judge was wrong in telling the jury that if the trader, by reason of the assignment, was prevented from carrying on his business, then that the making of the deed was an act of bankruptcy. They cited and relied on *Young v. Waud* (7), *Smith v. Cannon* (8), *Worsley v. De Mattos* (9), *Wilson v. Day* (10).

[*MARTIN, B.* referred to *Wedge v. Newlyn* (11).]

POLLOCK, C.B.—I am of opinion that this rule ought to be discharged. Considering the length of the discussion which took place upon the rule, I do not think it necessary to say more than this, that it appears to me *Smith v. Cannon* (8) establishes this proposition, that where a trader being in insolvent circumstances makes an assignment of his property, which if acted on would prevent him from carrying on his trade, he thereby commits an act of bankruptcy. I think it quite plain, according to what passed between the parties at the time the assignment was made, the debtor who took the assignment was aware that

the trader was insolvent, because the trader informed him that if he conveyed his goods to him he could not carry on his business. The transaction contains two distinct elements which make it an act of bankruptcy irrespective of any fraud. The ground upon which I put the case is this: at the time of the conveyance the party taking the assignment was aware the trader was insolvent, and was aware that the assignment would if acted on break up the concern, and that must necessarily delay and defeat the creditors.

PIGOTT, B.—I am of the same opinion. This is not a case where a trader conveys all his property, or all with a colourable exception, which I take to be the same thing as conveying all; but it is a case where he conveys his property, stock-in-trade, and all that shall come upon the premises, including his horses and waggons with which he carried on his trade, with the exception of the value of an equity of redemption, and I think about 50*l.* worth of book debts, with this addition, that he conveys also everything that should come upon the premises after the execution of the deed; and therefore the question is, whether the assignment is an act of bankruptcy. It was proved that the bankrupt knew perfectly well, and the defendants knew perfectly well, that if this deed was put in force he would be at once unable to carry on his business any longer. Those are the facts, and upon those facts my learned Brother left to the jury the question, did that deed comprise all the property of the bankrupt available to enable him to carry on his trade, and would the effect of putting it in force be to stop his business and thereby defeat the creditors? That that would necessarily be the case the bankrupt knew; the defendants also knew that that would be its effect. Now I cannot see any objection that can be taken to that direction. The section of the act of parliament under which the question arises, is section 67. of the 12 & 13 Vict. c. 106, and that section, as I will read it shortly, says, that if a trader makes a fraudulent transfer of any of his goods with intent to defeat his creditors that shall be an act of bankruptcy. Now, there was here, in point of fact, a transfer. What was the necessary effect of it? Why the necessary effect was to defeat creditors. Then a man, in law, is taken to

(2) 11 Com. B. Rep. N.S. 209.

(3) 12 Com. B. Rep. 85; s.c. 21 Law J. Rep. (N.S.) C.P. 173.

(4) 22 Law J. Rep. (N.S.) Bankr. 45; s.c. 3 De Gex, M. & G. 534.

(5) 10 Law Times, N.S. 113.

(6) 1 De Gex, S. & J. 273; s.c. 32 Law J. Rep. (N.S.) Bankr. 23.

(7) 8 Exch. Rep. 221; s.c. 22 Law J. Rep. (N.S.) Exch. 27.

(8) 2 E. & B. 35; s.c. 22 Law J. Rep. (N.S.) Q.B. 290.

(9) 1 Burr. 467.

(10) 2 Burr. 827.

(11) 4 B. & Ad. 831.

contemplate the necessary consequence of his own act. I think that, therefore, you get that ingredient added, that there is an act of transfer with the intent to do that which is the necessary consequence of the act, and that is to stop his trade and necessarily to delay his creditors. Then having all those ingredients at present the only question remains, was it a fraudulent transfer? The word "fraudulent" Mr. Field presses upon us as the important point in the case, and we have to say what is the meaning of the word "fraudulent" in the section of the act of parliament. It seems to me that all the authorities almost are uniform upon that subject, and it is not necessary that there should be moral fraud. The great point to look at is this, would it have the effect of defeating and delaying the creditors? and if so, it is fraudulent within the meaning of the Bankrupt Act, the object of which is, that the goods of the debtor shall be divided rateably among his creditors. Mansfield, C.J. lays it down in *Morgan v. Horseman* (12), that "a conveyance either of all or part of a man's property in favour of fewer than all the creditors is an act of bankruptcy, because it is the means whereby the creditors may be defeated and delayed;" and that case is followed up by numerous other cases, down to the late case of *Smith v. Cannon* (8). Parke, B. there again says, "The test is, whether the result and necessary effect is to delay and defeat the creditors." I take it, therefore, if that is its effect, it is fraudulent within the meaning of this section of the act. I think with that view of the act of parliament, in association with all the authorities, the learned Judge could not have left it to the jury in any other way.

MARTIN, B.—I think, assuming that the cases cited from the Courts of equity are correct, if the verdict had been the other way, there would have been ground to move for misdirection. If the cases of *Ex parte Bailey* (4), *Ex parte Wensley* (5) and *Goodricke v. Taylor* (6) be law, they go much beyond my direction in this matter. The question in this case is, whether an act of bankruptcy was committed by the execution of the deed of the 3rd of November 1864; and the first thing to ascertain is, what were the circumstances of the

bankrupt at that time? His circumstances were these: that he was a man possessed of a number of carts and horses, and some little stock-in-trade; that he used the carts and horses for the purpose of carting goods for hire, and he also was an agent for the sale of coals, and upon that day his own account of the matter, which was wholly undisputed, was, "I executed this bill of sale, which includes all the tangible property I possessed." "But at that time," he says, "I had some land, but it was mortgaged, and there were about 50*l.* of book debts due to me, 22*l.* of which were good, and the rest was doubtful." That was the state of things, and he tells us one of the defendants, who were relatives of his, applied to him for payment of his debt; and he further states, "I knew if the bill of sale was enforced, it would stop my business at once." That is his own account, and his son says the same thing, and it is proved by both himself and his son that the defendant knew that the debtor was not able to pay 5*s.* in the pound. In that state of things he executed this bill of sale, and he says, if the bill of sale is put in force it was calculated to stop his business. It was put in force, and it did stop his business that very moment. Mr. Field, in his argument, contends that we are to ascertain what proportion the property conveyed by the deed bears to the whole of the property of the assignor, and the amount of the property excepted from the deed is the test whether the deed is an act of bankruptcy or not, and if that mode were adopted here the conveyance would not be a conveyance of all the trader's property. All the property the man really had was the equity of redemption, and I am not aware of any mode by which that was available to the creditors, short of paying off the debt or filing a bill in equity. That is a very different thing from a man having available property with which he may go into the market. With respect to the verdict, I think no other verdict could be expected.

Rule discharged (13).

(13) The learned counsel for the defendants asked for leave to appeal, stating that he had applied to the learned Judge for leave to move the Court; but the Court refused to grant leave to appeal, Martin, B. stating that the learned counsel ought to have tendered a bill of exceptions to his ruling.

1865. } KERSHAW v. OGDEN AND
May 8. } OTHERS.

Statute of Frauds—Sale of Specific Goods—Acceptance and Actual Receipt.

The defendants agreed by parol to purchase of the plaintiff four specific stacks of cotton waste at 1s. 9d. per pound. They sent their own packer with their sacks and their own carts to fetch it; their packer packed the waste into eighty-one sacks, twenty-one of which were weighed and then loaded on the defendants' cart and taken to the defendants' premises; the rest of the sacks were not weighed. On arrival of the twenty-one sacks at the defendants' premises they refused to accept any portion of the waste, on the ground that it was of inferior quality:—Held, that the property in the waste passed to the defendants, and that there was sufficient evidence of an acceptance and receipt to satisfy the Statute of Frauds.

Declaration contained a special count for not accepting certain cotton waste, and a count for goods bargained and sold, and goods sold and delivered, and money due on accounts stated.

Pleas: First, that the defendants did not buy the goods; secondly, that the defendants were ready and willing to accept, but that the plaintiff was not ready and willing to deliver; fourthly, to the common count, never indebted.

The cause was tried, at Leeds, before Mellor, J. The facts as found by the jury were, that in December 1863, one Greenhalgh, an agent of the defendants, went to the plaintiff's warehouse, where he saw five stacks of cotton waste; one of them being of inferior quality, he negotiated with the plaintiff for the purchase of the other four. He asked for a sample. The plaintiff declined to sell by sample, but told him, "You see the waste, examine it as much as you please, and take a sample yourself." Greenhalgh took a sample and asked for a guarantee that the bulk was equal to sample. The plaintiff refused to give any guarantee, but stated that the waste was all alike, for it was made from one description of cotton. After some negotiation the defendants' agent agreed to purchase the four specific stacks at 1s. 9d. per pound, the defendants to send their own packer and sacks and their carts to

remove it. On the 3rd of January following the defendants sent their packer with eighty-one sacks to pack the waste, and he, assisted by the plaintiff's men, packed the four stacks purchased into the eighty-one sacks. On the 5th of January twenty-one sacks were weighed, put into the defendants' cart and, with a delivery order stating the weights, taken to the defendants' premises. The rest of the sacks were not weighed. The same day the twenty-one sacks were returned to the plaintiff by the defendants with a note, stating that the waste was of an inferior description to that purchased by the defendants. The cart loaded with the waste was left at the plaintiff's warehouse, who, to prevent it from spoiling, gave directions to place it under shelter, and the next day it was taken back into the plaintiff's warehouse. The learned Judge left the question to the jury, whether the defendants did accept and actually receive part of the goods; that if so their verdict must be for the plaintiff.

The jury found a verdict for the plaintiff for 784*l.*, the price of the cotton waste; and the learned Judge reserved leave to the defendants to move to enter a nonsuit on two grounds: First, that there was no evidence of an acceptance and actual receipt of the goods, so as to constitute a binding contract under the Statute of Frauds; and, secondly, that the property in the goods did not pass to the defendants.

Brett having obtained a rule accordingly, *E. James* and *Holkar* shewed cause.—First, the defendants purchased certain ascertained goods, viz., four specific stacks of cotton waste, and when the defendants' packer put the waste into the sacks there was an acceptance of the goods. The Statute of Frauds, however, requires an actual receipt as well as acceptance; here the two concurred, for when the defendants' servants put the waste into the cart and took it away, there was an actual receipt; and it was held in *Cusack v. Robinson* (1), that the acceptance may precede the receipt. Next, it will be said, on the other side, that the whole of the sacks were not weighed; and that, as something remained to be done, in order to ascertain the price to be paid for the waste, the property did not pass until the sacks were weighed, and *Simmons*

(1) 1 B. & S. 209; s.c. 30 Law J. Rep. (N.S.) Q.B. 261.

v. *Swift* (2) will be relied on; but that case is explained in *Furley v. Bates* (3), and the Court in their judgment lay down a principle which governs the present case; it is there said, "It is clear that this rule does not apply if the parties have made it sufficiently clear whether or not they intend that the property should pass or not, and that their intention must be looked at in every case." Here the parties intended that the property in the waste should pass when the defendants' own men put it into the sacks.

Brett and T. Jones, contra.—The plaintiff has recovered in this action for the whole price of the goods sold, and he can, therefore, only retain his verdict on the count for goods bargained and sold. Now there is no evidence of any contract under the Statute of Frauds; to constitute such a contract there must be an acceptance of part and an actual receipt of the goods. In *Bill v. Baiment* (4), Lord Wensleydale, then Parke, B., said, "To take the case out of the 17th section there must be both delivery and acceptance; and the question is whether they have been proved in the present case. I think they have not. I agree that there was evidence for the jury of acceptance, or rather of intended acceptance. The direction to mark the goods was evidence to go to the jury *quo animo* the defendants took possession of them. But there must also be a delivery; and to constitute that, the possession must have been parted with by the owner, so as to deprive him of his right of lien." Now, here there was neither a delivery nor an acceptance. The defendants' packer was not an agent to accept, and immediately the goods arrived on the defendants' premises they sent them back to the plaintiff because they were of inferior quality. The facts shew that there was no intention on the part of the defendants to accept the goods.—They also referred to *Castle v. Swoorden* (5).

POLLOCK, C.B.—We are both of opinion, and as far as the argument had proceeded, my Brother Bramwell was of the same

opinion, that this rule ought to be discharged (6). I think the case is not distinguishable in principle from the case cited of *Furley v. Bates* (3), and it really was a question for the jury, what was the character of the delivery to the defendants, the taking the goods to the defendants' place of business, and the plaintiff afterwards housing the goods to prevent mischief from accruing to them. The jury have decided those facts in favour of the plaintiff. I own I do not see any reason to question the propriety of what the jury have found, and so I think the rule must be discharged. With respect to the question of nonsuit. I think the direction of the Judge to the jury was perfectly right; the question was properly left to the jury, and the Judge does not disagree with the finding of the jury. I think the rule should be discharged.

MARTIN, B.—I am of the same opinion. The question depends upon what was the contract, and the jury have found the contract was, that the defendants agreed to buy from the plaintiff four stacks of cotton waste specifically mentioned, more or less, taking them for better or worse. If the finding is, as I have no doubt it was, right, the result was, the property in the four stacks became the property of the buyers, the defendants, and the plaintiff became entitled to the price in an action for goods bargained and sold, if the Statute of Frauds was satisfied. The Statute of Frauds requires that there shall be an acceptance of part of the goods so sold and an actual receipt; and if the contract is as I have here stated, the defendants sent their own man, and their own cart, and their own packer to pack their own goods and bring them away, and the moment they were put into the cart and taken away, I should say before, but certainly when they were put into the cart for the purpose of bringing them away, there was evidence to go to the jury of an acceptance and receipt; and if the jury had found that there was not, I should have been prepared to set aside the verdict as being a verdict against evidence. I am therefore clearly of opinion that this rule ought to be discharged.

Rule discharged.

(6) Bramwell, B. left the court before the conclusion of the argument.

(2) 5 B. & C. 857; a.c. 5 Law J. Rep. (N.S.) Q.B. 10.

(3) 33 Law J. Rep. (N.S.) Exch. 43; a.c. 2 H. & C. 200.

(4) 30 Law J. Rep. (N.S.) Exch. 310.

(5) 9 Mee. & W. 36.

1865. } COOPER AND OTHERS v. BILL
 April 28. } AND ANOTHER.

Contract—Sale of Goods—Transfer of Possession—Stoppage in Transitu—Unpaid Vendor's Lien.

The defendants entered into a contract with G. as follows: "21st of September 1864. Sold to G. the oak timber offered to him at the prices stated in his letter of the 12th of September, viz., trees of 60 feet and upwards at 2s. 8d. per foot; trees under 60 feet 2s. 5d. per foot, delivered to boats. The above to be 12 inches girth and upwards; and two coffin logs, at 4s. per foot. Payment 100*l.* by bill at one month, and balance by bill at four months from measurement." The timber had been brought by the defendants to certain wharves belonging to the Herefordshire Canal Company. On the 7th of October G.'s agent measured the timber, marked it and had it "squared," paying 5*l.* to the persons employed. On the 15th of October G. gave 100*l.* bill at one month, which was paid, and two other bills, one for 100*l.* and the other for 75*l.* at four months. While these last bills were running G. became insolvent and made an assignment of his estate to the plaintiffs as trustees for the benefit of creditors; the defendants took possession of the timber and claimed to retain it as unpaid vendors:—Held, in an action by the plaintiffs, the Court having power to draw inferences of fact, that there was a transfer of the possession of the timber to G. the vendee, and that the vendors had no lien for the price.

The plaintiffs sued—as trustees of the estate and effects of H. Gurney, a debtor, for and on behalf of his creditors, under a deed made between H. Gurney and the plaintiffs, relating to the administration of his estate according to the clauses of the Bankruptcy Act, 1861,—for the detention of certain timber.

The defendants pleaded—First, *non detinet*. Secondly, not possessed. Thirdly, that before the alleged detention and before the execution of the alleged deed, the defendants agreed to sell to H. Gurney, and H. Gurney agreed to buy of the defendants, the timber in the declaration mentioned, at certain prices and

on certain terms, amongst others, to be delivered by the defendants to boats, payment of 100*l.* by bill at one month and balance by bill at four months from measurement; and thereupon afterwards the defendants consigned and lodged the said timber at certain wharves and into the possession of certain wharfingers, preparatory to delivery thereof to boats, in pursuance of the contract, and H. Gurney delivered to the defendants a promissory note for the said 100*l.* at one month, and two other promissory notes at four months for 100*l.* and 75*l.* respectively, being the price of the balance of the timber, which promissory notes were respectively made by H. Gurney and payable to the defendants' order: and that before payment of the two last-mentioned promissory notes for 100*l.* and 75*l.* H. Gurney stopped payment, and became insolvent and unable to meet his engagements; and whilst H. Gurney was insolvent, and whilst the timber was so lodged at the said wharves and in possession of the said wharfingers, and whilst the same was in course of transit from the defendants to H. Gurney, and before the delivery of the same or any part thereof to boats, or to H. Gurney, and before the same or any part thereof had come into the possession or control of H. Gurney, or of the plaintiffs as trustees as aforesaid, and whilst the two promissory notes for 100*l.* and 75*l.* for the balance of the price of the timber were wholly unpaid, and whilst the defendants were unpaid vendors of the timber, they, the defendants, on account of the insolvency, then stopped the said timber *in transitu*, and caused the wharfingers to retain the same, and the defendants afterwards refused to deliver the same to H. Gurney or the plaintiffs as trustees as aforesaid, which is the alleged detention.

Fourth plea—That the defendants repeat the allegations contained in the third plea relating to the sale by the defendants and purchase by H. Gurney of the timber and the terms thereof, and the making and delivering by H. Gurney to the defendants of the promissory notes for and on account of the price; and that before the said goods or any part thereof had been delivered to boats, or had come into the possession or control of H. Gurney, or of the plaintiffs as trustees, and before payment of the two

promissory notes for 100*l.* and 75*l.*, and before the defendants ever parted with the possession of the goods or any of them, H. Gurney stopped payment, and became insolvent and unable to meet his engagements; and thereupon, whilst H. Gurney was insolvent, the defendants, as unpaid vendors, detained and still detain the said goods as a lien for the unpaid part of the purchase-money, which is the alleged detention.

At the trial, before Keating, J., at the Hereford Assizes, the following facts were proved: H. Gurney was a timber-merchant, residing at Birmingham, who, on the 21st of December 1864, made an assignment of his estate and effects to the plaintiffs, as trustees on behalf of his creditors, under the Bankruptcy Act, 1861. The defendants Benjamin Bill and Edward Bill were timber-dealers at Ledbury. In the summer of 1864 E. Bill offered to sell Gurney some oak timber. Gurney directed his agent, one Firmer, to examine and report upon it. At that time part of the timber was lying at the old wharf at Ledbury, part at the wharf at Canon Froome, and a large tree was in a field about a mile and half from Ledbury. Firmer saw the timber and reported favourably to Gurney. The following correspondence then took place between Gurney and the defendants.

" Birmingham, September 12th, 1864.

" Dear Sirs,—I will agree to purchase your oak timber of 12 inches girth and upwards, on the following terms, at Ledbury and Canon Froome, to be delivered free to boats when required. Trees of 60 feet and upwards at 2*s.* 8*d.* per foot. Under 60 feet, 2*s.* 5*d.*; a fair abatement to be made in measurement for any defects. No quarter inches to be taken in the girths, and no half feet in the whole lengths of the trees. There is one red butt which I cannot take. I will try and deal for some of the smaller trees when I measure the others. Payment by my acceptance at four months date from measurement. If this is all fully agreed, and I suppose it is, as they are the terms you named here, I will send and measure as soon as I am in receipt of your reply.

H. Gurney."

" Ledbury, September 13th, 1864.

" Dear Sir,—We are in receipt of your letter, and in reply we accept your offer

for the oak timber, but, with regard to payment, we shall want 100*l.* paid when it is measured, or on the 30th of September next (as we have two heavy accounts to pay on the 1st and 2nd of October), the remainder a four months' bill from date of measurement. Please let us know whether these terms will suit you.

" Bill & Son."

" Birmingham, 14th September 1864.

" Dear Sirs,—You agreed to the four months' bill when you were here. I should not get enough out of it to make it worth while to pay 100*l.* cash, as that would be nearly half the amount, and you can pay my bill into the bank to meet your engagements. You must not depart from the terms you agreed to when here.

" H. Gurney."

After some negotiation the following contract was entered into.

" 21st September 1864.—Sold to H. Gurney the oak timber offered to him at the prices stated in his letter of the 12th of September, viz., trees of 60 feet and upwards at 2*s.* 8*d.* per foot, trees under 60 feet at 2*s.* 5*d.* per foot, delivered to boats. The above to be 12 inches girth and upwards; and two coffin logs, at 4*s.* per foot. Payment 100*l.* by bill at one month, and balance by bill at four months from measurement.

Bill & Son."

After this contract was entered into, Gurney sent his agent Firmer to measure the timber, which the agent did on the 7th of October. At this time the tree in the field had been removed to Ledbury Wharf, and the measurement took place at the Canon Froome and Ledbury Wharves. On measuring the timber Gurney's agent "scribed" or cut out the initials of H. Gurney, and also numbered each tree; H. G. was also marked with a hammer and punch on each tree. After the timber had been measured and marked, the agent gave orders to two of Gurney's men, whom he had brought with him to assist in the measurement, to "square" the timber. This occupied about ten days, and cost 5*l.*, which Gurney paid. On the 15th of October Gurney sent the promissory notes to the defendants, one for 100*l.* at one month, and two at four months for 100*l.* and 75*l.* respectively, and wrote to the defendants, "You have to deliver the timber to the

boats according to the agreement. I forget whether you wish to freight the timber here when it is required. Please say, and your lowest rate per foot." The defendants replied, "As regards carrying the timber we should like to carry it, but cannot quote the rate unless we know where it is to go to." Upon which Gurney informed them "that the timber would have to be delivered at Birmingham, and at the Saltley works." The defendants wrote to Gurney in reply that their terms were 4d. per foot to Birmingham, and 4½d. per foot to the Saltley works.

The Ledbury and Canon Froome Wharves are the property of the Herefordshire Canal Company, and are termed "free wharves." They were used by the defendants for the purpose of depositing their timber until it was sold, when it was conveyed to its destination by canal. The timber in question was not placed on the wharves at the water's edge, but would require labour to bring it to the water's edge, and in some cases horse labour. The bill for 100l. at one month's date was duly paid at maturity. But before the other two bills fell due, and while the timber still remained at the wharves, Gurney became insolvent, and on the 21st of December 1864, made an assignment of his estate to trustees for the benefit of his creditors, under the Bankruptcy Act, 1861. The plaintiffs, as trustees, demanded the timber, and the defendants gave up a portion sufficient to cover the amount of the promissory note which had been paid, but refused to deliver up the rest.

On these facts being proved it was agreed between the parties, with the sanction of the learned Judge, that a verdict should be entered for the plaintiffs for 175l., and that the defendants should have leave reserved to move to set aside the verdict and enter a nonsuit, upon the ground that the defendants were entitled to stop the timber *in transitu*: the defendants admitting that the property in the timber vested in the plaintiffs before action, and the Court to be at liberty to draw inferences of fact if necessary.

Powell having obtained a rule accordingly,—

Huddleston and *Griffiths* shewed cause.—First, they contended that the *transitus*

was at an end when the timber was placed on the wharves ready to be put into the boats, and that the expression "free to boats" did not mean that the timber was to be delivered free on board the boats, but was to be placed near the boats so as to be convenient for loading. Secondly, they contended that the acts of measuring, marking and "squaring" the timber, and the fact that the promissory notes in payment were to be given from the measurement of the timber, was sufficient evidence to shew that it was the intention of the parties that the right of possession passed to Gurney, and that the defendants' lien as unpaid vendors was gone.

Powell and *Matthews*, contra, contended that by the contract the defendants were to deliver the timber "free to boats," that is, that the timber would have to be carried from where it was placed to the water's edge, and that it would require labour to do so; and that until the timber was removed from the wharf to a place convenient for loading, the *transitus* was not at an end, and that the defendants were entitled to stop it *in transitu*; but, at all events, they had a right to retain possession of the timber for their lien as unpaid vendors. That the acts of measuring, marking and squaring the timbers were done for the purpose of ascertaining the price to be paid and in order to complete the bargain; but they were not done with the intention of taking possession. They cited *Lickbarrow v. Mason* (1), *Gibson v. Carruthers* (2), *Whitehead v. Anderson* (3) and *Dixon v. Yates* (4).

POLLOCK, C.B.—I am of opinion that this rule ought to be discharged. It appears to me that this is just one of those cases where the use of the term "stoppage *in transitu*" is very much calculated to mislead. The question is not one of stoppage *in transitu*; but it is whether the lien of the vendors has ceased by their allowing

(1) 1 Smith's Lead. Cas. 388.

(2) 8 Mee. & W. 321; s.c. 11 Law J. Rep. (N.S.) Exch. 138.

(3) 9 Ibid. 518; s.c. 11 Law J. Rep. (N.S.) Exch. 157.

(4) 5 B. & Ad. 318; s.c. 2 Law J. Rep. (N.S.) K.B. 198.

the vendee to take possession of the goods, which were not in the possession either of the plaintiff or of the defendant, but of a third person, a wharfinger. I own, it appears to me, it is very much more a question of fact than of law; the question being whether the vendor had allowed the vendee to take actual possession of the goods for which he had given three bills, one of which for 100*l.* was duly paid. In point of fact, it appears to me the vendee had taken actual possession of the timber. The vendor allowed the vendee to go to the place where the timber was, to mark it with his initials, and to expend money in having the timber "squared," as the expression is. I think these facts shew that the vendee actually took possession of the timber, and preclude the vendor from afterwards setting up a lien upon the goods. It seems to me the defendants' case is answered by saying, not that the transit was at an end, but by saying that the vendor had parted with his lien by allowing the vendee to take possession of the goods, the goods being out of the possession of the vendor and in the possession of a third person, the wharfinger. I think it is very possible that if the goods had not gone out of the actual possession of the vendors, and had not been partially paid for, the Court might have held that the defendants might have been entitled to have said The goods shall not go out of our possession till we are paid. But that is not the case here, and I therefore think the rule ought to be discharged.

MARTIN, B.—I am by no means certain that, upon the true construction of the contract, Mr. Huddleston's view is not right. But I am clearly of opinion it was a question of fact upon which the jury ought to arrive at a conclusion that there was an actual transfer of the possession of this timber from the vendor to the vendee. It would appear that the vendors were persons who, in addition to selling timber, had boats on the canal, because from some letters it clearly appears that the vendee Gurney, in the letter of the 5th of October, asks this question, "I forget whether you wish to freight the timber when it is required. Please say, and your lowest rate per foot." They were timber-dealers as well as boatmen; they had timber on the banks of this canal, which they themselves

frequently carried for the vendee to such places as the vendee desired it to be brought. Under those circumstances, the defendants enter into this contract: "September 1864. Sold to H. Gurney the oak timber offered to him at the prices stated in his letter of the 12th of September, viz., trees of 60 feet and upwards at 2*s.* 8*d.* per foot, trees under 60 feet 2*s.* 5*d.* per foot, delivered to boats. The above to be 12 inches girth and upwards; and two coffin logs, at 4*s.* per foot. Payment 100*l.* by bill at one month, and balance by bill at four months from the measurement." Accordingly, the measurement took place, and after the measurement the bills were drawn, in pursuance of the contract; the first was paid, and afterwards, or about the same time, I dare say it was part of the same transaction, H. Gurney's agent marked and numbered the timber. If that were the state of things alone, I apprehend it would be a question of law and fact, whether the real meaning was not that the property in possession vested in the vendee from the time of the measurement. If Mr. Powell's argument is right, then this consequence would necessarily follow, that if after the measurement, and after the bills had been given, and after the person had agreed absolutely to pay the bills when they fall due, this timber had been burnt, it would, according to his argument, have been at the risk of the vendors, and it would have been an answer to the bill in the hands of the vendors, that the property was still in them, and there was no consideration for the bills. I apprehend it is a much more reasonable construction of the contract that the measurement was to be made, the property passing, and the possession passing, that the bills were then to be given, and would be absolutely payable, and the timber, after it was initiated and numbered and marked, should be squared at the risk of the vendee; he was to take the risk as he would have to pay the bills; and if part of the contract was "to deliver to boats," that the vendors should convey the timber to the boats was a contract wholly collateral to the main one with the vendee, and did not affect the transfer or the possession. It seems to me, upon this evidence, if we are to draw inferences of fact, no one can fail to

draw the conclusion that as between these parties when once the timber was measured and paid for, and marked and numbered and then squared, it was the intention of the parties that the vendee was to take the timber. He could do what he pleased with it; he could have altered its destination. The consequence then is, that though these bills had not been paid, the vendors had no right to meddle with this timber, and are responsible to the assignees of the vendee.

BRAMWELL, B.—I am of the same opinion. I think Mr. Powell has raised the right question, and argued it in the right way, but it seems to me, nevertheless, that we must decide the question of fact, which is left for us to decide, against him. I cannot doubt that but for the stipulation "free to boats," there would have been a perfect delivery, and if there had been a change of property and a change of possession, the vendors' lien would have been gone. Are we, because there is that stipulation to draw a contrary inference to what we should otherwise have drawn? There seems no reason why we should. If the goods had been left at the warehouse of the defendants themselves, and these things had been done, the defendants would have had a right to say You must not leave these things here, you must take them away. In this case the timber had actually been in the possession of the vendee for a period of twelve days, and yet it is said there is no transfer of possession. There is no difficulty in supposing possession was delivered, even if some little matter remained to be done. It is not unlike the case of a man who sells a looking-glass, undertaking at the same time to fix it: he does sell it, and the fixing remains to be done; he has parted with his lien. I think there is considerable difficulty on another point, that is to say, the defendants retain a portion of these goods only. I am not at all sure that their right as unpaid vendors when the whole of the goods are in their possession, is not to rescind the contract or to avail themselves of the power to retain the whole and return the money they have received. I think the rule should be discharged.

Rule discharged.

1865. }
May 10. } MORGAN v. GATH.

Contract—Goods Bargained and Sold—Acceptance of lesser Quantity than ordered—Statute of Frauds.

The defendant on the 14th of April signed the following bought note: "I have this day bought from you the following: 500 piculs China cotton at 17d. per lb., June or July delivery, guaranteed fair, marks to be given when cotton ready for delivery; in case of dispute arising out of this contract, the matter to be referred to two respectable brokers for settlement, who shall decide as to quality and allowance, if any, to be made; the cotton to be taken from the warehouse with customary allowances of tare and draft, and the invoice to be dated from the date of the notice being given that the cotton is ready for delivery; to be delivered in merchantable condition to the buyer; the damaged, if any, to be rejected, provided it cannot be made merchantable." The defendant sold the cotton to Curry on the 25th of June. The plaintiff declared the marks on 420 piculs ex Queensbury, which were warehoused at the docks, and 80 piculs ex Princess Royal, but he never was in a position to deliver the latter. Owing to a dispute as to the quality of the 420 piculs of cotton, the matter was referred and an allowance made. The 420 piculs were afterwards weighed, the price ascertained, the invoice made out, and subsequently, at the defendant's request, corrected by deducting the amount of the allowance:—Held, that there was evidence that the defendant consented to take the 420 piculs, and the property in the same passed to him so that the plaintiff could maintain an action for goods bargained and sold.

The declaration contained an indebitatus count for goods bargained and sold, goods sold and delivered, money paid, money received, interest, and money due on accounts stated. The second count alleged that by a certain agreement the plaintiff agreed to sell and deliver to the defendant, and the defendant agreed to buy and accept from the plaintiff a large quantity, to wit, 500 piculs China cotton, of a certain quality and description at a certain price to be paid by the defendant to the plaintiff, and to be delivered by the plaintiff to the defendant as herein

mentioned, and notice of the said cotton being ready for delivery to be given by the plaintiff to the defendant as therein mentioned. And the plaintiff says that all things on the plaintiff's part were done, and all conditions precedent happened, and all times elapsed necessary to entitle the plaintiff to have the said cotton accepted by the defendant, and to be paid the said price for the same, and to bring this action; yet the defendant did not and would not accept the said cotton from the plaintiff, and did not and would not pay to the said plaintiff the said price for the same, whereby the plaintiff has lost the price of the said cotton and has been put to great expense in keeping and taking care of the same, and has lost great sums of money upon the re-sale of the said cotton.

The defendant pleaded, to the first count, never indebted; to the second he pleaded traverses of the agreement, and of notice of the plaintiff's being ready and willing to deliver, and a plea alleging that the said contract was made between the plaintiff and the defendant subject to a condition on the part of the plaintiff that the plaintiff would deliver the said cotton in merchantable condition, and that at the time when the plaintiff was ready and willing to deliver the cotton it was not in merchantable condition; wherefore and by reason of the premises the defendant refused to accept and to pay for the said cotton. On these pleas issue was joined.

There were other pleadings, but it is unnecessary to mention them.

The cause was tried, at the Liverpool Spring Assizes, 1865, before Mellor, J. and a special jury, when evidence was given to the following effect: The plaintiff and the defendant were cotton-brokers in Liverpool; the former agreed to sell to the latter 500 piculs China cotton, and the following is a copy of the bought note, which was addressed to the plaintiff and signed by the defendant:

"Liverpool, 14th April, 1864.

"I have this day bought from you the following (500) five hundred piculs China cotton, at seventeen pence (17d.) per lb., June or July delivery 1864. Guaranteed fair, marks to be given when the cotton is ready for delivery. In case of dispute arising out of this contract, the matter to be referred to

two respectable brokers for settlement, who shall decide as to quality and the allowance, if any, to be made. The cotton to be taken from the warehouse with customary allowances of tare and draft, and the invoice to be dated from the date of the notice being given that the cotton is ready for delivery. To be delivered in merchantable condition to the buyer; the damaged, if any, to be rejected, provided it cannot be made merchantable. Payment within ten days from date of invoice or before delivery, if required, equal to cash in ten days and three months."

On the 24th of June the plaintiff bought from certain persons trading under the style of Whitaker & Co. 190 bales China cotton *ex Queensbury*; this quantity was estimated to be equivalent to about 420 piculs. On the 25th the plaintiff sent to the defendant a declaration, of which the following is a copy:

"Mr. Samuel Gath.

"I beg to declare the following as ships' names and marks against 500 piculs China cotton sold you 14th April, 1864.

[P] 420 piculs *ex Queensbury*.

80 do *ex Princess Royal*.

"Liverpool, 25th June, 1864."

This declaration was unsigned and did not contain the usual words "Invoice to date from to-day"; it also omitted to state that the cotton was then ready for delivery. The defendant entered into a contract to sell to the firm of Curry & Co. the cotton which he had bought of the plaintiff. On the 4th of July the plaintiff received from Messrs. Whitaker & Co. a notice that the cotton would be weighed over, which he indorsed over and sent to the defendants. The cotton was accordingly weighed. On the same day the plaintiff met Mr. Curry, who objected that no notice that the cotton was ready for delivery had been sent; the plaintiff proposed that the notice should date from that day, to which Mr. Curry replied, "Very well," and went away. The plaintiff received a sampling order from Messrs. Whitaker and forwarded it to the defendant. The plaintiff met the defendant, and pressed for payment of the price of the cotton; he answered that when Messrs. Curry paid 1,000*l.*, which they would shortly do, he would pay it over to the

plaintiff. Messrs. Curry sent through the defendant a request for an arbitration, and each party appointed a broker as arbitrator. The arbitration was proceeded with, and resulted in the allowance of one-eighth of a penny per lb., the plaintiff's arbitrator (who was called as a witness) alleging that if the cotton had been unmerchantable, it would have been rejected and no allowance would have been made. Messrs. Whitaker, not having been paid for the 190 bales by the plaintiff, on the 27th of July put a stop-order on the cotton, i.e. forbade its delivery to his order, and it was admitted that the 80 piculs *ex Princess Royal* were never in his possession, and that he never was in a position to deliver them. Evidence was given to shew that the damaged portions had been picked out of the 190 bales by the 1st of June, and that the residue was merchantable; it was further shewn that Curry & Co. applied for, and on the 11th of July received, samples of the cotton, which still remained, until the 1st of December, at the Albert Docks, Liverpool. The invoice was sent back to the plaintiff to have the amount of the allowance deducted from the price of the cotton; this having been done, the document was returned to and kept by the defendant. On the 24th of October the plaintiff's attornies wrote to the defendant, demanding payment. On behalf of the defendant evidence was given to shew that the cotton was unmerchantable at the time of the arbitration, and that the stop-order was not taken off until the 1st of December, after the present action had been commenced; it was elicited that the defendant had indorsed a sampling order, dated the 7th of July, and drawn by the plaintiff, and the plaintiff had lodged a delivery order from Messrs. Whitaker at the docks, about the end of June.

The learned Judge, in the course of his summing up, stated that, though the contract might be for 500 piculs June or July delivery, if the defendant chose to accept the declaration of a portion of them, and to take sampling orders, to submit to an arbitration, and when he had received the invoice of the portion *ex Queensbury*, to send it back again to the plaintiff to have the allowance made upon the quantity therein specified, the defendant might have

rendered himself liable to accept the smaller quantity, and the plaintiff would not be bound to deliver the whole, because the defendant by his conduct would have intimated his willingness to take the smaller amount, provided the cotton was fair and merchantable, and that the question seemed to be the same as if the plaintiff had offered to the defendant the 500 piculs. His Lordship left it to the jury to say whether the defendant accepted the lesser quantity mentioned in the invoice, whether the cotton was merchantable, and whether notice was given that it was ready for delivery; the jury having found all those questions in the affirmative, the verdict was entered for the plaintiff and the damages were assessed at 2,852*l.* 4*s.*, being the invoice price of the 460 piculs of cotton with the deduction of the allowance; leave was reserved to the defendant to move to enter a nonsuit or to enter a verdict for nominal damages if the Court should be of opinion that the breach occurred on the 31st of July, cotton at that date not having fallen in price, or to reduce the damages to 845*l.* 2*s.* if the Court should be of opinion that the breach occurred on the 24th of October, the date of the letter written to the defendant by the plaintiff's attornies, cotton then fetching 1*s.* per lb.

Brett had this Term (22nd of April) obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, on the ground that the plaintiff was never ready to deliver 500 piculs of cotton in the contract mentioned, and that there was no evidence of a binding agreement by defendant to take less, and if there was there was no count in the declaration to support such contract; or, why the verdict should not be reduced to nominal damages on the ground that there was no fall in the market at the time of the breach of contract, or to 845*l.* 2*s.*

Edward James and *C. Crompton* shewed cause.—If the defendant did not attend the weighing over of the cotton, at least he had notice from the plaintiff that the 190 bales would be weighed: a request was made on behalf of Messrs. Curry & Co., who are in this respect identified with the defendant: moreover, Messrs. Curry applied

for, and received samples. It is admitted that if samples are unfair, a purchaser is not bound; but here it is not even pretended that they were in the least unfair. The question seems to be whether the contract being for one entire quantity the plaintiff can be allowed to recover for the sale of a less number of piculs than the number stipulated for. It is submitted that the property in the cotton passed to the defendant, and if the Court be of that opinion, the plaintiff will be entitled to retain the verdict under the count for goods bargained and sold; the vendor has done all that was necessary to vest the property in the purchaser, who is therefore liable to pay the full contract price.

[MARTIN, B.—If a man agrees to sell 100 quarters of wheat, and afterwards finds that he possesses only eighty, which the buyer consents to accept, this is tantamount to a waiver of the former contract: no action could be maintained by the vendee, against the vendor for the omission to deliver the whole number of 100 quarters.]

They referred to *Dixon v. Yates* (1).

Brett and Arthur Peel, in support of the rule.—The Judge directed the verdict to be entered for the plaintiff merely as matter of form. The contract was to be performed in June or July. The question is, was the plaintiff ever willing to deliver the cotton contracted for during June or July? That he was bound to do by the written agreement. When a purchaser has contracted to take a certain quantity of goods, he is compellable to accept that quantity only, and is not bound to receive a smaller amount, but it is said that the defendant was bound to accept the 420 piculs instead of 500.

[MARTIN, B.—No; the question put was, did he accept them?]

It is submitted that the jury found only that there was an agreement to accept, and not an actual acceptance: the plaintiff is not entitled to recover on such a contract for the 420 bales, as it is not in writing, and is not declared on; the plaintiff was not ready to deliver even a part of them. The defendant could not be held liable until

the end of July, and had all that time in which he could accept.

[MARTIN, B.—The parties to the suit disagree as to the inference to be drawn from the facts: on the evidence there seems to me a perfectly valid bargain and sale, if not sale and delivery. POLLOCK, C.B.—The property in the cotton which was weighed over, did pass to the defendant.]

To make this contract to accept the 420 piculs good, there must be an actual receipt of them by the defendant; owing to the stop-order he could not get possession of the cotton *ex Queensbury*. There never was any evidence of actual acceptance, and the property in the 420 piculs did not pass. If that be so, the plaintiff can sue only for the refusal to accept, and will be entitled only to the difference between the amount mentioned in the invoice and the price in the market at the time when the breach occurred. Although the contract was entered on 14th of April, no attempt was made to shew that the plaintiff was ready to deliver more than 420 piculs; as to them there was no acceptance to prevent the operation of the Statute of Frauds, section 17; the delivery order was worthless; owing to the stop-order the plaintiff could not pass the property in the cotton *ex Queensbury*; it is submitted that the defendant did not assent to the contract of sale for the 420 picula.

POLLOCK, C.B.—My Brother Martin and myself are agreed that the rule should be discharged. The jury have found that the lesser quantity was accepted, and I think there were grounds for their so finding. The learned Judge reserved leave to move to enter a nonsuit, or nominal damages, or to reduce the damages to 845*l.* 2*s.* But the verdict was given upon the fact that there was an acceptance of the lesser quantity by the defendant, and it appears to me that there was evidence on which they were entitled so to find. As to the amount of damages, on which point the learned Judge reserved two questions for this Court, it appears to me that we are not called upon, and are not entitled to disturb the verdict. The chief complaint urged during the argument on the defendant's behalf was that the verdict was against the evidence. The point was for the jury: they have

(1) 5 B. & Ad. 313; s. c. 2 Law J. Rep. (N.S.) K.B. 198.

found that the lesser quantity was accepted; and there was evidence on which they could legally give their verdict for the plaintiff on that ground. I am therefore of opinion, that the rule ought to be discharged.

MARTIN, B.—When this case comes to be understood, it is exceedingly clear. So far from our judgment being at variance with the opinion of my Brother Mellor, it is in complete accordance with it, and his view is stated in the most distinct terms, and it is manifest that, in his judgment, if the jury should find the verdict which they did, the plaintiff was entitled to recover the invoice price of the goods. It is as plain as it possibly can be, that that was his statement to the jury, and we entirely concur with him. The question which has been raised is, whether we are of opinion the plaintiff is entitled to retain the verdict in its present form. I do not entertain a doubt upon it. It seems that, upon the 14th of April 1864, Morgan agreed to sell to Gath, the defendant, 500 piculs of china cotton at 17*d.* per lb., June or July delivery 1864, guaranteed fair. There is the ordinary stipulation in all these cotton contracts, that in case of dispute the matter should be referred to two respectable brokers for settlement. It appears Morgan had not then the cotton, but he afterwards purchased a certain portion, which was in reality 420 piculs, from a person named Whitaker, and he received from Whitaker upon the 27th of June a delivery order. Now, a delivery order is familiar to most persons: it is an order from the vendor in favour of the vendee to be delivered to the warehouseman; and the delivery order was lodged at the docks, according to the evidence of the principal officer, somewhere about that time. Then, as to the sampling order; Morgan, the plaintiff, delivered it to Gath the defendant, and it was acted on and signed by him. The next step is the weighing, and at the head of the invoice the weight of each bale is separately put down, and the calculation made is 2,783*l.* 17*s.* This invoice was sent in in the ordinary course. But some objection was made to the quality of the cotton, and the defendant gave the ordinary notice to act upon the second condition of the contract: "In case of dispute arising out of this contract, the matter to be referred to

two respectable brokers." The two brokers met, and they decided that an allowance should be made of 1*d.* a pound; the invoice is sent back, and a deduction is made from the original price, making a net sum of 2,852*l.* 4*s.* Afterwards the invoice is sent in to the defendant, who never makes the slightest objection to it. That is what took place about the beginning of July. Afterwards there was, upon the 27th of July, this stop order; and if the defendant or Messrs. Curry, who were the sub-vendees from him, had claimed to get these goods at any time after the stop was put on, and insisted on the delivery, and had failed to obtain it, a different question might have been raised; but nothing of the kind was done. The defendant seemed to have determined not to take this cotton from Morgan, and there it remained. The stop was taken off on the 1st of December, and no attempt had ever been made by the defendant, or by the sub-vendee, to get possession of this cotton, during that period. The Judge gave his opinion upon the state of things at the completion of the invoice; and in my judgment, the goods having been weighed, the price ascertained, the invoice having been sent in, corrected and made in accordance with the decision of the two referees, there was evidence to go to the jury that the property in this cotton had passed; and if it became vested in Gath, and ceased to be vested in Morgan, this action for goods bargained and sold can be maintained.

Now, it is said that it cannot, because, first, there was a contract for 500 piculs, and not 420. If the defendant had stood upon that, it would have been unanswerable. I apprehend that now no action could be maintained upon that contract by the plaintiff, because he was never ready and willing to deliver 500 piculs in pursuance of it. If the property passes in the portion which he has agreed to take, just as if the whole had been weighed to him, then, I am of opinion, there is no new contract at all, nothing to require a second writing to satisfy the Statute of Frauds. There is no doubt if there be an agreement to sell 500 piculs of cotton, and the vendee assents to take a part in performance, that is 420, of it, and if that part is weighed to him, he

becomes indebted to the vendor for the goods which he so consented to take. The learned Judge upon the evidence left it to the jury: first, "was the lesser quantity accepted?" and the jury found in the affirmative; and also "was the quality merchantable?" and the jury found that it was. Therefore, it seems to me, everything has been done which was necessary for the purpose of passing the property in these 420 piculs to the defendant; and the jury have found that he actually accepted it. I think it is an exceedingly clear case, and my judgment entirely accords with that of the Judge who tried the cause.

Rule discharged.

1865. } WEBBER v. THE GREAT WESTERN
April 29. } RAILWAY COMPANY.

Carriers by Railway—Parties—Contract to carry over another Company's Line—Evidence.

Goods were delivered to P. & Co., agents at Worcester for the Great Western Railway, to be carried to Chester "via Stafford." The goods were conveyed over the line of the Great Western Railway from Worcester to Stafford, and thence to Chester over the London and North Western Company's line, the Great Western Railway having no line between Stafford and Chester. The waggons of the Great Western Company travelled the whole journey. P. & Co. were also agents for the London and North Western Company, whom they favoured rather than the Great Western Company:—Held, that there was evidence of one contract with the Great Western Company to carry the whole journey from Worcester to Chester, and that they were therefore liable for any damage done to the goods during the journey.

This was an action for negligence in carrying the plaintiff's clock from Worcester to Chester. The question of law was—were the Great Western Railway Company properly made defendants?

At the trial, before Blackburn, J., at the Chester Spring Assizes, 1865, evidence was given that the clock was delivered at Worcester to Pickford & Co., who in their advertisements held themselves out as agents for the defendants; that the clock was for-

warded by the West Midland Railway, of which the defendants were lessees; that the plaintiff was informed of the arrival of the clock at Chester by the London and North Western Railway Company, over whose line it had travelled from Stafford to Chester, the defendants having no line between those places; that it was clearly expressed, at the time of the delivery of the clock to Pickford & Co., that it should go *via* Stafford; and that it travelled in the defendants' waggons all the way to Chester. It also appeared that Pickford & Co. were agents for the London and North-Western Railway as well as for the defendants, and that they favoured the London and North-Western Company. On its arrival at Chester the clock was found to be damaged, but it did not appear when or where during the journey the damage had taken place.

Blackburn, J. told the jury that if the defendants contracted to carry the clock the whole way to Chester, they were liable for the damage done; but that if they contracted to carry it a part of the way only, they would not be liable, unless the damage was done during that part of the journey. The jury found a verdict for the plaintiff, damages 5*l.*, Blackburn J. reserving leave to move to set that verdict aside.

W. R. Grove having obtained a rule accordingly, on the ground that there was no evidence on which the jury ought to have found that the defendants were liable,—

M'Intyre now shewed cause, contending that the London and North Western Company merely acted as agents for the defendants in carrying the goods from Stafford to Chester. On the defendants' own handbill it was stated that the goods would be sent "*via* Stafford," and it was by means of the production of the defendants' handbill that the consignee got possession of the goods at Chester. He cited *Muschamp v. the Lancaster and Preston Railway Company* (1), *Scothorn v. the South Staffordshire Railway Company* (2), and *The Bristol and Exeter Railway Company v. Collins* (3).

(1) 8 Mee. & W. 421; s. c. 10 Law J. Rep. (N.S.) Exch. 460.

(2) 8 Exch. 341; s. c. 22 Law J. Rep. (N.S.) Exch. 121.

(3) 7 H.L. Cas. 194; s. c. 29 Law J. Rep. (N.S.) Exch. 41.

Grove (with him *Horatio Lloyd*), contra, contended that Pickford & Co. were acting here for the London and North Western Company, and not for the defendants, for it was shewn that they favoured the London and North Western Company, and that they had a direct interest in forwarding the goods by the line of the London and North Western Company from Stafford.

[*MARTIN, B.*—If the goods had been lost between Worcester and Stafford, who would have been liable?]

If the damage had happened on the defendants' line, they would have been liable whether Pickford & Co. had intervened or not. Again, Pickford & Co. are not merely agents, but large carriers themselves; therefore, either they are liable as the persons who originally took the goods from the customer, contracting to carry them the whole way, or the London and North Western Company are liable, for whom Pickford & Co. acted in receiving the goods. The test is—who was *dominus stineris*? *Muschamp's case* (1) only decided that where nothing was said about the route,

there was a *prima facie* liability on the part of the company receiving the goods (4).

Cur. adv. vult.

POLLOCK, C.B. (May 9) delivered the judgment of the Court (5).—In this case I am of opinion, with the rest of the Court, that there was evidence to go to the jury that there was one contract only, and not two contracts. The jury have so found, and we are of opinion there was sufficient evidence to warrant their finding; and, if we take it to be a correct finding, then the judgment of the Court will follow conclusively that there was but one contract. Therefore the defendants are liable, and the verdict must stand.

Rule discharged (6).

(4) In reply to a question from the Bench, *McIntyre* stated that after *Brown v. the London and North Western Railway Company* (32 Law J. Rep. (N.S.) Q.B. 318), this action could not be brought in the County Court.

(5) *Pollock, C.B., Martin, B., Bramwell, B. and Pigott, B.*

(6) It was understood that the defendants intended to appeal.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER.

TRINITY TERM, 28 VICTORIÆ.

1865. } PRIESTLEY v. FERNIE AND
June 23. } ANOTHER.

*Ship and Shipping—Master—Owner—
Separate Actions against.*

A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either the one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other.

The declaration stated, that Daniel Kavanagh, master of the vessel called *The Queen of Commerce*, for a voyage of the said vessel from the port of Liverpool to Hobson's Bay, Port Phillip, signed the following bill of lading:

"Shipped in good order and condition, except chips and sand-cracks, by Edmund Thompson, &c., agents for Harper & Moore, in and upon the good ship or vessel called *The Queen of Commerce*, whereof Kavanagh

is master for this present voyage, and now lying in the port of Liverpool and bound to Hobson's Bay, Port Phillip, 264 retorts, being marked and numbered and enumerated as per margin, and are to be delivered in the like order and condition, except chips and sand-cracks or breakage arising from any cause, save improper stowage, and, subject to the under-mentioned clauses, from the ship's tackle, at the aforesaid Hobson's Bay or railway pier (all and every the dangers and accidents of the seas, fire and navigation of whatsoever nature or kind excepted) unto the Melbourne Gas Company, or to their assigns, freight for the said goods being payable in Melbourne as per margin, with primage and average accustomed. In witness whereof the master of the said ship or vessel hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the rest to stand void.

"Weight, contents, and value unknown, and not answerable for breakage arising from any cause except the improper stowage,

nor for loss by fire, vermin, or collision. Goods for the bay or railway pier, if not taken from alongside within three days after ship's arrival, may be landed by ship's agents, and all expenses to be paid before delivery; all risk of river craft and lighterage to be borne by the shippers.

"Entries to be passed by consignees within twenty-four hours after arrival of ship, or ship's agent to do so, at consignees' expense. Dated, in Liverpool, this 24th day of November 1860.

"Daniel Kavanagh."

And the following words, being part of the said bill of lading, are printed across the said bill of lading to the left of the matter before copied :

"Freight, if payable in Liverpool, to be paid in cash on signing bills of lading. Freight, if payable abroad, to be paid in cash before delivery of goods to charterer's agents, Messrs. Swire Brothers."

And in the margin of the said bill of lading the said goods and the freight thereof, and the said primage are thus described :

264 retorts, weighing 86 tons 12 cwt.,	
at 55s. per ton	£238 3 0
Primage 10 per cent.	23 16 8
	<hr/>
	£261 19 8

And the said company, by their agents in that behalf, shipped and delivered such goods as are specified in the said bill of lading to the defendants, and they accepted and received of and from the said company the same on board the said vessel, in such order and condition as are mentioned in the said bill of lading, to be by the defendants conveyed in the said vessel to such place and for such purpose, and subject to such terms and conditions as are in the said bill stated and contained, and the said vessel completed the said voyage, and everything has been done and happened, and all times elapsed requisite to enable the said company to have all the said terms observed and performed, and the said goods delivered to the said company at the place in the said bill of lading specified in that behalf, and in the order and condition contracted for, and to entitle the plaintiff suing as aforesaid to recover in this action in respect of the matters in this count stated, yet the defen-

dants, although not prevented by the said excepted dangers, accidents, causes, matters or things, or any of them, failed to deliver the said goods to the said company, in the order and condition contracted for, and wholly failed to deliver part of the said goods to the said company, and have delivered part of the said goods not in the order and condition contracted for, but in bad order and condition, and damaged otherwise than in any of the said excepted particulars, and otherwise than by or through the said excepted dangers or accidents, causes, matters and things, or any of them, and thereby the said company have lost the said goods so not delivered as aforesaid, and the said goods so delivered as aforesaid have become of less value to the said company.

Fifth plea—That the plaintiff as such secretary as in the declaration alleged, and on behalf of the said company, heretofore, in the Supreme Court of Melbourne, in the colony of Victoria, then having jurisdiction in that behalf, impleaded the said Daniel Kavanagh in the declaration mentioned as and being the master of the said ship, and signing the said bill of lading for the same identical causes of action as in the declaration alleged, and such proceedings were thereupon had in the said court that the plaintiff as such secretary recovered against the said Daniel Kavanagh 140*l.* 3*s.*, for the said cause of action, and his costs of suit in that behalf; and afterwards the plaintiff, as such secretary as aforesaid, and on behalf of the said company, in the Court of Exchequer of Pleas at Westminster, impleaded the said Daniel Kavanagh for and in respect of and upon the said judgment so recovered as aforesaid and such proceedings were thereupon had in that action that the plaintiff afterwards, by the judgment of the said last-mentioned Court, recovered against the said Daniel Kavanagh 288*l.* 10*s.* 10*d.*, and his costs of suit in that behalf, and after the recovery of the said last-mentioned judgment, the plaintiff, for having satisfaction thereof, caused to be duly issued out of the said Court of Exchequer of Pleas a writ of *ca. sa.* upon the said judgment, and by virtue of which said writ the said Daniel Kavanagh was before this suit duly taken in execution at the suit of the plaintiff, and

was kept and detained in custody to satisfy the plaintiff in the said action; and that they are being sued in this action in respect of the said Daniel Kavanagh having signed the said bill of lading as master of the said ship on behalf of the defendants as owners thereof, and that they are not otherwise liable in this action.

Second replication to the fifth plea—That the said Daniel Kavanagh, being a prisoner under the said writ, became bankrupt within the meaning of the statutes in force concerning bankrupts, and thereupon was discharged from custody under the said writ of *ca. sa.*, without the consent of the plaintiff, by act of law under and by virtue of the statutes then in force relating to bankrupts, and that such proceedings were had in the matter of the said bankruptcy that the said Daniel Kavanagh afterwards and before this suit duly obtained an order of discharge under the said statutes, and was thereby discharged of and from the said judgments, and each of them, and the said judgments are and each of them is wholly unsatisfied, and the plaintiff had not at any time before the recovery of the said judgment in the said Court of Exchequer, or before the said Daniel Kavanagh obtained his order of discharge as aforesaid, notice or knowledge that the said bill of lading and contract were made by the defendants or any of them.

The plaintiff also demurred to the fifth plea.

Rejoinder as to the said second replication—That after the said Daniel Kavanagh became and was bankrupt as in the said replication mentioned, and before the commencement of this suit, the plaintiff was admitted to prove, and proved, in respect of the said judgment so recovered in the said Court of Exchequer as aforesaid, against the estate of the said Daniel Kavanagh, under the said bankruptcy, for the amount due upon the said judgment.

The defendants also demurred to the second replication.

Quain, in support of the demurrer to the plea.—There is an express authority against the plea. In *Story on Agency*, section 295, that learned writer says, "There seems, however, to be one peculiarity in the Roman law on this subject, and that is, that while

it gives a right to proceed against the owner or employer, as well as against the master of the ship, for the amount of the repairs and supplies furnished for the ship and for other contracts made by him within the scope of his employment, yet if the creditor elects to proceed in a suit against either of them, he thereby discharges the other. Our law, on the other hand, while it gives an election to the creditor to sue either the master or the owner in a distinct and separate action, does not preclude the creditor by such an election from maintaining another action against the party not sued, unless in the first action he has obtained a complete satisfaction of the claim." Now, in the first action the plaintiff has not obtained a complete satisfaction. This case is like that of principal and agent; and where the contract has been made with the agent, the principal is not discharged unless it be shewn that it is unfair to sue the principal—*Thompson v. Davenport* (1). If this plea is good, the principal is discharged without any release, without any matter amounting to a discharge, and without being liable over to the agent. Is he discharged by bringing an action? It is submitted that he is not. Bringing an action does not conclusively shew that the plaintiff has elected to sue the master, particularly when the replication alleges that the plaintiff had not at any time before the recovery of the judgment notice or knowledge that the defendants were the owners of the vessel. In *Kent's Commentaries*, vol. 3, p. 161, the law is thus laid down: "The master is always personally bound by his contracts, and the person who deals with the captain in a matter relative to the usual employment of the ship, or for repairs or supplies furnished her, has a double remedy. He may sue the master on his own personal contract, and he may sue the owner on the contract made on his behalf by his agent the master." It would appear to be clear from this passage that the plaintiff has a double remedy against the master and against the owner. Then, by analogy to the rule which prevails in the cases of principal and agent, if there is a remedy against both, the owner is not discharged

(1) 9 B. & C. 78.

unless there has been a settlement of accounts between the principal or agent, or unless the day of payment is allowed to go by, so as to lead the principal into the supposition that the agent alone is held to be liable. The arrest of the master does not operate as a satisfaction of the debt; it is no such satisfaction as discharges the surety; between collateral parties, as in the present case, it is only *quasi* satisfaction.

R. G. Williams (*Aspinall* with him), in support of the plea.—The only authority that can be found in support of this action is the passage cited from Story. In *Abbott on Shipping*, p. 124, 8th edit., it is laid down: "It is true that the master also is answerable for his own contract; for in favour of commerce the law will not compel the merchant to seek after the owners and sue them, although it gives him the power to do so; but leaves him a two-fold remedy against the one or the other." The passage cited from *Kent's Commentaries* lays down the same proposition. The position of the master and the owner of a vessel is different from that of principal and agent; it is the only case in which the law gives a special privilege of suing either the master or the owner. Besides, no case has been cited in which, after the agent has been sued and arrested, an action was held to lie against the principal. *Thompson v. Davenport* (1) is no authority for such a proposition. In the case of principal and agent the seller has his election whether he will proceed against the one or the other, and directly he brings his action he has made his election. But there are not two contracts, and he cannot have two actions for the same identical cause of action. Here the plaintiff has elected to sue the master, and he has made no inquiry as to who the owners were. In the case of principal and agent, the proceedings against the principal must be taken within a reasonable time; here too long a time has elapsed to proceed against the owners. The action against the master at Melbourne, the action on the judgment in this country, the arrest, and proving on the estate in bankruptcy are all strong evidence of acts of election to proceed against the master, and the plaintiff

having made his election to look to the master cannot now sue the owners. The replication does not allege that the master is not an owner, it only states that the present defendants were not known to be owners; it is consistent with the statement in the replication that the master was an owner and known to the plaintiff as an owner.

Quain, in reply.

BRAMWELL, B. —'The judgment I am about to deliver is the opinion of my Lord Chief Baron, my Brother Channell, and myself. My Brothers Martin and Pigott did not hear the case.

We are of opinion our judgment should be for the defendant. If this were an ordinary case of principal and agent, where the agent having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that where a contract is so made the contractee has an election to sue agent or principal, supposes he can only sue one of them—that is to say, sue to judgment. For it may be that an action brought against one might be discontinued and fresh proceedings be well taken against the other. Further, there is abundance of authority to shew that where the situation of the principal is altered by dealings with the agent as principal, the former is no longer subject to an action. But this is not the case here. The defendants may or may not be liable to indemnify the master in respect of his costs or his imprisonment; they may or may not be, but they are clearly liable to him or his estate in respect of the damages recovered against him, and proceedings might have been taken against them as soon as judgment was recovered against the master and before any payment by or execution against him. They are now, therefore, under a liability to the master or his estate to the extent of the whole claim, and yet it is sought to bring them under a fresh liability for that to the plaintiff. If this, then, were the ordinary case we have mentioned, there could be no doubt on the subject. But it is said that the liability of the master of a vessel acting for his owners and their

liability where he acts for them is different from the liabilities in ordinary cases of principal and agent, and that first one and then the others may be sued. The plaintiff's argument then is, that the present case is anomalous and exceptional. Where that is contended for, strong reasons ought to be given for it. What reason is given here? It is certain that the master's liability is founded on the same considerations as that of an ordinary agent, namely, he makes the contract in his own name—*Rich v. Coe* (2), *Story on Agency*, sect. 296. But it is said that for purposes of commerce it is convenient that both master and owner should be suable. So it is; but why to the extent contended for, more than in any other case of principal and agent? It might be hard to make a person who deals with the master run after the owner to sue him; but why, if he sues the master, should he afterwards sue the owner, merely because it is very right he should be able to sue the master or owner? In reality no reason can be given for the distinction attempted between this and other cases of principal and agent. We do not say none could be given why, in all cases of principal and agent, both should be suable, but that there is no particular reason applicable to the masters and owners of ships. The case then must rest not on principle but on authority, and that authority is limited to a passage in *Story on Agency*. It is remarkable that he is of opinion that there was by the Roman law an option to sue either, but not both. If so, what he lays down is peculiar to our law, and doubly anomalous. He gives no reason for it, but cites *Livermore on Agency*, vol. 2, 167, 169 (edit. 1818). He (Story) says, the second action may be maintained, unless "in the first action he has obtained a complete satisfaction of the claim." On reference, however, to *Livermore* (we say it with great respect), he really says nothing in support of such a proposition; what he says is, "Masters of merchant-vessels are personally answerable upon the contracts made by them in relation to the employment of the ship, to repairs, or to supplies furnished for the ship's use. For the law

gives to the merchant who contracts with the master a twofold remedy against the owners and against the masters." For this he cites *Rich v. Coe* (2), which, though a very questionable decision, justifies *Livermore's* proposition, but not *Story's*. It only decides that the owners are liable upon an order by the master for necessaries though without their authority. It is true Lord Mansfield says the master, the owner, and the ship are trusted, but he says nothing to support what is contended for. It is remarkable that *Story* does not cite this authority so cited by *Livermore*. *Melius est petere fontes, quam sectari rivulos*. Then really there is no authority for this contention, while there is much the other way in the silence of all other writers on the subject. It is not suggested in *Abbott on Shipping*, 91, nor in *Kent's Commentaries* (see 2 *Kent*, 599; 3 *Kent*, 217), nor in *Maude and Pollock*, see 112; nor in *MacLachlan*, see p. 128; nor in 1 *Parsons on Maritime Law*, 37. There is one powerful consideration the other way, namely, if the master contracts under seal, no action lies on the contract against the owners. Why? If the master makes two contracts, one for himself and one for his owners, why should his contract, being under seal, prevent the owners being sued on that which he the master has made for them? Nothing. But if he makes one contract only, as in ordinary cases, where the agent contracts in his own name, which the merchant may say binds him because made in his own name, or binds his owners because made for them, then the decisions are intelligible and the expression is correct, the owners are not liable because of a technical rule that a contract under seal cannot bind a person not executing without giving authority under seal for its making—See *Abbott on Shipping*, edition 1856, p. 169. *Leslie v. Wilson* (3) is not opposed to this. Therefore we give judgment for the defendant.

Judgment for defendant.

1865.
May 3, 4, 5; } FLETCHER v. RYLANDS AND
June 23. } ANOTHER.

*Trespass—Negligence—Escape of Water
from Artificial Reservoir—Consequential
Damage.*

The defendants employed a competent engineer and contractor to select a site for, and to construct a reservoir on their land. During the construction, the contractor's people met with some old vertical shafts (of the existence of which the defendants were ignorant), and they failed to exercise reasonable skill and care, with reference to these shafts, to provide for the pressure the reservoir was intended to bear. The water from the reservoir escaped down the shafts, through certain old coal workings, under the defendants' land, and under land between the defendants' land and land of the plaintiff, into the plaintiff's colliery, which was thereby flooded:—Held, by Pollock, C.B. and Martin, B., that, this damage not being the immediate result of the defendants' act, there must be negligence to render them legally responsible to the plaintiff; and that the defendants, being ignorant of the existence of the circumstances requiring the exercise of unusual care on their part, were not guilty of negligence.

Held, by Bramwell, B., that, the plaintiff having the right to be free from water sent to him through any artificial course by the defendants—whether directly or indirectly,—this action was maintainable on that right being infringed; and that the defendants' knowledge or ignorance of the damage likely to result from their act was immaterial.

This action came on to be tried at the Liverpool Summer Assizes, 1862, when a verdict was found for the plaintiff for 5,000*l.* and 40*s.* costs, subject to the award of an arbitrator, who afterwards was empowered by Judge's order to state a special case instead of making an award. The material parts of the CASE were as follows.—

On the 17th of November 1849 the plaintiff became tenant of certain beds of coal lying under certain lands belonging to the Earl of Wilton, situate in the township of Ainsworth, in the county of Lancaster, with powers of winning and getting the

same at a certain acreage rent for the coal gotten; and on the same day an agreement in writing was entered into, whereby the Earl of Wilton agreed to demise to the plaintiff for sixteen years, from the 24th of March 1855, all the beds of coal lying under the said last-mentioned lands, and also under certain other lands, situate in the township of Radcliffe, in the same county, at the same acreage rent as before. Shortly afterwards the plaintiff commenced boring for the coal; but finding the same would not be worth working, he obtained verbal permission from Lord Wilton to work the beds of coal lying under certain other lands lying to the north of the said first-mentioned lands, but not including the site of the reservoir hereinafter mentioned; and in or about the month of April 1850 the plaintiff commenced sinking a pit in the said other lands lying to the north of the said first-mentioned lands; and later in the same year he commenced getting, by means of that pit, the coal lying under the other lands to the north of the first-mentioned lands. The pit so sunk is hereinafter called the "Red House Pit," and the colliery worked thereby the "Red House Colliery." He continued to work the Red House Colliery until the year 1855, when he commenced also to work the coal under the lands in the township of Radcliffe mentioned in the agreement, from which time until the bursting of the defendants' reservoir, as hereinafter mentioned, he continued to work both the said collieries.

8. In the year 1860 the defendants, who were the proprietors of a mill near to the Red House Colliery, called the "Ainsworth Mill," made a reservoir, for the purpose of supplying their said mill with water, in certain other land belonging to Lord Wilton, lying to the north-west of the Red House Colliery, and separated therefrom partly by land belonging to Walker Hulton, Esq., and partly by land belonging to John Whitehead, Esq. This was done by virtue and in pursuance of an arrangement made by them for the purpose with Lord Wilton.

9. The said land of Mr. Hulton partly adjoins on its east side the land of Mr. Whitehead; on its north side the said land of Lord Wilton in which the defendants' reservoir was made; and on its south side

the land under which lay the beds of coal worked by the Red House Colliery. The land of Mr. Whitehead, except where it is adjoined by the land of Mr. Hulton, is entirely surrounded by Lord Wilton's property, and on its south side is partly adjoined by the land under which lay the beds of coal worked by the Red House Colliery.

11. The beds or seams of coal in Lord Wilton's land, worked by the Red House Colliery, are continued under the lands of Mr. Hulton and Mr. Whitehead, and under the land of Lord Wilton in which the said reservoir was made. The dip of these beds or seams of coal is downwards from about north-east to south-west.

12. It was not known to the defendants, or to any of the persons employed by them in or about the selecting of the site, or the planning or constructing of the reservoir, until after the reservoir burst as hereinafter mentioned, that any coal had been worked under the reservoir, or under any of the land of Lord Wilton lying to the north of the land of Mr. Hulton; but, in point of fact, the coal under the site of the reservoir, and under the last-mentioned land of Lord Wilton lying between the site and the land of Mr. Hulton, as well as under the lands of Mr. Hulton and Mr. Whitehead, had been partially worked at some time or other beyond living memory; and when the plaintiff commenced working the Red House Colliery, and from thence until the bursting of the reservoir as hereinafter mentioned, old coal workings under the site of the reservoir communicated with old coal workings under the land of Mr. Whitehead, by means of other and intervening old coal workings under the land of Mr. Hulton and the land of Lord Wilton lying to the north of the land of Mr. Hulton.

13. Soon after the plaintiff commenced to work the Red House Colliery he made arrangements with Mr. Whitehead to get, by means of the Red House Pit, the un-gotten coal lying under the land of Mr. Whitehead; and, in pursuance of the arrangements so made, he did, accordingly, in or about the year 1851, work through from the Red House Colliery into the coal lying under the land of Mr. Whitehead, and so into the old coal workings under the last-mentioned land. This was done by the

plaintiff, in the first instance, without the knowledge or permission of Lord Wilton; but afterwards, and whilst the plaintiff was employed in working the coal under Mr. Whitehead's land by means of the Red House Pit as aforesaid, it became known to Lord Wilton's agents that the plaintiff was so working that coal, and from that time the plaintiff so worked that coal without any objection on their part.

15. In consequence of the plaintiff's working through from the Red House Colliery into the old coal workings under the land of Mr. Whitehead, the old coal workings under the site of the reservoir were,—by means of the aforesaid intervening underground coal workings under the lands of Mr. Hulton and Mr. Whitehead, and the land of Lord Wilton lying to the north of the land of Mr. Hulton,—made to communicate with the plaintiff's coal workings in the Red House Colliery in such a manner that water, which found its way into the coal workings under the reservoir, would, through and by means of such underground communications, flow down to and into the plaintiff's coal workings in the Red House Colliery.

16. These underground communications were effected several years before the defendants commenced making their reservoir, and continued down to the time of the bursting thereof; *but the fact of their existence was not known to the defendants, or to any agent of theirs, or to any person employed by them, until after the bursting as hereinafter mentioned.*

17. In the course of constructing and excavating for the bed of the reservoir, five old shafts running vertically downwards were met with in the portion of land selected for the site of the reservoir. At the time they were so met with the sides or walls of at least three of them were constructed of timber, and were still in existence, but the shafts themselves were filled up with marl or soil of the same kind as the marl or soil which immediately surrounded them; and it was not known to or suspected by the defendants, or any of the persons employed by them in or about the planning or constructing of the reservoir that they were (as they afterwards proved to be) shafts which had been made for the purpose of getting the coal under the land

in which the reservoir was made, or that they led down to coal workings under the site of the reservoir.

18. For the selection of the site of the reservoir, and for the planning and constructing thereof, it was necessary that the defendants should employ an engineer and contractors, and *they did employ for those purposes a competent engineer and competent contractors* by and under whom the site was selected, and the reservoir was planned and constructed; and, *on the part of the defendants themselves, there was no personal negligence or default whatever* in or about or in relation to the selection of the site, or in or about the planning or construction of the reservoir; *but, in point of fact, reasonable and proper care and skill were not exercised by or on the part of the persons so employed by them* with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the reservoir, to bear the pressure of water which, when filled to the height proposed, it would have to bear.

19. The reservoir was completed about the beginning of December 1860, when the defendants caused the same to be partially filled with water; and on the morning of the 11th of December in the same year, whilst the reservoir was so partially filled, one of the shafts which had been so met with as aforesaid gave way and burst downwards; in consequence of which the water of the reservoir flowed into the old coal workings underneath, and by means of the underground communications then existing between those old coal workings and the plaintiff's coal workings in the Red House Colliery as above described, large quantities of the water so flowing from the reservoir as aforesaid found their way into the coal workings in the Red House Colliery, and by reason thereof the said colliery became and was flooded, and the working thereof was obliged to be and was for a time necessarily suspended.

20. The plaintiff took immediate steps to pump out the water so flooding the colliery, for the purpose of enabling him to proceed with the working thereof; and as soon as the water was sufficiently pumped out therefrom, he proceeded to dress up the workings thereof and to repair the

damages done to them by the flooding; but whilst he was employed in dressing up and repairing the damages done to the said workings, and before the colliery was restored to a condition to admit of the working thereof being recommenced, the boiler of the steam-engine used by him in working the said colliery, and which was necessary for the purpose of pumping and keeping the colliery clear of water, exploded, in consequence of which the pumps so used by the plaintiff for keeping the colliery clear of water could not be worked, and the workings of the colliery again gradually filled with water, naturally arising and accumulating therein.

21. An inspector of coal-mines afterwards visited the Red House Colliery officially for the purpose of inquiring into the said explosion, and he was made acquainted with the fact of the water from the defendants' reservoir having escaped from the reservoir and flooded the colliery as aforesaid; and he warned the plaintiff of the danger and responsibility he would incur if he employed men in the colliery whilst the reservoir was used for storing water, unless means were taken to prevent the flooding of the colliery; and in consequence of the warning so given to him, the plaintiff abandoned and gave up the said Red House Colliery, and since the explosion of the boiler, the colliery has been entirely abandoned and given up as a working colliery.

22. At the time when the plaintiff so abandoned and gave up the colliery there was not any water in the reservoir; but the defendants, with the view and intention of again using the reservoir for storing water, were then proceeding to repair it, and taking such steps as were deemed sufficient to make the same secure for that purpose. There was reason, however, to fear, at the time when the plaintiff abandoned and gave up the colliery, that if the reservoir was again used for the storing of water, it might again burst and cause the colliery to be flooded; and in point of fact the reservoir, on being again filled with water after the defendants had so repaired it, did again burst down one of the shafts; but whether the water of the reservoir on this occasion flooded or would have flooded the

Red House Colliery is not known, this colliery having been previously abandoned, and being then filled with water which had naturally arisen and accumulated therein.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover damages from the defendants by reason of the matters stated in the case.

Manisty (J. A. Russell with him), for the plaintiff.—The defendants are liable on the maxim, *Sic utere tuo ut alienum non laedas*. If a man collect a dangerous element, be it fire or water, on his own land, and suffer it to escape on to mine, he is liable to me for the injury I sustain in consequence. He may collect it if he likes, but he must take care that it does not trespass on to my land. I may be bound to receive water, naturally flowing from above; but, if the watercourse be artificial, I am not so bound—*Smith v. Kenrick* (1) and *Tenant v. Goldwin* (2), both cited in *Hodgkinson v. Ennor* (3), and *Baird v. Williamson* (4).

[BRAMWELL, B. — *Baird v. Williamson* (4) establishes that the defendant could not do intentionally what he has done here.]

In *Groucott v. Williams* (5), where damage was claimed for the loss of a mare that fell down an old mine-shaft in a field, Blackburn, J. said, "Where an alteration has been made in the normal state of things, the person who makes it is the one upon whom the liability is thrown, to take care that no injury result." So, *Chauntler v. Robinson* (6), per Parke, B., *Sutton v. Clarke* (7), and *Tubervil v. Stamp* (8). —He also cited *Alston v. Grant* (9), *Bagnall*

v. the London and North-Western Railway Company (10), *Bonomi v. Backhouse* (11).

[MARTIN, B.—*Chadwick v. Trower* (12) is against you.]

It is not in point. There were there two adjoining houses, each with an underground vault. Besides, the *dicta* in that case are to be distinguished from the judgment, which proceeded on the ground that there was no allegation of any right of the plaintiffs to have their vault supported by the vault or walls of the defendant.

[MARTIN, B. referred to *Vaughan v. the Taff Vale Railway Company* (13).]

In that case there was a statutory power to use the engine.

Mellish (T. Jones with him).—There is no decision precisely in point. The case depends on principle only. If a man does something secretly on his own land which he has a right to do, the effect being that something, which his neighbour has a right to do, becomes by the secret act dangerous; the latter not having acted negligently, cannot be held liable for the consequences of the secret act. The maxim, *Sic utere tuo, &c.*, is not absolute in its application. It means that one is to take all reasonable care not to injure another. The essence of this case is that the danger was unknown. In all the cases cited, the danger or the probability of damage was known. This being a case of consequential damage, negligence must be proved. There is no analogy between this case and that of damage from fire; for the liability as to fire existed by virtue of the custom of the realm, as in the case of carriers and innkeepers—see *Com. Dig.*, tit. 'Action on the Case for Negligence,' A. 6, and *Filliter v. Phippard* (14). The cause of the thing being dangerous here was something being done by the plaintiff on his own land

(1) 7 Com. B. Rep. 515; s. c. 18 Law J. Rep. (N.S.) C.P. 172.

(2) 1 Salk. 21 and 360; s. c. 2 Lord Raym. 1089.

(3) 4 B. & S. 229; s. c. 32 Law J. Rep. (N.S.) Q.B. 231.

(4) 15 Com. B. Rep. N.S. 376; s. c. 33 Law J. Rep. (N.S.) C.P. 101.

(5) 4 B. & S. 149; s. c. 32 Law J. Rep. (N.S.) Q.B. 237.

(6) 4 Exch. Rep. 163; s. c. 19 Law J. Rep. (N.S.) Exch. 170.

(7) 6 Taunt. 29.

(8) 1 Salk. 18.

(9) 2 El. & B. 128; s. c. 23 Law J. Rep. (N.S.) Q.B. 163.

(10) 7 Hurl. & N. 423; s. c. 31 Law J. Rep. (N.S.) Exch. 480.

(11) 9 H.L. Cas. 903; s. c. 27 Law J. Rep. (N.S.) Q.B. 378, and *ante*, Q.B. 181.

(12) 6 Bing. N.C. 1; s. c. 8 Law J. Rep. (N.S.) Exch. 268; reversing s. c. 3 Bing. N.C. 334; s. c. 6 Law J. Rep. (N.S.) C.P. 47.

(13) 5 Hurl. & N. 679; s. c. 28 Law J. Rep. (N.S.) Exch. 41; and 29 Law J. Rep. (N.S.) Exch. 247.

(14) 11 Q.B. Rep. 347, 454; s. c. 17 Law J. Rep. (N.S.) Q.B. 89.

secretly. *Tenant v. Goldwin* (2) is easily distinguishable. Lord Holt there said "it was the defendant's wall and the defendant's filth; and he was bound of common right to keep his wall so as his filth might not damnify his neighbour"; and the declaration was held good on account of the words *debuit reparare*. In *Smith v. Kenrick* (1) the act was done purposely. Cresswell, J. in that case comments on all the cases cited on the other side. In *Lawrence v. the Great Northern Railway Company* (15) the damage was caused by a direct act of the defendants. In *Hodgkinson v. Ennor* (3) foul water was turned into a running stream. In *Chauntler v. Robinson* (6) the only decision was that the declaration was bad. *Sutton v. Clarke* (7) contains a *dictum* only in favour of the plaintiff, and *Tuberville v. Stamp* (8) was a case on the custom of the realm. *Trouer v. Chadwick* (12) is in the defendants' favour, if negligence has to do with the case. If there was carelessness here, it was on the part of the plaintiff who had opened the old working, and not of the defendants. And even if the contractor knew of the danger, the defendants are not on that account liable—*Butler v. Hunter* (16).

Manisty, in reply.—The plaintiff has a right to enjoy his property without interruption from his neighbour, except so far as regards servitudes of nature and right. He is under a servitude to receive natural water in his mine, but not foreign water brought on his land by the hand of man. The defendants' misfortune is not to be visited on the plaintiff. It is the misfortune of those who, though unknown to themselves, had the defect in their own land. Neither wilfulness nor negligence is necessary, where there is a right infringed. Still, even if negligence be necessary to support the action, it has been found as a fact that there was negligence (17). The contractor delivered over the reservoir in what appeared to be a perfect state, and the plaintiff has no remedy against him.

Curr. adv. vult.

(15) 16 Q.B. Rep. 643; s.c. 20 Law J. Rep. (n.s.) Q.B. 298.

(16) 7 Hurl. & N. 826; s.c. 31 Law J. Rep. (n.s.) Exch. 214.

(17) See paragraph 18 of the case.

The learned Barons differing in opinion delivered their judgments *seriatim*, on the 23rd of June 1865, as follows—

BRAMWELL, B.—The facts on which, as it seems to me, the question here depends, are as follow: The plaintiff is the occupier of mines, which he has worked to the boundary of the property in or under which they are. The defendants have made a reservoir, and filled it with water, on the surface of property separated from the plaintiff's by property of an intervening owner. The water has escaped down old shafts into old workings on the defendants' premises, has passed through other old workings in the intermediate premises, has reached the plaintiff's workings, and done him damage. The defendants were not aware of the old underground workings, nor of the communication between them. I agree with Mr. Mellish, that the case is singularly wanting in authority, and, therefore, while it is always desirable to ascertain the principle on which a case depends, it is especially so here.

Now, what is the plaintiff's right? He had the right to work his mines to their extent, leaving no boundary between himself and the next owner. By so doing, he subjected himself to all consequences resulting from natural causes; among others, to the influx of all water naturally flowing in; but he had a right to be free from what has been called foreign water—that is, water artificially brought or sent to him directly, or indirectly by its being sent to where it would flow to him. The defendants had no right to pour or send water on to the plaintiff's works. Had they done so knowingly, it is admitted an action would lie, and that it would if they did it again, is also proved by the case of *Hodgkinson v. Ennor* (3). The plaintiff's right then has been infringed. The defendants, in causing water to flow to the plaintiff, have done that which they had no right to do. What difference, in point of law, does it make that they have done it unwittingly? I think none; and, consequently, that the action is maintainable. The plaintiff's case is, "You have violated my right; you have done what you had no right to do, and have done me damage." If the plaintiff has the right I

mention, the action is maintainable. If he has it not, it is because his right is only to have his mines free from foreign water sent by the act of those who know what they are doing. I think this is not so. I know no case of a right so limited. As a rule, the knowledge or ignorance of the damage done is immaterial. The burthen of proof of this proposition is not on the plaintiff.

I proceed to deal with the arguments the other way. It is said, there must be a trespass or nuisance with negligence. I do not agree with that, and I think *Bonomi v. Backhouse* (11) shews the contrary. But why is not this a trespass?—see *Gregory v. Piper* (18). Wilfulness is not material—see *Leame v. Bray* (19). Why is it not a nuisance? The nuisance is not in the reservoir, but in the water escaping. As in *Bonomi v. Backhouse* (11), the act was lawful, the mischievous consequence was a wrong. Where two carriages come in collision, if there is no negligence in either, it is as much the act of the one driver as of the other that they meet. The cases of carriers and innkeepers are really cases of contract, and, though exceptional, furnish no evidence that the general law, in cases wholly independent of contract, is not what I have stated. The old common law liability for fire created a liability beyond what I contend for here. I cannot think *Trower v. Chadwick* (12) opposed to this view. The Court there held the count bad. They laid stress on the defendant not having notice; but I think the decision would have been, and properly, the same, had he had notice, because it was not shewn that there was any right in the plaintiff to have his vaults so built as to impose on the defendant the burthen of pulling down his premises in any particular way, or with any particular care. On the other hand, the cases of *Bonomi v. Backhouse* (11), *Hodgkinson v. Ennor* (3) and *Tenant v. Goldwin* (2) seem, in principle, in point for the plaintiff. It is clear that, in the latter case, the Court decided that the defendant must, at his peril, keep his filth from injuring his neighbour, for it is a charge of common right, *Sic utere tuo ut alienum non lædas*.

(18) 9 B. & C. 591.

(19) 3 East, 593.

I think, therefore, on the plain ground that the defendants have caused water to flow into the plaintiff's mines, which, but for the defendants' act, would not have gone there, this action is maintainable. I think that the defendants' innocence, whatever may be its moral bearing on the case, is immaterial in point of law. But I may as well add, that if the defendants did not know what would happen, their agents knew that there were old shafts on their land; knew, therefore, that they must lead to old workings; knew that those old workings might extend in any direction, and, consequently, knew damage might happen. The defendants surely are as liable as their agents would be. Why should not both be held to act at their peril? But I own, this seems to me, rather to enforce the rule, that knowledge and wilfulness are not necessary to make the defendant liable, than to give the plaintiff a separate ground of action. My judgment is for the plaintiff.

MARTIN, B.—The circumstances of this case raise two questions: First, assuming the plaintiff and the defendants to be the owners of two adjoining closes of land, and at some time or other beyond living memory coal to have been worked under both closes, and that the workings under the close of the defendants communicated with the workings under the close of the plaintiff, but that of the existence of such workings both plaintiff and defendant were ignorant, and that the defendants, without any negligence or default whatever, made a reservoir upon their own land for the purpose of collecting water to supply a manufactory, and that the water escaped from an old shaft at the bottom of the reservoir into the old workings below the defendants' close, and thence into the plaintiff's close, and did damage there,—are the defendants responsible?

The second question is, assuming the defendants not to be responsible upon the above state of facts, does it make any difference that they employed a competent engineer and competent contractors who were ignorant of the existence of the old workings, and who selected the site of the reservoir and planned and constructed it, while on the part of the

defendants themselves there was no personal negligence or default whatever, but in point of fact, reasonable and proper care and skill were not exercised by and on behalf of the persons so employed, with reference to the old shafts found at the bottom of the reservoir, to provide for the sufficiency of the reservoir to bear the pressure of the water, which, when filled to the height proposed, it would have to bear?

It has been contended on behalf of the plaintiff, that the first question ought to be decided in the affirmative. Several cases were cited in support of this view, but it was admitted that none of them were direct authorities. Several *dicta* and opinions of Judges were also cited, but it seems to me, that it cannot be affirmed, that in any one of them the Judge had clearly in his contemplation the state of things supposed by the first question to exist. If, therefore, there is no authority either way, the case must be decided upon principle and legal analogy.

First, I think there was no trespass. In the judgment of my Brother Bramwell, to which I shall hereafter refer, he seems to think the act of the defendants was a trespass; but I cannot concur, as I own it seems to me that the cases cited by him, namely, *Leame v. Bray* (18) and *Gregory v. Piper* (17), prove the contrary. I think the true criterion of trespass is laid down in the judgment in the former case, namely, that to constitute trespass, the act doing the damage must be immediate, and that if the damage be not immediate but consequential, which I think the present was, it is not trespass. Secondly, I think there was no nuisance in the ordinary and generally understood meaning of that word; that is to say, something hurtful or injurious to the senses. The making a pond for holding water is a nuisance to no one. The digging a reservoir on a man's own land is a lawful act. It does not appear that there was any embankment, or that the water in the reservoir was ever above the level of the natural surface of the land; but the water escaped from the bottom of the reservoir, and, in ordinary course, would descend by gravitation into the defendants' own land, and they did not know of the existence of the old workings. To hold the defendants liable,

would therefore make them insurers against the consequence of a lawful act upon their own land, when they had no reason to believe or suspect that any damage was likely to ensue. No case was cited in which the question has arisen as to real property; but as to personal property the question arises every day, and there is no better established rule of law than that, when damage is done to personal property, or even to the person, by collision either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and, if there be no negligence, the party sustaining the damage must bear with it. The existence of this rule is proved by the exceptions to it, namely, the cases of the innkeeper and the common carrier of goods for hire, who are *quasi* insurers. These cases are said to be by the custom of the realm, treating them as exceptions from the ordinary rule of law. In the absence of authority to the contrary, I can see no reason why damage to real property should be governed by a different rule or principle than damage to personal property. There is an instance, also, of damage to real property, where the party causing it was at common law liable upon the custom of the realm as a *quasi* insurer; namely, in the case of the master of a house, if a fire had kindled there, and consumed the house of another. In such case the master of the house was liable at common law without proof of negligence on his part. See *Comyns's Digest*, tit. 'Action upon the Case for Negligence,' (A. 6.) This seems to be an exception from the ordinary rule at law; and, in my opinion, affords an argument that in other cases such as the present there must be negligence to create a liability. For these reasons, I think the first question ought to be answered in favour of the defendant.

There then arises the second question, namely, does it make any difference that reasonable and proper care and skill were not exercised by the engineer and contractors employed by the defendant (they being competent persons) with reference to the shafts, which were five old shafts running vertically downwards in that portion of the land selected for the reservoir, but which were not known or suspected by any one to be (as they afterwards proved to be) shafts which had

been made for the purpose of getting coal under the land beneath the reservoir, or to lead to coal under it? Now, assuming that the want of reasonable and proper care and skill by the engineer and contractors constituted in point of law want of reasonable and proper skill by the defendants themselves (which is by no means a clear proposition), I nevertheless think that the defendants are not responsible. The assumed facts are these: The defendants dig a reservoir in their own land; they do not know or suspect that their doing it in the manner they did would do any damage to their neighbour: is there any authority to shew that the law casts upon them a liability for damage, should it occur? In my opinion there is authority to the contrary. *Prima facie* a man may excavate a reservoir for water in his own land. Whether he does so carefully and skilfully would seem to be his own concern; and, if he be ignorant that any fact exists which makes it dangerous to his neighbour, it is difficult to see what duty is imposed upon him to take any peculiar care, or use any particular skill in the matter. When a man does an act upon his close, which of itself is lawful, but is alleged to be wrongful towards an adjoining neighbour by reason of the existence of some underground openings between their two closes, reason and good sense would seem to require that he should know or have the means of knowledge of the existence of the openings. How can a man be said to be negligent when he is ignorant of the existence of the circumstances which require the exercise of care? But, as I have before said, I think the second question, and therefore necessarily the first, is concluded by authority.

In the case of *Trower v. Chadwick* (12) a cause of action alleged in the declaration was that the defendant was owner and occupier of a vault and walls, and was about to pull them down, and that it was his duty to use due care and skill in pulling them down, but that he did not do so, and thereby plaintiff's vault and walls were damaged. The Court of Common Pleas held that this duty was imposed by law, and that a breach which alleged that the defendant conducted himself so carelessly, negligently, and unskilfully in pulling down his vault and walls as thereby to injure the plaintiff's

vault and walls, afforded and was a good cause of action. Error was brought, and in the judgment of the Court of Exchequer Chamber the judgment of the Court of Common Pleas was declared to be erroneous, in the most direct and express terms. Baron Parke said, "The duty alleged was to use due care and skill in pulling down the vault and walls adjoining the plaintiff's vault and walls, so that, for want of such care and skill, the plaintiff's vault and walls should not be damaged; and the breach was, that the defendant did not use such due care and skill, and that by reason thereof damage ensued." He then proceeds thus; "The question is, whether the law imposes upon the defendant an obligation to take such care in pulling down his vault and walls as that the adjoining vault shall not be injured. Supposing this to be so, when the party is cognisant of the existence of the vault, we are of opinion that no such obligation can arise, unless there be an averment that the defendant knew of its existence, for one degree of care would be required when no vault exists, but the soil is left in its natural state; another where there is a vault; and another and still greater degree of care would be required where the adjoining vault was in a weak and fragile condition; and how is the defendant to ascertain the precise degree of care and caution the law requires of him, if he has no notice of the existence or of the nature of the structure? We think that no such obligation exists in the absence of notice."

Now, substituting defendants' reservoir for defendant's vault and walls in *Trower v. Chadwick* (12), and plaintiff's close and coal mine for the plaintiff's vault, the cases seem to be identical. I can perceive no distinction, and I therefore think both questions ought to be answered in the negative, and that the defendants are entitled to our judgment.

I have already referred to the judgment of my Brother Bramwell, which I have carefully read and considered, but I cannot concur in it. I entertain no doubt, that if the defendants directly and by their immediate act cast water upon the plaintiff's land, it would have been a trespass, and that they would have been liable to an

action for it. But this they did not do. What they did was, to dig a reservoir in their own land, and put water in it, which, by underground openings of which they were ignorant, escaped into the plaintiff's land. I think this is a very different thing from a direct casting of water upon the land, and that the legal liabilities consequent upon it are governed by a different principle. So also, I do not think the cases cited by him as in point of principle in favour of the plaintiff, really are so. In *Bonomi v. Backhouse* (11), the act done by the defendant was removing the natural and rightful support of his neighbour's land, which at the time, he must have known might and probably would do damage. This seems to me a very different thing from making a reservoir and filling it with water, from which no one supposed any damage would arise. As to the case of *Tenant v. Goldwin* (3). I cannot understand what difficulty there was in it, or how it can be an authority in the present case. Judgment had gone by default; the motion was in arrest of judgment; and the declaration contained an averment that the defendant *debit et solebat* to repair a wall between the plaintiff's and the defendant's closes, and that by reason of the want of repair of the wall the damage ensued. This averment was admitted to be true by the form of the proceedings, and being admitted, I cannot myself see where the difficulty was as to the defendant's liability, or how the case can be an authority where no such liability to repair is admitted to exist. It is not alleged in the present case that the defendants were under a liability to stop up the opening in their own land from the adjoining land. I therefore retain the opinion I originally formed. I think this case is governed by *Trower v. Chadwick* (12), and that to hold the defendants liable for any negligence, would be to constitute them insurers, which I am of opinion would be contrary to legal analogy and principle.

POLLOCK, C.B. (20).—The question in this case is, in my judgment, one of great difficulty, and therefore of much

(20) The judgment of Pollock, C.B. was read by Channell, B., who was not himself present during the argument of the case.

doubt. Apparently it has never before been the subject of litigation, for the Reports are without any decided case in point, and the books of authority are silent on the immediate matter, and afford only indirect assistance. The general question is, for what acts done on his own land (and apparently quite lawful) is the owner of an estate liable if it should turn out in the result that damage is thereby occasioned to the estate of another (who may be an immediate or a distant neighbour) on account of some circumstance entirely unknown to the proprietor who causes the act to be done?

I quite agree with my Brother Bramwell, that in a case like the present it is most important to ascertain the principle on which a decision should proceed. As one mode of doing so, I will assume that the communication by which the water escaped from the defendants' to the plaintiff's estate was a natural one. There are several counties in England—Derbyshire especially—where this might occur; where a natural communication might cause water to pass underground to a distant property, such communication being wholly unknown and unsuspected by either party. Now, in such a case, would the distant neighbour have a right of action if, in consequence of an attempt to form an artificial piece of water, whether for utility or ornament, the water escaped into an underground channel and did damage beyond the limits of the property on which the reservoir was formed? I see no ground on which an action could be maintained for the damage arising under such circumstances. Well, then, if the underground communication be the result of the complaining party having exercised his right to take the minerals, does that give him a better right to complain? I own I think not, and I agree with my Brother Martin that no action will lie. It appears to me that my Brother Bramwell assumes too strongly that the complainant had a right to be free from what is called foreign water. That may be so with reference to surface rights, but I am not prepared to hold that it applies to every possible way in which water may happen to come. There being therefore no authority for bringing such an action, I think the safer

course is to decide in favour of the defendants.

With respect to the negligence of the engineer employed to make the reservoir, it is not stated in what it consisted, nor is it shewn that it is such as would make the owner of the land responsible; and any liability arising from the acts of the engineer is more a question of fact than of law.

Judgment for the defendants.

1865. }
June 3. } CHAPMAN v. COTTRELL.

Promissory Note — Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 18.—Origin of Cause of Action—Note made Abroad, but delivered in England.

The defendant, a British subject resident in Florence, signed two promissory notes there, as joint and several maker with his brother in London, to whom he sent them by post. His brother then also signed them, and delivered them in London to the payees:—Held, in accordance with Cox v. Troy (1), that the cause of action arose when the notes were delivered to the payees in this country, and that the defendant could therefore be sued here under the 18th section of the Common Law Procedure Act, 1852.

It appeared, from the affidavit of George Cottrell, the defendant's brother, that, in pursuance of an arrangement made between George Cottrell and the Union Bank of London (of which the plaintiff was one of the registered public officers), the defendant, who was resident at Florence in the kingdom of Italy, was to join his brother in giving some security to the bank for a balance due to them from George Cottrell, who accordingly wrote and sent to Florence to the defendant the two promissory notes for 300*l.* each, upon which this action was brought. The defendant there attached his signature to the notes, and returned them by the post to his brother, who afterwards signed them himself and sent them to the Union Bank. At the time the notes became due, the defen-

dant's brother had not paid the balance due from him to the bank; and this action was therefore afterwards brought against the defendant.

The notes were in the following form:

"£300.

London, 30th Dec. 1863.

"Three months after date we jointly and severally promise to pay to the Union Bank of London three hundred pounds value received.

"Geo. E. Cottrell.

"Henry Cottrell."

A summons having been taken out at chambers to set aside the writ, &c., on the ground that the cause of action did not arise within the jurisdiction, but that it arose on the defendant Henry Cottrell signing the notes at Florence,—*Pigott, B.* referred the matter to the Court; and

Henry James now applied for a rule to shew cause why the writ and all subsequent proceedings should not be set aside for irregularity on the above ground.—The "cause of action," in the 18th section of the Common Law Procedure Act, 1852, means the whole cause of action—*Sichel v. Borch* (2), in which case *Pollock, C.B.* says that "it is not because the breach of the contract was in this country that the cause of action is within the jurisdiction." The mere writing of his name by the defendant in Florence is part of the cause of action. In *Roff v. Miller* (3), where the question turned on 9 & 10 Vict. c. 128. (the City Small Debts Act), the bill was accepted in Piccadilly and delivered to the plaintiffs at Billingsgate, out of the jurisdiction; and *Cresswell, J.* said, "The cause of action was not the delivery of the bill at Billingsgate, but its unrevoked acceptance in Piccadilly." And in *Wilde v. Sheridan* (4) (turning upon 9 & 10 Vict. c. 95, the County Court Act), *Coleridge, J.* said that *Roff v. Miller* (3) was well decided. The contract of acceptance results from the mere writing by the acceptor on the bill without delivery; the acceptor does not deliver the bill, in the same sense as the drawer or the indorser delivers it. And the maker of a promissory note stands on the same footing as the acceptor of a bill of exchange.

(2) 33 Law J. Rep. (N.S.) Exch. 179; a.c. 2 H. & C. 954.

(3) 19 Law J. Rep. (N.S.) C.P. 278.

(4) 21 Law J. Rep. (N.S.) Q.B. 260.

(1) 5 B. & Ald. 474.

[MARTIN, B.—But the case of these promissory notes is different; the defendant signed the notes abroad, and sent them over here to have them delivered. *Cox v. Troy* (1) is a direct authority that there must be something equivalent to delivery, to make the contract.]

The case only shews that the acceptance may be revoked before delivery. The mere writing on the paper is still part of the cause of action.

Lush and *Shaw* appeared to shew cause in the first instance, but were not called upon.

MARTIN, B.—The question here is, where was the contract made by the defendants, in London or in Florence? There can be no doubt that the contract was made in London, for there was no contract until the note was delivered to the plaintiffs by the agent of the defendant in London. The judgment in *Cox v. Troy* (1) proceeds entirely on the ground that the defendant did not deliver the bill after he had written his acceptance. Abbott, C.J. there said, that the finding that the defendant did accept the bill did not seem to mean more than that at one period he did write an acceptance on it; and at that time was minded to accept it; and that the question therefore was, "whether he was at liberty, on an alteration of circumstances, to erase the words before he delivered out the bill to the holder." So Bayley, J. says, "I have no difficulty in saying, from principles of common sense, that it is not the mere act of writing on the bill, but the making a communication of what is so written, that binds the acceptor." And Holroyd, J. takes the same view. I entirely agree with them; and I am therefore clear that there never was any cause of action in this case until the notes were delivered to the payees by the defendant's agent in England.

BRAMWELL, B.—I am of the same opinion. The bank had no interest whatever in this paper till it was delivered over to them by the defendant's brother in this country, and then only was there any contract by the defendant.

[CHANNELL, B. had left, having previously intimated that he agreed with the rest of the Court.]

Rule refused.

NEW SERIES, 34.—EXCHEQ.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Exchequer.*)

1865. } SYMONS AND ANOTHER, v.
June 21. } GEORGE AND OTHERS.*

Debtor and Creditor—Creditors' Deed—Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, sections 192, 194, 197.—Non-Assent of requisite Number of Creditors.

*The plaintiffs were trustees under a deed of assignment for the benefit of creditors, which purported to be made under the Bankruptcy Act, 1861, and was in the form given in Schedule D. of that act. The deed was duly executed, attested, stamped and registered, according to the provisions of section 192, but was not assented to by the requisite majority of creditors. The defendants were assignees of the estate of certain bankrupt creditors of the debtor, and a *fi. fa.* having been issued against his property by the defendants an interpleader issue was directed:—Held, by the Court of Exchequer Chamber, that the deed was valid to pass the property, and that the plaintiffs were entitled to the verdict.*

This was an appeal by the defendants against a decision of the Court of Exchequer, discharging a rule to enter a verdict in their favour. The decision in the Court below, which will be found reported in 33 *Law J. Rep.* (N.S.) Exch. 231, was upon an interpleader issue. The plaintiffs were trustees under a deed of assignment, executed by one John Cooke, for the benefit of his creditors. The deed purported to be made in pursuance of the Bankruptcy Act, 1861, and was executed, attested, stamped and registered in accordance with section 192. of the Bankruptcy Act, and possession of the property was given to the plaintiffs as trustees, immediately on the execution of the deed; but there was no evidence at the trial to shew that the deed was assented to by the requisite majority of creditors. The defendants were assignees of the estate of certain bankrupt creditors of the said John Cooke, and they issued a writ of *fi. fa.* on the 14th of January 1864. The Judge who tried the cause directed a verdict for the plain-

* Decided in the Sittings after Trinity Term, 1865, coram Crompton, J., Willes, J., Byles, J., Blackburn, J., Keating, J. and Shée, J.

tiffs, with leave to move to enter it for the defendants. A rule was accordingly obtained; and was, on argument, discharged by the Court of Exchequer.

Gray (Cooke and Cleave with him), for the appellants (defendants in the Court below).—The question this Court has to decide is, whether section 197. of the Bankruptcy Act, 1861, applies to this deed. The deed is not in conformity with the provisions of section 192. of that act. It has not been assented to by the prescribed number of creditors. The deed is therefore void, and the trusts fail. If the trusts are incapable of execution, it is a conveyance without consideration, and the deed is void. It is then only a voluntary conveyance. Section 192. of the Bankruptcy Act defines what deeds shall be valid. Section 193. provides how the deeds shall be registered. Section 194. enacts that deeds shall be registered in the Court of Bankruptcy, or otherwise shall not be received in evidence. Then comes section 197, which provides that, "From and after registration of such deed the debtors, trustees and parties to such deed, or who have assented to such deed, and the effects of such debtor shall be subject to the jurisdiction of the Court of Bankruptcy, in the same manner as if such debtor had been adjudged a bankrupt." Then, what is the meaning of the words "such deed" in this section? It is submitted it means a deed in conformity with the provisions of section 192, and this deed is not.

[BLACKBURN, J.—You have to shew us that the deed is a bad deed at common law.]

It is bad if it purports to give aids and remedies to creditors which it cannot give. *Ex parte Alexander* (1) is an authority that trustees and creditors under a deed which is to operate under the Bankruptcy Act, 1861, are to have the same powers and privileges as assignees would have in case of an adjudication in bankruptcy. A creditor who signed this deed expected to have those powers and privileges. The concluding words of section 197, "to be administered as in bankruptcy," mean that all the powers contained in the Bankruptcy Act are to be exercisable, viz. power, firstly, to examine a debtor and discover estate; secondly, to

dispute the debts of creditors, if necessary. It is by no means the same thing to have this done by trustees at their option. Besides a mortgagor at common law may have his action and keep his security, but in Bankruptcy he must obtain an order to sell the security, and can only prove for the balance. There is also no remedy in case of fraudulent preference. He cited *Topping v. Keysell* (2).

H. Matthews, for the respondents (plaintiffs in the Court below), was not called upon.

CROMPTON, J.—We are all of opinion that the judgment of the Court of Exchequer was right, and ought to be affirmed. We think this deed is a good deed at common law. The trusts of the deed are by no means impossible. It is no uncommon provision in deeds of this description, that the property of a debtor shall be administered as it would be in the Court of Bankruptcy. It has been said that the rights of a mortgagor would not be the same under this deed as they would be if the debtor's estate were administered in Bankruptcy; that in administering the estate in the Court of Bankruptcy a mortgagee must obtain an order to sell any security he may hold, and can only prove for the balance due to him, whereas he might under this deed retain the security, and prove for the amount of his whole debt. It is also objected that there is no power under this deed to recover back property parted with by a debtor by way of fraudulent preference. It is also said that at common law the property would pass immediately; but I do not see that the deed imposes any hardship upon any one. Any dissenting creditor may file his bill in Chancery, and obtain relief. It is objected that the trustees under this deed may, if they please, reject some claims. That would be a breach of trust, for which any person who is an object of the trust may have a remedy. I think my Brother Martin puts the judgment in the Court below upon the proper ground, viz., that a man has a right to convey his property to trustees upon such trusts as he may think fit, provided he has power to dispose of the property. I can, however, quite understand

(1) 1 De Gaz. S. & S. 311.

(2) 33 Law J. Rep. (N.S.) C.P. 225.

[MARTIN, B.—But the case of these promissory notes is different; the defendant signed the notes abroad, and sent them over here to have them delivered. *Cox v. Troy* (1) is a direct authority that there must be something equivalent to delivery, to make the contract.]

That case only shews that the acceptance may be revoked before delivery. The mere writing on the paper is still part of the cause of action.

Lush and *Shaw* appeared to shew cause in the first instance, but were not called upon.

MARTIN, B.—The question here is, where was the contract made by the defendants, in London or in Florence? There can be no doubt that the contract was made in London, for there was no contract until the note was delivered to the plaintiffs by the agent of the defendant in London. The judgment in *Cox v. Troy* (1) proceeds entirely on the ground that the defendant did not deliver the bill after he had written his acceptance. Abbott, C.J. there said, that the finding that the defendant did accept the bill did not seem to mean more than that at one period he did write an acceptance on it, and at that time was minded to accept it; and that the question therefore was "whether he was at liberty, on an alteration of circumstances, to erase the words before he delivered out the bill to the holder." So Bayley, J. says, "I have no difficulty in saying, from principles of common sense, that it is not the mere act of writing on the bill, but the making a communication of what is so written, that binds the acceptor." And Holroyd, J. takes the same view. I entirely agree with them; and I am therefore clear that there never was any cause of action in this case, until the notes were delivered to the payees by the defendant's agent in England.

BRAMWELL, B.—I am of the same opinion. The bank had no interest whatever in this paper till it was delivered over to them by the defendant's brother in this country, and then only was there any contract by the defendant.

[CHANNELL, B. had left, having previously intimated that he agreed with the rest of the Court.]

Rule refused.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Exchequer.*)

1865. } SYMONS AND ANOTHER. v.
June 21. } GEORGE AND OTHERS.*

Debtor and Creditor—24 & 25 Vict. c. 134, sections 192, 194, 197.—*Trust Deed*—*Non-Assent of requisite Number of Creditors*—*Control of Court of Bankruptcy.*

A trust deed was in the form given in Schedule D. of the Bankruptcy Act, 1861, and was registered, &c., pursuant to section 192. of that act, but was not assented to by the prescribed majority of creditors:—Held, affirming the judgment of the Court of Exchequer, that such deed was, by virtue of sections 194. and 197. of that act, subject to the jurisdiction of the Court of Bankruptcy.

This was an appeal by the defendants against a decision of the Court of Exchequer, discharging a rule to enter a verdict in their favour. The case in the Court below, which will be found reported in 33 *Law J. Rep.* (N.S.) Exch. 231, was an interpleader issue directed by Bramwell, B. The plaintiffs were trustees under a deed of assignment, executed by one John Cooke, for the benefit of his creditors. The deed purported to be made in pursuance of the Bankruptcy Act, 1861, and was executed, attested and registered in accordance with section 192. of the Bankruptcy Act, and possession of the property was given to the plaintiffs as trustees, immediately on the execution of the deed; but there was no evidence at the trial to shew that the deed was assented to by the requisite majority of creditors. The defendants were assignees of the estate of certain bankrupt creditors of the said John Cooke, and they issued a writ of *fi. fa.* on the 14th of January 1864. The question for the opinion of the Court was, whether the deed was subject to the jurisdiction of the Court of Bankruptcy.

Gray (Cooke and *Cleave* with him), for the appellants, defendants in the Court below.—The question this Court has to decide is, whether section 197. of

* Decided in the Sittings after Trinity Term, 1865, coram Crompton, J., Willes, J., Byles, J., Blackburn, J., Keating, J. and Shee, J.

the Bankruptcy Act, 1861, applies to this deed. The deed is not in conformity with the provisions of section 192. of that act. It has, no doubt, been executed, attested and registered, and is in the form given in Schedule D. of the Bankruptcy Act ; but it is not assented to by the prescribed number of creditors. The deed is therefore void, and the trusts fail. If the trusts are incapable of execution, it is a conveyance without consideration, and the deed is void. It is then only a voluntary conveyance. Section 192. of the Bankruptcy Act defines what deeds shall be valid. Section 193. provides how the deeds shall be registered. Section 194. enacts that deeds shall be registered in the Court of Bankruptcy, or otherwise shall not be received in evidence. Then comes section 197, which provides that, "From and after registration of such deed the debtors, trustees and parties to such deed, or who have assented to such deed, and the effects of such debtor shall be subject to the jurisdiction of the Court of Bankruptcy, in the same manner as if such debtor had been adjudged a bankrupt." Then, what is the meaning of the words "such deed" in this section? It is submitted it means a deed in conformity with the provisions of section 192, and this deed is not.

[BLACKBURN, J.—You have to shew us that the deed is a bad deed at common law.]

It is bad if it purports to give aids and remedies to creditors which it cannot give. *Ex parte Alexander* (1) is an authority that trustees and creditors under a deed which is to operate under the Bankruptcy Act, 1861, are to have the same powers and privileges as assignees would have in case of an adjudication in bankruptcy. A creditor who signed this deed expected to have those powers and privileges. The concluding words of section 197, "to be administered as in bankruptcy," mean that all the powers contained in the Bankruptcy Act are to be exercisable, viz. power, firstly, to examine a debtor and discover estate ; secondly, to dispute the debts of creditors, if necessary. It is by no means the same thing to have this done by trustees at their option. Besides, a mortgagor at common law may have

his action and keep his security, but in Bankruptcy he must obtain an order to sell the security, and can only prove for the balance. There is also no remedy in case of fraudulent preference. But if the trusts of the deed cannot be carried out, they must be struck out of the deed, and there remains but a mere voluntary conveyance, which is void.—He cited *Topping v. Keysell* (2).

H. Matthews, for the respondents (plaintiffs in the Court below), was not called upon.

CROMPTON, J.—We are all of opinion that the judgment of the Court of Exchequer was right, and ought to be affirmed. We think this deed is a good deed at common law. The trusts of the deed are by no means impossible. It is no uncommon provision in deeds of this description, that the property of a debtor shall be administered as it would be in the Court of Bankruptcy. It has been said, that the rights of a mortgagor would not be the same under this deed as they would be if the debtor's estate were administered in bankruptcy ; that in administering the estate in the Court of Bankruptcy a mortgagee must obtain an order to sell any security he may hold, and can only prove for the balance due to him, whereas he might under this deed retain the security, and prove for the amount of his whole debt. It is also objected that there is no power under this deed to recover back property parted with by a debtor by way of fraudulent preference. It is also said that at common law the property would pass immediately ; but I do not see that the deed imposes any hardship upon any one. Any dissenting creditor may file his bill in Chancery, and obtain relief. It is objected that the trustees under this deed may, if they please, reject some claims. That would be a breach of trust, for which any person who is an object of the trust may have a remedy. I think my Brother Martin puts the judgment in the Court below upon the proper ground, viz., that a man has a right to convey his property to trustees upon such trusts as he may think fit, provided he has power to dispose of the property. I can, however, quite understand

(1) 1 De Gex, S. & S. 311.

(2) 33 Law J. Rep. (N.S.) C.P. 225.

that the deed might have been delivered as an escrow upon the condition that the provisions of section 192. should be complied with; but if that fact was in dispute, that question should have been left to the jury. We cannot take upon ourselves to decide that fact; that would be entirely a question for the jury. The deed is in the form given in Schedule D. of the Bankruptcy Act, but that form is a conventional form, which might be used without any reference whatever to the provisions of section 192. I therefore think that, as the trusts of the deed are not impossible, it is a valid deed at common law. I think the property vested in the plaintiffs immediately on the execution of the deed and for a good consideration. For these reasons I am of opinion that the judgment of the Court below is right.

The other JUDGES concurred.

Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Exchequer.*)

1865. } CLARKE v. WILLIAMS AND
June 22. } OTHERS.*

Debtor and Creditor—Bankruptcy Act, 1861—Deed of Arrangement—Release—Plea in Bar.

A deed was executed by a debtor for the benefit of his creditors under the Bankruptcy Act, 1861. The deed did not contain a clause of release:—Held (affirming the judgment of the Court of Exchequer), that such a deed cannot be pleaded in bar to an action.

Error was brought in this case to reverse the judgment of the Court of Exchequer in favour of the plaintiff on a demurrer to a plea (1).

The declaration was for goods bargained and sold, for goods sold and delivered, for money paid and for money due on accounts stated.

Plea, that after the accruing of the plaintiff's claim, and after the 11th of October 1861, the defendant was indebted to the plaintiff and divers other persons; and there-

upon a deed, bearing date the 30th of January 1864, was made and entered into and executed by and between the defendant W. Lewis, L. Lewis, J. Lewis and J. Williams of the one part, and W. W. Lewis of the other part, which said deed was and is as follows: "This deed, made the 30th of January 1864, between J. Williams, W. Lewis, L. Lewis, J. Lewis and J. Williams, all of &c., of the one part, and W. W. Lewis, of &c., on behalf of and with the assent of the undersigned creditors of the said J. Williams, W. Lewis, L. Lewis, J. Lewis and J. Williams of the other part, Witnesseth that the said J. Williams, W. Lewis, L. Lewis, J. Lewis and J. Williams hereby convey all their estate and effects to the said W. W. Lewis absolutely, to be applied and administered for the benefit of the creditors of the said J. Williams, W. Lewis, L. Lewis, J. Lewis and J. Williams, in like manner as if the said J. Williams, W. Lewis, L. Lewis, J. Lewis and J. Williams had been at the date hereof duly adjudged bankrupt." Averments, that a majority in number representing three-fourths in value of the creditors of the defendants whose debts respectively amounted to 10*l.* and upwards did, in writing, assent to and approve of the said deed, and the said trustees appointed by the deed executed the same, and the execution of the deed by the defendant was attested by an attorney; and within twenty-eight days from the execution of the deed by the defendant, the same was produced and left, having been first duly stamped, at the office of the Chief Registrar of the Court of Bankruptcy for the purpose of being registered, and together with such deed there was delivered to the Chief Registrar an affidavit by the defendant that a majority representing three-fourths in value of the creditors of the defendant whose debts amounted to 10*l.* and upwards had in writing assented to and approved of the said deed, and also stating the amount in value of the property and credits of the defendants comprised in the deed, and the deed did before the registration thereof bear such ordinary and *ad valorem* stamp duties as were provided by the Bankruptcy Act, 1861, in that behalf, and immediately on the execution of the deed by the defendant possession of all the property comprised therein

* Decided in the Sittings after Trinity Term, coram Crompton, J., Willes, J., Byles, J., Blackburn, J., Keating, J. and Shew, J.

(1) *Ante*, page 60.

of which the defendant could give or order possession was given to the said trustees, and at the time of the execution of the deed the plaintiff was a creditor of the defendants in respect of the claim herein pleaded to within the meaning of the Bankruptcy Act, 1861, and all conditions have happened and been performed, and all things having happened necessary in that behalf, the plaintiff became and was and is bound by the deed as if he had been a party thereto and had duly executed the same.

Demurrer, and joinder in demurrer. The ground of the demurrer was, that the deed did not contain any clause of release by the plaintiff to the defendants. The Court of Exchequer delivered judgment in favour of the plaintiff on the demurrer. The case in the Court below is reported *ante*, Exch. 60.

Crompton, for the plaintiff in error.—The question is, whether a composition-deed containing no release clause can be pleaded in bar to an action. The point has never been decided in this court. It is true that the Court of Common Pleas, in the case of *Eyre v. Archer* (2), held that such a deed cannot be pleaded, and the decision in that case was followed by the Court of Exchequer in *The Istones Park Iron Ore Company (Limited) v. Pattinson* (3), and by the Court of Queen's Bench in *Jones v. Morris* (4), but the point has never been decided by a Court of Error; *Eyre v. Archer* (2) is, therefore, the only authority against the defendant. At first a release was not considered absolutely necessary in order to render a deed pleadable in bar to an action; and *Garrod v. Simpson* (5) is an authority that a deed, under the 192nd section of the Bankruptcy Act, 1861, even though it contain no release, may be pleaded in bar if the composition has been tendered, as the deed might be taken as an accord and satisfaction if the plaintiff has accepted a dividend; therefore the release clause cannot be said to be absolutely necessary. This point was not raised in *Eyre v. Archer* (1).

[CROMPTON, J.—What is there in this

deed to bar the suit? The Bankruptcy Act provides machinery for staying execution, but the deed is no bar to an action.]

The plea does not state whether the plaintiff has received a dividend or not. It is therefore consistent with the pleadings that the plaintiff has accepted a dividend under the deed, and Lord Campbell, in *Whitmore v. Turquand* (6), says, "Although this deed contains no release nor declaration that the dividend is to be taken in full satisfaction of the debt, the arrangement is in the nature of a *cessio bonorum* under the Roman Civil Law, and I think that when a dividend has been received satisfaction is to be inferred." A creditor who has assented must stand in the same position as a creditor who had proved his debt stood in under the act of 1849. (He referred to section 182. of that act.)

Hance, for the defendant in error, was not called upon.

CROMPTON, J.—There are several authorities upon the validity of such a deed by way of plea in bar to an action, and these authorities occur since the passing of the Bankruptcy Act, 1861, and are founded upon that statute. The fundamental principle upon which all the cases have been decided, is that the deed is only a bar to an action if the statute makes it so. The deed would be no defence at common law. If I owe a man a debt, and assign over all my estate to trustees, the man has a right to get what he can under the assignment, and proceed for the balance. One creditor is not bound by the act of another creditor but by virtue of the provisions of the statute. There is no release clause in the deed, and there is nothing in the plea to shew a good answer to the plaintiff's claim; nor is there anything to shew that the composition was in the nature of accord and satisfaction. The only question that could be raised is under the 197th section of the Bankruptcy Act, 1861, which provides that the debtor shall have the benefit of the act in the same manner as if the creditor had proved his debt. This would enable a debtor to come in and stay execution; but, upon the ground stated in the cases referred to, I am of opinion that such a deed cannot be pleaded in bar to an action.

BYLES, J.—I am of the same opinion.

(6) 30 Law J. Rep. (N.S.) Chanc. 345.

(2) 16 Com. B. Rep. N.S. 638; s.c. 33 Law J. Rep. (N.S.) C.P. 296.

(3) 33 Law J. Rep. (N.S.) Exch. 193.

(4) *Ante*, Q.B. 90.

(5) 3 H. & C. 395; s.c. *ante*, p. 70.

The deed is no bar to an action, unless the Bankruptcy Act renders it a bar; but this is not so. The debtor's remedy should be by motion to stay execution, unless by leave of the Bankruptcy Court under the 198th section of the act.

The other JUDGES concurred.

Judgment affirmed.

1865. } KEMPSON AND OTHERS v.
May 9, 10.* } BOYLE AND ANOTHER.

Contract—Broker—Bought and Sold Notes—Variance.

A contract made by the defendants, who were brokers, in their own name, for the purchase of iron for the plaintiffs, was contained in bought and sold notes. The notes differed only in these particulars, that while the bought-note delivered by the brokers to the plaintiffs had the words "Deposit 5s. per ton, brokerage 0 per cent.," the sold-note contained the words "Deposit (blank); brokerage ½ per cent.":—Held, that parol evidence was admissible to shew an arrangement between the brokers and the plaintiffs, by which they required the latter to pay a deposit of 5s. per ton, and that the apparent variance between the notes, so explained by the usage of the parties, was not material.

Declaration by the assignees of Alfred Barker and Anne Maria Barker, bankrupts, on the common *indebitatus* counts.

Pleas—Never indebted; payment to the bankrupts before bankruptcy, and without notice by the defendants of any prior act of bankruptcy; and set-off of money due from the bankrupts before bankruptcy. Issues thereon.

The action was tried, at the Warwickshire Spring Assizes, 1865, before Willes, J., when it appeared that the plaintiffs were assignees of Barker & Co., bankrupts, who, as metal-dealers in Birmingham, had entered into large transactions with the defendants, metal-brokers in London. The defendants used to make purchases for Barker & Co., buying in their own name, and selling to Barker & Co. in their own name, and requiring from them a standing deposit of 5s. a ton on all purchases of iron made to their order. The defendants

were also occasionally authorized to sell for Barker & Co., but were not required in such case to pay any deposit.

On the 31st of December 1863 the defendants purchased from Newby & Co. in their own name for Barker & Co. 5,000 tons of iron, to be delivered in the following April. Barker & Co. being unable to pay the usual deposit, it was arranged that the defendants should hold certain copper, then in their hands, belonging to Barker & Co., as security for the amount of the deposit. The iron was re-sold by the defendants at a loss, and they repaid themselves the difference out of the proceeds of the copper, which had yielded a large profit. Barker & Co. became bankrupts on the 26th of February 1864, and the assignees sought to recover in this action the amount of the profit on the sales of copper the defendants claiming to set off against the profit on the copper the loss arising from the sale of the iron. The plaintiffs contended that there was no valid contract made by the defendants, as brokers, between the bankrupts and the sellers of the iron, and in support of their view relied on a variance between the terms of the bought and sold notes in which the contract was contained.

The defendants maintained that, as they had made a binding contract between the bankrupts and the sellers of the iron, and the plaintiffs were not ready to complete, they had a right to indemnify themselves.

The note delivered to Barker & Co. was as follows:

"Allhallows Chambers, Lombard Street,
London, 31st December 1863.

"*Bought* for account of Messrs. C. Barker & Son from our principals store-keeper's warrants for 5,000 tons (five thousand) of Scotch pig-iron, f. o. b. Glasgow, at 70/6 per ton net cash in Glasgow on 12th March 1864, or before in buyer's option, on seven days' notice being given against said documents.

"Prompt as above.

"*Deposit 5s. per ton by buyer's acceptance, payable 12th March.*

"Discount 0.

"*Brokerage 0 per cent.*

"Pelly, Boyle & Co.,

"Sworn metal-brokers."

* Decided in Easter Term.

The sold note, which corresponded with the above with the exception of the *deposit* being *nothing* and the *brokerage* being $\frac{1}{2}$ per cent., was as follows :

"Allhallows Chambers, Lombard Street,
London, 31st December 1863.

"Sold for account of Messrs. Newby & Co. to our principals storekeeper's warrants for 5,000 tons (five thousand) of Scotch pig-iron, f. o. b. Glasgow, at 70/6 per ton net cash in Glasgow on 12th March 1864, or before in buyer's option, on seven days' notice being given against said documents.

"Prompt as above.

"Deposit.

"Discount 0.

"Brokerage $\frac{1}{2}$ per cent.

(Signed) "Pelly, Boyle & Co."

The jury found a verdict for the defendants, the Judge reserving leave to move to enter a verdict for the plaintiffs for 2,850*l.*, the amount of the loss on the iron bought on the 31st of December 1863, on the ground that there was no binding contract as to that parcel of iron.

Macaulay having obtained a rule accordingly, citing *Townend v. Drakeford* (1),—

Lush, Hayes, Serj. and Beasley shewed cause, contending that there was really no variance between the notes such as to affect the validity of the contract. The defendants paid for the iron, and it was for their own security, and not for that of the sellers, that they required the deposit of 5*s.* per ton. The bankrupts being unable to pay this deposit, the arrangement was made about the copper. This arrangement was between Barker & Co. and the defendants, and had nothing to do with the contract between the defendants and the sellers. The defendants gave Barker & Co. a note describing the contract, and having attached to it a memorandum of the further arrangement between Barker & Co. and their brokers, a sort of postscript from the brokers to their principals. This can no more amount to a variance than the difference as to the brokerage, which is a matter between the broker and the seller. *Townend v. Drakeford* (1) is entirely different from this case, for there the broker had nothing to do with the matter, and was not liable at all. In *Rogers*

v. Hadley (2) parol evidence was admitted in support of an equitable plea, to shew that the bought and sold notes did not really set out the contract between the parties. So in *Bold v. Rayner* (3) Parke, B. said, that the variances there were all capable of being explained by mercantile usage, and that when so explained they were apparent only, and not material. That the bought note alone bound the parties here, is clear from *Humfrey v. Dale* (4).—(*Sicowright v. Archibald* (5), and *Thornton v. Kempster* (6), were also cited and distinguished.)

Field and Wills (*Macaulay* with them), in support of the rule, contended that the variance between the notes was fatal to the validity of the contract. Barker & Co. were under no liability; there was no contract with them under the Statute of Frauds; they could not have sued the sellers for not delivering the iron. Again, on the face of the contract the deposit was to go to the seller. In *Townend v. Drakeford* (1), Lord Denman, C.J. held that the bought and sold notes were the contract, and "not that which is written by the broker in a book which nobody sees."

POLLOCK, C.B.—The evidence shews clearly that the deposit was to go to the brokers, and there is no reason why evidence should not be given to shew that this was the case; the variance when so explained becomes immaterial. The rule must be discharged.

MARTIN, B.—The very nature of bought and sold notes is such that there may be a statement in the one which is not found in the other. I think that there is no material variance between them in this case.

PIGOTT, B.—I have not heard the argument for the plaintiffs, but I think that the notes do not differ in any material respect.

Rule discharged (7).

(2) 2 H. & C. 227; s. c. 32 Law J. Rep. (N.S.) Exch. 241; see per *Wilde, B.*, p. 253.

(3) 1 Moo. & W. 343.

(4) 7 E. & B. 266; s. c. 26 Law J. Rep. (N.S.) Q.B. 137; in Exch. Chamber, F. B. & E. 1004; s. c. 27 Law J. Rep. (N.S.) Q.B. 390.

(5) 17 Q.B. Rep. 103; s. c. 20 Law J. Rep. (N.S.) Q.B. 529.

(6) 5 Taunt. 786.

(7) Bramwell, B. was not present when judgment was delivered.

(1) 1 Car. & K. 20.

1865. }
June 8. } SCOTT v. BERRY.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134.)—Composition Deed—Parties—Assenting and Non-assenting Creditors—Equality.

A deed of composition made between J. B. (the debtor) of the first part, J. K. and B. B. (two sureties for securing the composition) of the second part, and the several other persons whose names are hereunto subscribed and seals affixed, of the third part, after reciting that the parties of the second and third parts, creditors of J. B. had agreed to accept a composition of 3s. in the pound, on having the same secured by the joint and several promissory notes of J. B, J. K. and B. B. payable in two equal instalments on the 20th of August and the 20th of September, and that J. B, J. K. and B. B. had made and delivered to each of the parties of the third part, their joint and several promissory notes, contained the following covenant and release: "J. B, J. K. and B. B. do and each of them doth covenant with the parties of the third part, and with each and every of them, that they, J. B, J. K. and B. B, or one of them, shall pay the several promissory notes as they shall respectively become due, and shall also make and deliver to all the other creditors of the said J. B. like joint and several promissory notes, payable at the several times and in manner aforesaid, for the like composition of 3s. in the pound upon their respective debts, and shall pay such composition to each of the last-mentioned creditors at the several times and in manner aforesaid, and the several parties of the third part and J. K. and B. B. do and each of them doth covenant with J. B. that they and each of them have accepted and will accept the said promissory notes by way of composition and payment of 3s. in the pound upon the amount of their several debts in full discharge of their debts, and that upon the payment of the said promissory notes they and each of them will execute to J. B. a general release and discharge from their debts." Three fourths in value of J. B.'s creditors had in writing assented to and approved of the deed, but the only parties who had executed the deed were the debtor and the two sureties:—Held, that as the

assenting creditors had not executed the deed, and the non-assenting creditors were not parties to it, neither class of creditors could sue on the deed, and that both classes were on an equality, and that the deed was valid.

Declaration, by indorsee against maker, on a bill of exchange for 100*l.* at three months after date, and for money lent, and for interest, and for money due on accounts stated.

Plea, by way of equitable defence, that after the accruing of the plaintiff's claim, and after the 11th of October 1861, the defendant was indebted to the plaintiff and divers other persons, and thereupon while he was so indebted, an indenture, bearing date the 28th of June 1864, was made as follows: This indenture made the 28th of June 1864, between John Berry, of Gomersal, in the county of York, maltster, of the first part, James Knowles, of Gomersal aforesaid, merchant, and Benjamin Berry, of Leeds, in the county of York, draper, of the second part, and the several other persons whose names are hereto subscribed and seals affixed of the third part. Whereas the said John Berry being unable to pay his creditors the full amount of their debts, hath prepared to pay to the whole of his creditors a composition of 3s. in the pound upon their several debts, and whereas the parties hereto of the second and third parts, who are creditors of the said John Berry in the several sums set opposite to their respective names hereunto subscribed, have agreed to accept the said composition on having the same secured by the joint and several promissory notes of the said J. Berry, and of the said J. Knowles and Benjamin Berry as his sureties, bearing even date herewith, and payable in two equal instalments on the 20th of August and the 20th of September following, and by the grant and assignment hereinafter contained. And whereas J. Berry and J. Knowles and B. Berry have accordingly made and delivered to each of the said parties hereto of the third part, their joint and several promissory notes for payment of the said composition at the several times and in manner aforesaid. And whereas a majority in number representing three-fourths in value of

the creditors of J. Berry, whose debts respectively amount to 10*l.* and upwards, have, before or after the execution hereof by him in writing, assented to and approved, and do hereby assent to and approve of the deed which is made and intended to be executed, registered and carried into effect in pursuance of and in manner provided by the Bankruptcy Act, 1861. Now, this indenture witnesseth, that in pursuance of the said agreement, and for the considerations herein mentioned, they, the said J. Berry, J. Knowles and B. Berry, do hereby, for themselves, their heirs, executors and administrators, and each of them, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree with and to the said parties hereto of the third part, and with and to each and every of them, that they, J. Berry, J. Knowles and B. Berry, or one of them, shall and will well and truly pay the said several promissory notes as and when they shall respectively become due, and shall and will also make and deliver to all the other creditors of the said J. Berry like joint and several promissory notes payable at the several times and in manner aforesaid for the like composition of 3*s.* in the pound upon their respective debts, or shall and will pay such composition to each of such of the last-mentioned creditors at the several times and in manner aforesaid. And the said several parties of the third part, and J. Knowles and B. Berry (so far as relates to their respective debts) for themselves severally and respectively and for their several respective heirs, executors and administrators, do and each of them doth hereby covenant with the said J. Berry, his executors and administrators, that they and each of them have accepted and will accept the said promissory notes by way of composition and payment of 3*s.* in the pound upon the amount of their several and respective debts, and in full discharge of the said J. Berry, his executors and administrators and his and their estate and effects from the same, and that, upon payment of the said promissory notes, they and each and every of them will, at the costs and charges of the said J. Berry, his executors and administrators, execute and give to him or them a general release and discharge from their several and respective

debts. The deed further contained an assignment unto J. Knowles and B. Berry, of all the real estate of J. Berry; of all his stock-in-trade, book debts, ready-money, goods, chattels and personal estate, in trust to sell and realize the same, and to pay the expenses relating to the preparation and carrying into effect of the deed, and then to pay the composition of 3*s.* in the pound upon all the debts, and to take up and provide for the promissory notes as the same should become payable, and to pay the ultimate surplus (if any) of the monies to J. Berry. The deed was executed by J. Berry, J. Knowles and B. Berry.

The plea then averred that a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards, had, in writing, approved of, or assented to, the said deed, and the said trustees appointed by the said deed had duly executed the same, and the said deed was duly registered, and the defendant had performed all conditions precedent to make the deed valid and binding on the plaintiff, and has always been ready and willing to pay to the plaintiff the said composition of 3*s.* in the pound upon his debt, as by the deed provided, and tendered and offered to pay the same to the plaintiff at the times and in the manner in the deed provided, and the plaintiff refused to accept the same; and the defendant brought into court the sum of 15*l.*, being the amount of the composition upon the plaintiff's debt, ready to be paid to the plaintiff, and, all conditions having been performed, the plaintiff was bound by the deed as if he had been a party thereto and had executed the same.

Replication that the defendant did not make the tender and offer as in the plea alleged. Upon which issue was joined.

The cause was tried, at the first sittings in Trinity Term, in Middlesex, before Pigott, B., when it was proved that three-fourths in value of the creditors had in writing assented to or approved of the deed; but the only parties who had executed the deed were the debtor and the two trustees. It was also proved that the composition had been tendered to the plaintiff. The jury found a verdict for the defendant.

T. Jones, in the same term, obtained a rule calling on the defendant to shew cause why judgment should not be entered for the plaintiff, notwithstanding the verdict found for the defendant, on the ground that the deed set forth in the plea was not binding on the plaintiff, and gave advantages to the parties thereto of the third part which it did not give to the plaintiff or other creditors not parties to the deed; that the covenant to release was conditional, and that the proviso for the surplus going to the defendant was unreasonable.

Hayes, Serj. and *Kemplay* shewed cause.—This is a deed between the debtor of the first part, two sureties of the second part, and the several other persons whose names are subscribed to the deed of the third part; and the deed provides for the payment of a composition of 3*s.* in the pound to the whole of the creditors of the debtor, by two instalments payable on the 20th of August and the 20th of September, and it assigns the whole of the debtor's property to the sureties. The debtor and the sureties covenant with the parties of the third part to pay the promissory notes as they become due, and the deed contains a release of the debtor by the parties of the third part upon the payment of the promissory notes. Now, it is said that this deed is not binding upon the non-assenting creditors. It will be argued that it gives greater advantages to the assenting creditors than it does to the non-assenting creditors; that the one class being parties to the deed have a remedy on the covenant in the event of the promissory notes not being paid, and that the other class, not being parties, cannot sue on the deed. But there is no inequality on this ground, because no creditor has executed the deed.

[*MARTIN, B.*—Is not the deed invalid as regards the non-assenting creditors because there is no direct covenant with them? How are they to get their composition? They will have to rely on the covenant with the trustees.]

The plaintiff has had a tender of the composition made to him, which he refused. The allegation in the plea is, that three-fourths of the creditors have assented to the deed; it is not necessary that they should execute the deed; the only parties

who have executed are the trustees; no creditors have executed the deed, therefore all the creditors are on the same footing and there is no inequality.

[*BRAMWELL, B.*—It was surely intended that the creditors should execute. According to your argument, it is a good deed until some one creditor executes it.]

It is sufficient for the present argument that no creditor has executed; whether a creditor can execute the deed after registration may be considered a doubtful point. This case is distinguishable from *Benham v. Broadhurst* (1). They also contended that the covenant to pay the promissory note was a joint covenant. They cited *Bradburne v. Botfield* (2) and *Anderson v. Martindale* (3).

T. Jones, in support of the rule.—In *Martin v. Gribble* (4) this Court has adopted *Ex parte Cockburn* (5), and that case shews that this deed is invalid and not binding upon the non-assenting creditors. The creditors who have subscribed to the deed of the third part have had their promissory notes delivered to them. The non-executing creditors have to rely only upon the covenant that the notes shall be made and delivered. The parties who have their promissory notes may sue at once on the notes if they are unpaid; but the other creditors cannot do so; they cannot sue on the deed, or if they can it must be through third persons. It is clear also that one class of creditors could obtain judgment in a speedier mode than the other; the one could sue under the Bill of Exchange Act, while the others, if they can sue at all, must sue on the covenant. Again, the release is only a conditional release, and cannot be pleaded even by way of equitable defence.

[*MARTIN, B.*—The deed may not operate as a release, but the debt having been tendered and paid into court, why should it not operate as an accord and satisfaction? *CHANNELL, B.* referred to *Garrod v. Simpson* (6).]

That case only decides that if a deed be good it may be pleaded by way of

(1) *Ante*, 61; s. c. 3 H. & C. 472.

(2) 14 Mee. & W. 559; s. c. 14 Law J. Rep. (N.S.) Exch. 330.

(3) 1 East, 497.

(4) *Ante*, 108; s. c. 3 H. & C. 631.

(5) 33 Law J. Rep. (N.S.) Bankr. 17.

(6) *Ante*, 70.

accord and satisfaction. Here, if the debtor went to equity for relief he would not be entitled to an absolute injunction. He could only ask for an injunction on the condition of his paying the composition.

POLLOCK, C.B.—This is an application on the part of the plaintiff for judgment *non obstante veredicto*. The plaintiff has sued the defendant for a debt, and the defendant has set up as a defence a deed of composition under the Bankruptcy Act, 1861. The jury have found the issue on this plea for the defendant. The plaintiff now asks, notwithstanding the verdict in favour of the defendant, that judgment be entered for him on the ground that the deed is no answer to the action. This is the short question the Court are called on to decide, and we are all of opinion that we cannot give the plaintiff judgment, notwithstanding the verdict; in other words, that substantially the deed is an answer to the action. The plaintiff's counsel, in his argument, contended that the present case was governed by a recent decision (7) in this Court, founded upon the opinion of the Lord Chancellor in *Ex parte Cockburn* (5). It is argued that the creditors who do not execute have no covenant upon which they can sue, or by means of which they can obtain that which the deed meant to give them. That really is not so. It is true that there is no covenant with them; but they have a remedy in the names of others, and at law can obtain all the benefit the deed intended them to have. Upon the whole, without going further into the matter, the deed having been assented to and approved of by the requisite number of creditors, it is an answer to the present action, and the rule ought to be discharged.

MARTIN, B.—I am of the same opinion. I do not suppose that what I am about to say will be satisfactory upon this subject, for I myself have never given a judgment upon these deeds satisfactory to myself, and I have never read a judgment satisfactory to my mind. I therefore do not expect that anything I am about to say will be satisfactory to other people. I believe that this arises from the difficulty of the subject itself. The law with respect to composition-deeds is comprised in a very few sections of an act of parliament, which

have been applied by persons in framing such deeds to objects of their own; in endeavouring to bring themselves within the provisions of the act of parliament their sole aim has been to secure an arrangement beneficial to themselves; the matter now has got beyond the reach of reason and common sense. I think that the plea, pleading the deed, may be held to be valid on a motion for judgment *non obstante veredicto*, for I apprehend in such a case the Court is entitled to look at everything which may reasonably support the plea, and to make every intendment which will give effect to and uphold the judgment. Taking it, then, from the averments of this plea, that no single creditor has executed this deed, and that the debtor and his two sureties are the only parties who have executed it, and that three-fourths in number of the creditors have assented to and approved of the deed, and have agreed to take a composition of 3s. in the pound on the amount of their debts, payable by promissory notes,—if that be the true state of the facts, then beyond all manner of doubt there is no inequality. No creditor has signed the deed, and they are all in the same position. If this is really the transaction, the deed would be a composition-deed within the very comprehensive terms of the 192nd section. If this deed be read as a proposal by the debtor and his sureties to give all creditors a composition of 3s. in the pound, payable by promissory notes at a certain time, and all the provisions of the act have been complied with, I am not prepared to say such a deed would be void. With respect to what has been said as to the distinction between this deed and the deed we had before us in a case a short time ago (7), in which, although I gave judgment that the deed was void against non-assenting creditors, I should have been very glad to have supported the deed if I could have done so, that case turned entirely on the application of a rule of law that persons who are not made parties to a deed cannot sue on the covenants of a deed. On the whole, it seems to me the plaintiff

(7) *Martin v. Gribble*, *ante*, 41. See also *The Chesterfield and Midland Silkstone Colliery Company (Limited), v. Hawkins*, *ante*, p. 121.

cannot have judgment *non obstante veredicto*, and the rule ought to be discharged.

BRAMWELL, B.—I agree with my Brother Martin. I have not only never read a judgment relating to composition-deeds under section 192. at all satisfactory to myself, but, on the contrary, to my mind, all the judgments have been most unsatisfactory. I have never read, and I have never heard of, a satisfactory judgment upon the subject. I am content that our judgment should be for the defendant. I will only further say that all the creditors in a composition-deed under section 192. ought to be equally treated. Yet it seems to me that there ought to be some qualification to this rule, and if you treat the non-assenting creditors as well as they should be treated, the deed ought not to be void because you treat the assenting creditors better; that is to say, if you do your best to give the non-assenting creditors—who will not come in—a right, there is no harm in giving the assenting creditors a better right. If the debtor gives the assenting creditors a covenant for the payment of the composition, and not being able to covenant directly with the non-assenting creditors because they will not be parties to the instrument, he enters into a covenant with third parties on their behalf, and so does his best to give them the same right, they ought not to be allowed to complain that they are not on equal terms with the other creditors.

CHANNELL, B.—After what has fallen from my Lord Chief Baron and the judgments of my learned Brothers, I cannot hope that the judgment I am about to deliver will be satisfactory to any one. It proceeds upon a short ground. This is an application that judgment may be entered for the plaintiff notwithstanding the verdict found for the defendant. That depends upon the question whether the plea is an answer to this action. Now, in the shape in which this case comes before us, there is imposed upon the Court the obligation of reading the plea in a way which will make it a defence to the action, if it can possibly be so read. I am of opinion that it can. It is necessary, in order to sustain the plea as a defence to the action, that the deed should be a good deed—that is, a good deed so far as it is disclosed by the plea. The deed

professes to be a deed that was intended to be executed by three different parties. The first party is the debtor; the second party are two persons who are trustees of the property, or sureties for the payment that the composition-deed was intended to secure; and the last are the persons whose names are subscribed, as of the third part. I apprehend the Court are entitled to read this as a deed which is executed only by the parties of the first and second parts, the debtor and the trustees; and there is no obligation by any person whose execution of it, if it had taken place, would have brought that person within the parties of the third part. That being so, whatever disadvantage there may be to creditors under this deed applies equally to all. They are all in the same position. No creditor has signed the deed; it is therefore free from the vice of inequality. There is no covenant upon which any of the creditors can sue; and this distinguishes the present case from *Ex parte Cockburn* (5) and the case (8) in this Court which followed it—a case where the deed was executed by some creditors, and where those creditors who executed had a right of action upon the covenant, which those who had not executed had not. The Court is therefore relieved from considering the point which arose in that case; and I do not see that we interfere with the Lord Chancellor's decision in *Ex parte Cockburn* (5), or with the case that followed it in this Court. Reading the plea as averring that the deed has not been signed by any creditor, I conceive it to be a good deed, and to afford an answer to the action. It is not set up by way of release, but by way of accord and satisfaction; and if *Garrod v. Simpson* (6) is a case to be questioned, it should be questioned in a Court of error; at least, this Court will act upon its own decisions, and, consistently with that case, the plea is a good plea. For these reasons, I am of opinion that this rule should be discharged.

Rule discharged.

(8) *The Chesterfield and Midland Silkstone Colliery Company (Limited) v. Hawkins*, ante, 121.

[IN THE HOUSE OF LORDS.]

1865. }
Feb. 14, 16, 17. } PARKER v. TOOTAL

Will — Devise — Construction — Estates Tail by Implication — Gift to a Class.

C. by his will gave his estate to his grandson T. C. for life, with remainder to "the first son of the body of the said T. C. severally and successively in tail male" of the name of C; and for want of such lawful issue of that name, either by his said grandson T. C. or his son J. C, then amongst his "daughters and their children" in fee:— Held, that estates tail were given to the first and other sons of T. C, and that the gift over to the daughters and their children was a gift to a class, and that a child of a daughter who died before the date of the will was not within the gift.

Semble, that estates tail by implication were given to T. C. and J. C. after the estates tail of the sons of T. C.

This was an appeal from a judgment of the Court of Exchequer Chamber(1), affirming a judgment of the Court of Exchequer, in an action of ejectment brought by John Barrow, since deceased, against the defendant in error.

The action was brought to recover a share of a freehold estate called the "Waste," otherwise "Weaste," in the county of Lancaster, formerly the property of Thomas Chorlton, the testator hereinafter mentioned. The defendant appeared to the writ of ejectment, and defended.

The cause came on for trial, at Liverpool, at the Summer Assizes, 1859, when, by consent, a verdict was found for the defendant, subject to a

SPECIAL CASE.

The said Thomas Chorlton died in the year 1799, having made his will, dated the 5th of September 1799, which will contained the following devise: "I give and devise unto my grandson Thomas Chorlton, son of the late Richard Chorlton, all that my estate where I now live, and all that other estate and premises thereto belonging, situate in Pendleton aforesaid, called or known by the name of Weaste Estate, now in the tenure or holding of

(1) 7 Hurl. & N. 962.

Thomas Walker, his assigns or under-tenants, for his own use during his natural life, with remainder to the first son of the body of the said Thomas Chorlton, lawfully begotten, severally and successively in tail male of the name of Chorlton; and for want of such lawful issue of that name, either by my said grandson Thomas Chorlton or my son James Chorlton, then I give and devise the said estate where I now live and the Weaste Estate amongst my daughters and their children, share and share alike, to hold unto them, his, her or their heirs for ever as tenants in common, but not as joint-tenants."

Thomas Chorlton the grandson, the only son of the said Richard Chorlton, survived the testator and was his heir-at-law, and died in October 1838, without having had any child (unless a child or children who died in infancy before his death).

James Chorlton, the second and only other son of the said testator, died in March 1804, having had an only son, Thomas Chorlton, who was born in October 1799, and died in October 1825, without issue.

The testator had six daughters, one of whom, named Ann, married John Barrow, and died intestate leaving several children, among whom was a son, John, her heir-at-law, who died in 1853, intestate, leaving the late plaintiff, John Barrow, his eldest son and heir-at-law.

The plaintiff John Barrow claimed a share of the said testator's estate, under the devise to the daughters of the said testator and their children, and commenced the present action on the 14th of July 1858.

The defendant claimed to be entitled to the whole estate under a feoffment made, and a recovery suffered by Thomas Chorlton, the son of Richard, and the heir-at-law of the testator, more than fifty years since, viz in the year 1810.

A special case was stated and came on for argument before the Court of Exchequer on the 30th of May 1860, when the plaintiff declining in that stage of the proceedings to argue the case, judgment was given for the defendant.

Error was thereupon brought in the Exchequer Chamber, and the plaintiff John Barrow having died, his death was duly suggested, and the proceedings were continued in the name of the present plaintiff

in error, who was the legal representative of the said John Barrow.

The special case was heard before the Court of Exchequer Chamber, on the 4th of February 1862, when the Court affirmed the judgment of the Court of Exchequer, on the grounds of the length of time which had elapsed, and the repeated decisions hereinafter referred to of other Courts upon the construction of the testator's will.

It appears from the reports of the cases of *Rushton v. Craven* (3) and *Mellish v. Mellish* (3), that the said Thomas Chorlton the son of Richard, after the feoffment and recovery by him in 1810, contracted to sell the estate to one William Craven, and that the said William Craven objecting to the title, on the ground that the said Thomas Chorlton had not by such feoffment and recovery acquired the fee simple in the premises, the said Thomas Chorlton filed a bill in the Court of Chancery against him for specific performance; and that on a reference to the Master a report was made in favour of the title: that exceptions to the report were thereupon taken by the defendant, and that upon the hearing of the exceptions, a case was sent from the Court of Chancery to the Court of King's Bench for its opinion, and the certificate of the Court of King's Bench was in favour of the title, viz.—That the said Thomas Chorlton took under the will of the testator an estate in tail male, and had by the feoffment and recovery acquired the fee simple, and such certificate was confirmed by Lord Eldon, who was then Lord Chancellor, and specific performance was decreed against the said William Craven.

The said William Craven having completed his purchase, mortgaged the premises to one Rushton, who filed a bill of foreclosure, *Rushton v. Craven* (2), in the Court of Exchequer in Equity, and by the decree made in that cause the premises were directed to be sold. William Croft, the purchaser of certain lots, part of the premises, including those the subject of the present action, objected to the title, and an order of reference as to the title was made to the Master, who certified that a good

title could be made; and, thereupon, Croft filed exceptions to this report, and the exceptions were argued before the Court of Exchequer in Equity, when judgment was reserved, and, subsequently, the Chief Baron Richards delivered the judgment of the Court, overruling the exceptions and confirming the report.

Manisty and Hardy, for the appellant, contended that Thomas Chorlton, the grandson, took only an estate for life under the will, with remainder to his first son, or his first and other sons successively, in tail male, with remainder by implication to the first son of James or his first and other sons successively in tail male, with remainder to the daughters and their children, and that the last remainder being a vested remainder was not defeated by the recovery. They cited *Baker v. Tucker* (4), *Blackborn v. Edgley* (5), *Lewis v. Waters* (6), *Wilkinson v. Adams* (7), *Evans v. Astley* (8), *Tenny v. Agar* (9) and *Daintry v. Daintry* (10).

Sir Hugh Cairns and Lewin, for the respondent, contended that the expression "the first son of Thomas Chorlton," was *nomen collectivum*, as appeared from the subsequent words "severally and successively," and that Thomas Chorlton took an estate tail by the rule in *Shelley's case*; and further, the words "for want of such lawful issue," must have meant "for want of male issue," as the word "issue" could not apply to an individual, which would give an estate tail to Thomas. The intention of the testator was, that estates tail should be given to Thomas and James. If no estate were devised to James or his issue, the remainder to the daughters and their children was a contingent remainder, but whether the remainder was vested or contingent it was equally destroyed by the recovery suffered by Thomas. Lastly, the gift to the daughters and their children was a gift to a class, and referred to daughters and children of daughters living at the time of the

(2) 2 Price, 599.

(3) 2 B. & C. 524; s. c. 3 Dowl. & Ry. 808; 2 Law J. Rep. K.B. 45.

(4) 3 H.L. Cas. 106.

(5) 1 P. Wms. 600.

(6) 6 East, 336.

(7) 1 Ves. & B. 422.

(8) 3 Burr. 1570.

(9) 12 East, 252.

(10) 6 Term Rep. 307.

testator's death or at the date of his will; and the plaintiff was excluded from the gift as his mother died before the date of the will.—They commented on the authorities cited for the appellant, and cited *Robinson v. Robinson* (11), *Mellish v. Mellish* (3), *Doe v. Garrod* (12), *Doe v. Davis* (13), *Raggett v. Beatty* (14), *Lewis v. Puxley* (15), *Doe v. Gallini* (16), 2 *Jarm. on Wills*, 456, *Doe v. Halley* (17), *Jack v. Fetherston* (18), *Cole v. Sewell* (19), *Fearne Cont. Rem.* 522, n. 9, *Clay v. Pennington* (20), and cases cited in 2 *Jarm. on Wills*, 726, *Gardiner v. Sheldon* (21), *Lancashire v. Fox* (22), *Ranelagh v. Ranelagh* (23), *Neighbour v. Thurlow* (24) and *Barnet v. Barnet* (25).

Manisty, in reply.

The LORD CHANCELLOR (Lord Westbury).—My Lords, your Lordships are now called upon to undertake a task of great difficulty, and one in which we must proceed with very great caution. You are required, on the part of the appellant, to arrive at a conclusion which would have the effect of subverting the judgment—the opinion, upon the construction of this difficult case, given by the Court of Queen's Bench about the year 1811, and which was confirmed by Lord Eldon shortly afterwards, probably in the year 1812, and which was adhered to by

the Lord Chief Baron of the Court of Exchequer, after a long and elaborate argument, in the year 1823.

I need not point out to your Lordships that the interval of time which has elapsed since the year 1812 has of course given rise to the well-founded conclusion on the part of the owners of this estate that they have a right to rely with certainty upon the title derived from that judgment. At the same time, the law admits of the present claim being made by the appellant; and your Lordships, with the caution to which I have adverted, must undoubtedly undertake the task of determining now whether, in your judgment, those former decisions by which, notwithstanding the lapse of time, you are not bound, are or are not right and correct expositions of the meaning of this will.

It is necessary, in the first place, to state shortly, that the will which you have to construe was made in the year 1799. The testator by whom that will was made, Thomas Chorlton, appears to have had an eldest son, Richard Chorlton, who had died previously to the will, leaving a son Thomas. Thomas, therefore, claiming under the testator, was, at the time of the making of the will, his heir-at-law. The testator also appears to have had a second son of the name of James. Richard, as I collect from the case, left no other son than Thomas. Thomas, at the time of the will, was of the age of twenty-one years, and was unmarried. James, the second son of the testator, was married, and it was probable he would have issue within a very short time after the time when this will was made. In that state of things the testator devises the property now in question unto his grandson Thomas for life, in a definite and express form of limitation; and then, after that gift, follow the words which create the controversy that your Lordships have now to determine. First of all the words are, "with remainder to the first son of the body of the said Thomas Chorlton lawfully begotten severally and successively in tail male of the name of Chorlton." The sentence is defective. We are familiar, no doubt, with sentences of this description which ordinarily are the mode of expressing gifts in tail to first and other sons of any particular individual.

(11) 2 Ves. 225.

(12) 2 B. & Ad. 87.

(13) 4 *Ibid.* 43; s.c. 1 *Law J. Rep.* (N.S.) K.B. 244.

(14) 5 Bing. 243; s.c. 2 M. & P. 512; 7 *Law J. Rep.* C.P. 9.

(15) 16 Mee. & W. 733; s.c. 16 *Law J. Rep.* (N.S.) Exch. 216.

(16) 5 B. & Ad. 621; s.c. 2 N. & M. 619; 3 *Law J. Rep.* (N.S.) K.B. 71: (in error) 3 Ad. & E. 340.

(17) 8 Term Rep. 5.

(18) 2 Hud. & B. 320.

(19) 4 Dr. & W. 1; s.c. 2 H.L. Cas. 186.

(20) 7 Sim. 370; s.c. 6 *Law J. Rep.* (N.S.) Chanc. 183.

(21) 1 Freem. 11.

(22) Cas. t. Talb. 262.

(23) 12 Beav. 200; s.c. 19 *Law J. Rep.* (N.S.) Chanc. 39.

(24) 28 Beav. 33.

(25) 29 *Ibid.* 239.

The first question is, whether the form of expression "to the first son" must be taken as a defective form of expression, by force of the words "severally and successively in tail male," because it is obvious that those words would not be applicable to the first son, if the words "first son" are taken as the intended form of expression, and as a *designatio* of one individual.

It is therefore, I think, reasonably clear, that upon the whole formula of words which we find here, you must supply, by way of addition to the words "first son," "the first and other sons in tail male," or otherwise you will refuse to give effect to the will, and will in reality strike out of the will the subsequent words, "severally and successively." That, I apprehend, is reasonably clear.

If that be so, the next point which demands the attention of your Lordships is, what is the effect of the words "for want of such lawful issue of that name"? The difficulty which here arises is, to determine whether those words are no more than the ordinary words intended to carry the son's estate, and to be expressive of the fact of the former estates having either failed of taking effect at all, or, if they did take effect, of having come to their natural expiration. Upon this there is considerable controversy. It is said, on the part of the appellant, that the referential construction is that it is the rule of interpretation which confines the word "such" to the repetition only of the antecedents as they are found in the will. It is contended, I say, by the appellant, that that rule of construction has now been firmly established, and he insists therefore that these words, "for want of such lawful issue of that name," must be limited entirely to the events of there having been no such lawful issue, or of the lawful issue comprehended within the antecedent words having ceased to exist.

On the other hand, it is contended by the respondent, with more force, that these words indicate a special intention on the part of the testator to provide for all the male issue of his loins bearing his name. And the case is put (which the respondent has a right to put) of this contingency: Suppose the testator to have a son who died in his lifetime, leaving sons, and then he made a will in which he repeats limita-

tions such as these—uses limitations such as these—"to my first and other sons." That is the ordinary limitation, and would not comprehend or include the grandson, the son of his deceased son. Yet it is palpable, from the form of expression used to indicate the gift over, that it was the testator's desire that all the issue of his name should be provided for. The respondent therefore insists that if that case had occurred, and were now presented to the Courts, the Courts would arrive at the conclusion that the referential word "such" was entirely satisfied by the antecedent words "male issue," and that the words I am referring to, namely, "for want of such lawful issue," would, in that case, be read "for want of male lawful issue."

Now, if that be the interpretation which the words reasonably bear, and it being an interpretation in aid of an object, or express intention, on the part of the testator, the effect of that mode of rendering the relative word "such" would be to annex to the special limitation to the first and other sons in tail male a general expression that the estate should not go over until there was a universal failure of male lawful issue of Thomas. Consequently, in the event I supposed, of Thomas having had a grandson born to him before the date of the will, the estate would not go over without including that grandson; and in order to include that grandson we should, upon the established rules of interpretation, give to Thomas by necessary implication, in order to affect the estate, an estate in tail male by way of remainder after the limitations to the first and other sons of Thomas.

Now I cannot but infer that that was the mode of interpretation adopted by the Court of Queen's Bench, and sanctioned and approved of by Lord Eldon. Unfortunately, it seems that this case was argued in the Court of Queen's Bench after Lord Eldon had arrived at that unfortunate conclusion that the certificate sent by the Court of common law to the Court of Chancery should contain no reasons for their determination.

It is probably an unfounded story, but still it is the story, that Lord Eldon was much in the habit of criticizing the language of the certificates that accom-

panied those decisions, and hence it is said that the conclusion of the Court of Queen's Bench was arrived at. I advert to that story only for the purpose of saying, that as it was confessedly Lord Eldon's habit to scrutinize with much accuracy the certificates of the Courts of common law, it is not likely that he would have acquiesced in the conclusion of the Court of Queen's Bench unless he had been satisfied that that was the fair interpretation of the will. Nay, further, he must not only have been satisfied that it was a reasonable interpretation, but that it was a proper interpretation, because he confirmed the certificate for the purpose of forcing the purchaser to take the title. That, my Lords, having regard to the established rules of the court of equity, and the forbearance from compelling a purchaser to take a doubtful title, is a sufficient indicium of Lord Eldon's satisfaction with the construction that had been put upon these words of devise.

Now, undoubtedly, it is an extremely difficult thing, after this long interval of time, to arrive at any different interpretation; but, nevertheless, it is your Lordships' duty not to accept that construction merely upon the credit due to so high an authority, unless you conscientiously believe it to be the construction which must be called for by the words and does effectuate the intention of the testator, as it is to be collected from the will.

Now there is very much to be said in favour of that construction, because you give effect to every word, though you give to the word "such," as I have already observed, a limited operation as a word of reference. But the construction by which you are able to give to Thomas an estate in tail male in remainder upon the limitations to his first and other sons, also enables you to give, by a parity of reasoning, the same estate tail in remainder to James; and, then, my Lords, we get the ultimate remainder to the daughters as a vested remainder expectant, and consequential upon a series of other remainders; and the whole scheme of the will is complete, and the intention of the testator is thus put beyond the power of being defeated except in the manner in which it was defeated, namely, that at that time of day contingent remainders were not protected if there were

no trustees to preserve them, and the limitations to first and other sons of Thomas were at the mercy of Thomas; for the life estate of Thomas coalescing with the remainder given in tail enabled him to suffer a new recovery and to create a new title by the destruction, or by preventing the possibility of the remainders to his first and other sons from subsequently taking effect.

I am very much inclined, therefore, to recommend you to say that that reasonable interpretation, satisfying, as it does, the language of the will, though it does not carry the principle of referential construction to the full extent to which it has been now carried by subsequent cases, yet it is a construction that satisfies every word, and I think makes the will agree in every part, and supplies an interpretation which accounts for the antecedent decisions, and which interpretation, therefore, being recommended by those decisions, comes with great weight to the minds of your Lordships.

But if that be not the construction, then the only other construction which the subsequent words admit of would be this: If we take the words "for want of such lawful issue of that name" to be simply words, as I have said, introductory of the remainder, and expressive only of the expiration of the antecedent estates, then the words that follow, "either by my grandson Thomas Chorlton, or my son James Chorlton," can be expressive only of this: in default of such issue male by my son Thomas as would be entitled to take under the antecedent limitations of this particular will, and also in default of such issue male of my son James as would be entitled to take, under similar limitations to his first and other sons, then to my daughters; and if the words that are here found are expanded and unfolded in the manner I have expressed, the question arises, whether the defective former expression being amplified in the manner I have stated, that amplifying form of expression would or would not give to the first and other sons of James estates correspondent to those which are limited to the first and other sons of Thomas by a necessary implication, or whether they would be expressive only of a contingent

event which must happen, in addition to the expiration of the antecedent limitations, before the remainder to the daughters would take effect; and, consequently, the remainder to the daughters would not be a vested remainder expectant on the determination of the estates limited to the first and other sons of Thomas, but would be a remainder that would arise and take effect only in the event of there also happening, before the limitations to the sons of James came to an end, the further contingency of there being no issue male of James.

There is the great difficulty in the case, whether these words shall be satisfied by the expression of that contingency, or whether the words be taken to express that contingency, and shall, of necessity, also receive this further construction of being not merely expressive of a contingency, but of giving estates also to the first and other sons of James correspondent to those already expressly giving to the first and other sons of Thomas.

Upon this particular point I quite agree with some remarks made at the bar, that the older cases are no longer to be regarded as safe guides in such an inquiry. The latitude so often given as to the doctrine of implication may be founded upon two grounds: either where the implication arises by a form of expression which necessarily, from the very effect of the words, involves and implies something else, or an implication may also be founded upon the form of gift, or a direction to do something which cannot be carried into effect, without, of necessity, implying and involving something else in order to give effect to that direction or something else, which is a consequence necessarily resulting from that direction. Now, two examples will illustrate sufficiently the force and meaning of that abstract proposition. If I give to my heir-at-law an estate from and after the death of A. B., the form of expression indicates that my heir-at-law shall not have the enjoyment of that estate until the life of A. B. has come to an end. But if that be so, the estate not going to my heir-at-law during that interval of time, and no other owner being provided for it, it must escape or go to A. B. during the interval; and Courts of justice have arrived

at the decision that the form of expression involves this conclusion, that A. B. must be the person to enjoy the estate until that event happens, until which the right of the heir-at-law is postponed.

Another form of direction would arise upon this, which is a common one. If I give to A. B. in tail, remainder to C. D. in tail, and if A. B. and C. D. shall die without issue, then over. The form of expression is not to take effect until A. B. and C. D. are dead without issue; and if one dies without issue leaving another, there is necessarily imported a remainder from one to the other. But now the question is, whether either of those two examples is at all applicable to the case before your Lordships? Taking the amplified form of words which I have already stated, I cannot find in that form of expression anything like an indication that the first and other sons of James were to take estates in tail male correspondent with those already given to the first and other sons of Thomas. Neither can I find that such an indication is necessary in order to support the gift over. Neither can I find that the language of the gift over does, in terms, involve the necessity of the gift over waiting the termination of estates, which, by supposed implication, are to be raised in the first and other sons of James. Confining oneself, therefore, to that most wholesome rule of interpretation which we have at length arrived at, and ought rigidly to adhere to, that though we construe the language in conformity with the meaning of the words, yet the intention to be ascribed to the testator must not be an intention which we think the testator ought to have meant, because it was his duty to do so; but it must be an intention, the grounds and reasons for imputing which, the ground and reasons for clothing his mind with which, we are able to derive from the language that he does use; and if that language is satisfied by going to a certain extent, there is no obligation to go further. If the language here, speaking of the sons by implication, is satisfied by the expression of that contingency, no matter whether it appears to be an express contingency or not, there seems no warrant in the decisions of any Court of justice for any other than that particular interpretation which is sufficient to satisfy the words.

I cannot, therefore, bring myself individually to advise your Lordships that you ought here, upon this will, to infer estates limited, by a necessary implication, to the first and other sons of James, and thereby put the estate in the appellant. I put out of consideration the circumstance that this interpretation does not appear to have suggested itself to the great legal minds who have again and again attended to this will. That ought not to be conclusive upon the matter. It is true it is a circumstance which probably confirms one in the conclusion that one is disposed to arrive at upon the principles. I have stated that there is no sufficient expression of intention to give estates to the first and other sons of James as would warrant me on the foundation of what is written to raise these estates in the first and other sons of James. If that be so, then whether you regard the estate taken by Thomas, the grandson, as an estate for life only without a remainder to himself, or whether you regard it as giving the remainder to himself in tail, which coalesced with his particular estate, the title of the respondent is good; for, in the one case, the estate to the daughters would be a contingent remainder destroyed by the operation of the recovery, and in the other case, though the estate to the daughters is a vested remainder, yet it would be expectant upon the estate tail in remainder in Thomas, and the estate tail in remainder in James, and the remainder of Thomas the grandson would be equally good.

I am afraid I have detained your Lordships at unnecessary length upon this matter; but after the arguments at the bar, I think it would be inconsistent to avoid expressing any opinion upon this part of the case; but I candidly feel that the whole of that part of the case to which I have, perhaps unnecessarily, given so much time, is one not needed for the determination of this question.

The title of the appellant arises in this manner. The testator had several daughters—six in number—one of them, Ann Barrow, died in the year 1796. The testator's will, as I have already said, was made in the year 1799. She died therefore before the date of the will. She left children, and under one of those children the present

appellant claims a small, undivided portion of the estate in question.

Now, it is necessary for the appellant to bring himself within the operation of the gift which is made of the remainder over, and that gift is, "to my daughters and their children share and share alike." Now, whenever there are words used in a will indicative of a class, the words must be taken to denote the class as it was constituted either at the date of the will or at the death of the testator. It is impossible to include persons except those that are found to come within the description of the words indicative of a class, either at the date of the will or at the death of the testator. Now it is perfectly clear that the words "amongst my daughters" is a gift to a class, and it is perfectly clear that Ann Barrow was not one of that class either at the date of the will, for she was dead, and of course not at the death of the testator. If that be so, then we come to the words "and her children." Now the appellant contends that the words "and her children" must not be limited to the children of the persons constituting a class in immediate connexion with which these words are used; but he reads them as if they were thus written—"amongst my daughters and the children of my daughters." Your Lordships will observe he gives to the second words, "my daughters," a different effect and extent of meaning from the extent of meaning belonging "to my daughters" in the first part. It would then run thus: "amongst my daughters," that is, those now living, "and the children of my daughters"; and under the words "my daughters," as secondly used (being identical with the first), he would include a different set of persons from those included in the first. That interpretation, I think, cannot be by possibility adopted. The words are there connecting the "children" with the persons who constitute a class, "amongst my daughters and the children of them," and that of necessity indicates and includes persons included under the words "my daughters," and none other.

Some cases were cited at the bar in support of this distributive and expansive construction; but upon examination of them, I think there is no one of them that approximates at all to the form

of this expression, and each one of them is found to be based upon a different form of words, indicating a greater latitude; and they are here clearly the opposite of an intention to give to daughters' children, whether they were children of persons living at the date of the death of the testator, or children of persons coming under a certain description who had pre-deceased the testator. The principle, I believe, is perfectly clear, that it is impossible to carry these words, in immediate connexion with the class, beyond the extent of the class itself.

That would suffice for the determination of this case. It is a pity it was not more attended to by the appellant before these proceedings were commenced. I am satisfied, if the argument had been before it on that point the Court below would have arrived at the conclusion that the appellant was not entitled under this description of the persons who are to take under the gift of the ultimate remainder.

On all these grounds, I think the appellant is wrong; and I am of opinion on all these grounds I must advise your Lordships that the decision of the Court below ought to be affirmed.

LORD CRANWORTH.—With reference to this particular case I am clearly of opinion, with the Lord Chancellor, that the appeal must be dismissed. It struck me so, in an early portion of the discussion that the last point to which his Lordship has adverted is conclusive on this subject. I cannot help suspecting that the testator did mean to include the children of deceased daughters; but I think if we were to include them, we should not be construing his will, but making a new will for him which, we think, would be more consistent with his probable intentions. I think it is clear that a gift to "my daughters," which, alone, would mean, clearly, daughters living at the death, or at least at the date of the will (which are pretty nearly contemporaneous events in this case), would mean only those who were then living and not those who had pre-deceased him; and when he says, "to my daughters and their children" to be equally divided between and among them, it must mean the children of those previously described as daughters. And it may be thought, that that being

conclusive against the appellant, it is unnecessary to say anything upon the construction of the will on which this case has been so frequently considered in the different Courts upon the previous occasions. But I do not think it unnecessary, after the elaborate arguments we have heard at the bar on both sides, and the numerous occasions on which this will has been brought before the Courts, first before the Court of Queen's Bench, afterwards before Lord Chancellor Eldon, afterwards before the Chief Baron Richards, and they all expressed an opinion. Upon that mere ground I think it would be somewhat disrespectful to those Judges to pass it over without making some observations upon it. But there is another reason which appears to make it the bounden duty of your Lordships to express your opinion. Although, my Lords, more than twenty years have elapsed since the death of the tenant for life—he died in 1838—I do not see any claim that has been made by other persons not coming within the category of the descendants of a deceased daughter who might afterwards set up a claim; and it is fit you should know that the grounds on which you are proceeding are not confined merely to that which has reference solely to the position of the present appellant. On that subject it is impossible to say there is not very great difficulty and doubt about it; indeed, it would be absurd and presumptuous not to express any opinion after the great discussion this case has undergone, and the conclusions which have been from time to time arrived at upon it. I do not at all hesitate to express the clear opinion that the appellant is not right in contending that Thomas took an estate for life only, at least in the first instance. Neither have I the least doubt in concurring with the Lord Chancellor in saying, that although the expression is in that imperfect manner, "with remainder to the first son of the body of the said Thomas Chorlton," although that is very imperfectly expressed, I think it is an inference that we have not only made, but must make, that it is the first and other sons severally and successively in tail male; therefore Thomas became tenant for life with remainder to his first and other sons in tail male.

Now, it is to be observed that after that devise there is no gift to any one until you come to the daughters, unless by implication, to which I will presently advert. But the will goes on to say, "And for want of such lawful issue of that name, either by my said grandson Thomas Chorlton, or my son James Chorlton, then I give and devise the said estate where I now live, and the Weaste Estate amongst my daughters." Now, taking those words, without at all altering or enlarging them, the daughters clearly took only a contingent remainder upon the expiration of the estates in tail male of the sons of Thomas, contingent upon the casualty whether or not at that time there should be a total failure of issue male of Thomas, and a total failure of issue male of James. That was clearly a contingent remainder; but it was very ably argued by Mr. Manisty, and afterwards by Mr. Hardy, that this is a construction which the Court below ought not to have adopted, and which this Court ought not to sanction; for that it was reasonable—inasmuch as the estate was given to the daughters only for want of such lawful issue of that name (that is, of the first and other sons successively of Thomas)—since it was only given over for want of that lawful issue, "either by my said grandson Thomas Chorlton, or my said son James Chorlton," to infer that the testator meant to give to the children of James the same estates which he had given to the children of Thomas. Now that, my Lords, I confess, seems to me a very violent presumption. I am not fond of raising estates by implication, if it can be avoided. It too often happens that that is but a disguised way of making a will instead of interpreting it. But if I were to raise estates by implication here, the estates I should raise by implication are estates in remainder to Thomas and James. That seems to me to be what the testator meant. Suppose the testator were now living, and could tell what he meant, he would say, "I do not mean my daughters to take as long as there is any issue male of Thomas or of James"—not if there is any issue male of James's sons—that is not what he could have had in his contemplation. Therefore, the implication I should raise would be an estate tail in remainder in Thomas, with an estate tail in remainder in James. It is said, that will be at vari-

ance with the rule which has been laid down in modern times as correct, and that the words "for want of such lawful issue" are to be taken referentially, meaning the issue mentioned before, and should not be taken to enlarge the previous estate. Your Lordships will observe you do not enlarge the previous estate in the mode in which that rule of law laid down by Mr. Jarman is meant to imply. You do not say that Thomas took an estate, enlarged by these words to an estate tail. What you conclude is, if the estates are to be raised by implication, that the testator meant to say he gave an estate for life only to Thomas, with remainder to his first and other sons in tail male, and for want of such lawful issue, that is, for want of lawful issue male (that was the particular sort of issue he was contemplating), then, not that you enlarge the prior estate, but, for the purpose of effectuating the intentions of the testator, you give that, without which his intention would be defeated; the estate tail in remainder to Thomas and to James and to the daughters; and therefore, that it is a remainder, or rather a contingent remainder barred by the recovery, the result is the same. I rather think upon the authorities, that such an estate tail may be presumed, and that Thomas would, when he suffered the recovery, be a tenant in tail in possession, and that all the remainders over were barred. If that were not so, it must have been that he was only tenant for life, with remainder to his first and other sons in tail, with a contingent remainder over which was equally barred by the recovery, so that *quidcunque videt* the decision was correct before, by Lord Eldon in 1812. I agree that this appeal must be dismissed.

LORD CHELMSFORD.—I agree with my noble and learned friends in the conclusion at which they have arrived. With regard to the point in the case as to the title of the plaintiff to take as descendant of a daughter who was deceased at the time of the making of the will, I agree with my noble and learned friends that he does not come within the terms of the devise. Now I was very much struck with the way in which this was put by my noble and learned friend on the woolsack in the course of the argument.

He said, "To whom do the words 'my daughters' refer?" Clearly they can only refer to the daughters in existence at the date of the will. If this was the question as to the words of reference, "their children" must necessarily be confined to them, and it seems impossible, whatever we may conjecture as to the intention of the testator, to put any other interpretation upon the words than that suggested by my noble and learned friends, and it is conclusive against the title of the plaintiff.

The point does not appear to have been much regarded, if at all, and to have come upon the appellant rather by surprise, and therefore, I should much regret if the House were to come to a conclusion adverse to the appellant upon this point; but I agree with my two noble and learned friends with regard to their construction of the will, which construction is fatal to the title of the plaintiff.

It appears, from the statement, which was made by counsel on the argument of this case, in the case of *Mellish v. Mellish* (3), that Lord Eldon, and the Court of Queen's Bench upon the case submitted to them, came to the conclusion that Thomas Chorlton had an estate tail, and the counsel adds, that in the Court of Exchequer last year the Court came to the same result, acting upon the authority of *Robinson v. Robinson* (11). If that is so, the Lord Chief Baron must have been of opinion that the words "first son severally and successively," were words of limitation, and were equivalent to "issue male." Now, we have no account of the grounds upon which the Lord Chancellor and the Court of Queen's Bench came to the conclusion that there was an estate tail in Thomas Chorlton; but I think we must look for that estate tail in other words of the will than those upon which the Lord Chief Baron seems to have relied, because I read the will in the same way as my noble and learned friends.

I think, in the first place, Thomas Chorlton had an estate for life. Then, that the words "first son of his body severally and successively" in tail male must mean first son in order, severally and successively, or in other words, first and other sons in tail. Therefore, if the counsel were correct in saying that the Lord Chief Baron decided there was an

estate tail in Thomas Chorlton, upon the authority of the case of *Robinson v. Robinson* (11), I cannot agree in that decision, and we must look for the estate tail which Lord Eldon and the Court of Queen's Bench seem to have held was in Thomas Chorlton to other words of the will. That can only be found in the words which precede the limitation to the daughters—in the words "and for want of such lawful issue of that name, either by my said grandson Thomas Chorlton or my son James Chorlton," and the question upon those words would be whether an estate tail by implication was raised in Thomas Chorlton. Now the appellant contends that there was no implication by these words, of an estate in Thomas Chorlton, but that by the referential word "such"—"such lawful issue of that name" of James—the will must mean the first and other sons of James in tail male. And this estate by implication to the first and other sons of James would make the limitation to the daughters a vested remainder, and consequently that remainder would not be affected by the recovery which was suffered by Thomas Chorlton. It is true that that would have been a forfeiture of his estate for life; but the persons entitled in remainder were not bound to take advantage of that forfeiture. They might wait until the determination of the preceding estate, when they would be entitled in possession. Now, as has been said by my noble and learned friend near me (Lord Cranworth), on the question whether there is an estate raised by implication or not—whether that is determined one way or the other, in the view which he has taken, would be possibly immaterial as against the plaintiff. Suppose there is no implication of an estate in James, the consequence would be that the limitation to the daughters and their children would not take effect until failure of issue of Thomas and James, and that would, therefore, be a contingent remainder, and it would be defeated by the recovery suffered by Thomas Chorlton; but I am not disposed to concur with him that there really is no implication of an estate. I will take it, in the first place, there is an implication of an estate in tail male in James Chorlton. Now, if that be so, the limitation to the daughters would be a vested remainder. But if there

is also, as I think there must be, as well as an implication of an estate tail in James, an implication also of an estate tail in Thomas, then of course that estate tail in Thomas would enable him to suffer a recovery and to defeat all the limitations over.

Now, that there would be an implication of an estate tail in James, appears to me to be clear, from looking to the mode in which the testator has shewn an anxious desire that his estate should always continue in a person bearing the name of Chorlton. Now, suppose there is no implication of an estate tail in James, why, James might have had (as the ultimate limitation is not to take effect until the failure of issue male of James) sons for many generations—descendants for many generations, and during that time the estate would descend to the heir-at-law, who probably would not be a person bearing the name of Chorlton. Therefore, it appears to me that to effect the intention of the testator, there must be an estate tail by implication in James. And if there is an estate tail by implication in James, what reason can there be for saying that the very same expressions applicable to Thomas should not also raise an estate tail in him, assuming a question to have been stated under which it would be absolutely necessary, in order that the complete intention of the testator should have effect, that there should be an estate tail also in Thomas? Therefore, it appears that whichever way you take it, whether you imply estates tail in Thomas and James or not, that the result is equally unfavourable to the plaintiff. If there are no estates by implication, then, as the ultimate limitation is not to take effect until the failure of issue of Thomas and James, there would be a contingent remainder that would be defeated by the recovery; and if there are estates tail by implication to be raised in Thomas and James, then there were estates tail enabling Thomas to suffer the recovery, and to bar the subsequent limitations. Upon these grounds I agree with my noble and learned friends that the appeal must be dismissed.

Judgment of the Court below affirmed.

1865. { BROWN v. THE ACCRINGTON
Jan. 30.* { COTTON-SPINNING AND MA-
NUFACTURING COMPANY
(LIMITED).

Master and Servant — Negligence — Liability of Master.

A workman cannot recover damages from his employers for injury sustained by him while at work in their mill, and resulting from the building having been originally negligently constructed, unless personal negligence be proved against his employers themselves (or against some person acting by their orders), either in having given directions how the building should be constructed, or in having knowingly entrusted the execution of the work to an incompetent person.

Declaration—That the defendants were possessed of a certain unfinished cotton spinning-mill and premises at Accrington, and although the defendants were well aware and had full knowledge that the foundations of the said mill, and the pillars which were intended to support the same, were not sufficiently strong to support an extra story or stories, the defendants had carelessly, negligently and improperly built and erected, and had caused to be built and erected, an extra story or stories, and had placed and caused the same to be placed upon the said mill without increasing the support to the said mill, and had carelessly, &c. placed a weight on the said pillars too great for the said pillars and foundations to bear, and had carelessly &c. built and erected the said mill and premises of such insufficient materials and construction that the same was dangerous and likely and liable to fall down and to fall in; and the plaintiff was a stonemason, and was employed as such by the defendants for hire and reward; and the defendants, well knowing all the premises, and the danger of what had been done as aforesaid, and the danger that any one would incur and be exposed to who was in or upon the said mill and premises, extra story or stories, wrongfully, carelessly, &c. ordered and directed and induced and

* Decided in Hilary Term.

permitted the plaintiff to go up into the said mill and premises and into the said extra story or stories and work there as a stonemason in his said employment, and did not give the plaintiff any warning or notice of the premises, and of the danger of being in the said mill and premises, and in the said extra story or stories, and carelessly, &c. neglected to take any precautions against accidents and for the safety and protection of persons lawfully in and upon the said mill and premises; and the plaintiff thereupon, in obedience to the said order and direction, and not knowing the premises, and believing that there was no danger in obeying the said order and direction, did go into the said mill and premises, and did go up into the said extra story or stories, and did work there as a stonemason in his said employment; and whilst the plaintiff was so working as aforesaid in the said mill and premises, and in the said extra story or stories, and whilst he was fulfilling his duty and the said order and direction of the defendants, and without any negligence or default or knowledge or want of care on his part, and by means of the said careless, &c. conduct of the defendants in that behalf, and not otherwise, the said mill and premises fell down and fell in, and by means thereof and of the careless, &c. conduct of the defendants in that behalf, the plaintiff was precipitated down and was greatly and permanently wounded, injured and damaged.

The second count was similar to the first, alleging that the defendants carelessly, &c. induced, invited, and permitted the plaintiff to enter the said mill and premises, &c.

Plea—Not guilty. Issue thereon.

The case was tried, before Blackburn, J., at the Lancashire Winter Assize, 1864, when it appeared that the injuries complained of were sustained by the plaintiff when working as a stonemason in the defendants' mill. One Dean had been employed by the defendants as their clerk of the works to superintend the building of the mill in 1862. It was originally intended that the mill should be only two stories high, and that the foundations should be of ashlar, 3 feet thick; but subsequently the defendants altered their plans, determining

to have two additional stories. Before that, however, Dean had directed the foundations to be constructed of 16 feet of rubble instead of 3 feet of ashlar. In March 1863 the plaintiff was employed by Dean to work in the mill, and while occupied in the third story, the floor fell in, and he was injured. Evidence was given that some of the pillars on which the building rested had been observed to be not vertical, and that to rectify this their feet had been shifted from the centre of the rubble foundations below; it was also shewn that the rubble foundations were too weak for the weight of the two additional stories.

The Judge asked the jury, first, whether the accident was caused by the negligence of the company or any of their servants; secondly, whether the company were guilty of negligence in appointing Dean to superintend the work. The jury found for the plaintiff, damages 500*l.*, the Judge reserving leave to the defendants to move for a nonsuit, if the Court should think there was not sufficient evidence of negligence on the part of the defendants.

S. Temple having obtained a rule accordingly, either for a nonsuit, or a new trial, on the grounds that there was no evidence of negligence, and that, if there were, it was the negligence of a fellow-servant of the plaintiff,—

Edward James and *Holker* now shewed cause, contending that, in order that a master may be free from liability for injury done to his servant through the negligence of a fellow-servant, the master must shew that he was not guilty of negligence in employing an incompetent workman. The master is bound to select sound and safe materials—*Brydon v. Stewart* (1), *Roberts v. Smith* (2), *Mellors v. Shaw* (3), all cited in *Addison on Torts*, 2nd edit. p. 156. The jury have found here want of care on the part of the defendants in not employing a proper superintendent. A master must use reasonable care that his servants are not

(1) 2 Macqueen, 34.

(2) 2 Hurl. & N. 213; s.c. 26 Law J. Rep. (n.s.) Exch. 319.

(3) 1 B. & S. 437; s.c. 30 Law J. Rep. (n.s.) Q.B. 333.

exposed to unnecessary risk—*Barton's Hill Coal Company v. Reid* (4).

[MARTIN, B.—In that case there was want of reasonable care at the very time of the mischief. If I build a house as I please, and years afterwards it falls and injures some one, am I liable?]

Under such circumstances, a man by whose own negligent act the danger has been occasioned would be liable. The case is different where a man has purchased a house not knowing of its ruinous condition.

[MARTIN, B.—To whom am I under an obligation not to lay the foundation as I please?]

A landlord is responsible to the public for negligence in demising a house in a ruinous condition—*Todd v. Flight* (5). The defendants are liable if they were personally negligent—*Ashworth v. Stanwix* (6), *Roberts v. Smith* (2), *Mellors v. Shaw* (3); or, if there was no personal negligence on their part, still they are liable if Dean was negligent, unless the plaintiff was a fellow-servant of Dean—*Addison on Torts*, p. 324, and cases there cited. Again, supposing the plaintiff Dean's fellow-servant, then the defendants are liable for their original negligence in employing Dean, an incompetent workman, who was guilty of the negligence long before the plaintiff entered the defendants' service.

Temple and Kay, in support of the rule, contended that, even if the accident had been proved to be the result of Dean's negligence, the plaintiff could not recover, as he was Dean's fellow-servant—*Gallagher v. Piper* (7) and *Lovegrove v. the London, Brighton and South Coast Railway* (8); and that, even if the plaintiff was not Dean's fellow-servant, the defendants did not warrant the safety of the building; and as there was no personal negligence proved on their part, the plaintiff must, in order to make them liable, shew not only

that Dean was incompetent, but also that the defendants knew that he was incompetent when they employed him—*Potts v. the Port Carlisle Dock and Railway Company* (9).

Cur. adv. vult.

The judgment of the Court (10) was now (Jan. 30) delivered by—

POLLOCK, C.B.—The complaint of the plaintiff in this case is that, while he was working in the defendants' mill, one of the floors of the mill fell in, and he was injured. We are all of opinion that there was no such evidence of negligence as to enable the plaintiff to bring this action, and that therefore a nonsuit should be entered; but, as the plaintiff has the power of commencing another action if he pleases and presenting the case before a jury in a different light, and taking the opinion of a different tribunal, we think it right not to give a minute detail of the circumstances, or to reason upon the various matters so as to create any prejudice in the case of future inquiry.

Our opinion is founded on this, that there is no personal negligence brought home by the evidence before us, either to the defendants themselves or to any person acting as their servant or by their orders, for which they are responsible, either by having given directions how the work should be done, or by their having any reason to suppose that the person to whom they entrusted the charge of doing the work, was not a person competent to do the work.

Rule absolute for a nonsuit.

(9) 8 W. Rep. 524. Q.B.—“In this case a turntable, originally made for one line of rails only, had a second line placed on it, at right angles to the first line, but without any additional support being given to it. The turntable continued in use for five years, when it broke down, under the weight of a truck passing over the second line of rails, and caused the death of the plaintiff's husband. The Court held that the facts proved did not establish a case of negligence against the defendants.”

(10) Pollock, C.B., Martin, B., Channell, B. and Pigott, B.

(4) 3 Macqueen, 266.

(5) 9 Com. B. Rep. N.S. 377; s. c. 30 Law J. Rep. (N.S.) C.P. 21.

(6) 30 Law J. Rep. (N.S.) Q.B. 183.

(7) 83 Law J. Rep. (N.S.) C.P. 329; s. c. 16 Com. B. Rep. N.S. 669.

(8) Ibid. C.P. 329; s. c. 16 Com. B. Rep. N.S. 669.

1865. { LINTON AND ANOTHER v. THE
June 3. { BLAKENEY JOINT CO-OPERATIVE INDUSTRIAL SOCIETY.

Industrial and Provident Societies Acts, 15 & 16 Vict. c. 31, 17 & 18 Vict. c. 25, and 25 & 26 Vict. c. 87.—Liability of Corporation.

An industrial society, formed before the passing of the Industrial and Provident Societies Act, 1862, (which provides for the incorporation of previously-existing societies on registration, and enacts that legal proceedings then pending against a trustee or public officer may be prosecuted against the society in its registered name, but omits to provide for pending claims), cannot, although subsequently registered under that act, be sued as a corporation in an action commenced after the passing of the act for a debt incurred previously thereto.—So held on the authority of Dean v. Mellard (1).

Declaration for goods sold and delivered, and on accounts stated.

Plea—never indebted. Issue thereon.

The action was tried, before Martin, B., during the Sittings in Middlesex after Easter Term, 1865, when a formal verdict was taken for the plaintiffs for 27l. 4s. 10d., subject to the opinion of the Court as to whether the defendants were liable to be sued as a body corporate or not.

It appeared at the trial that an industrial society was formed in Blakeney, called the "Blakeney Miners' Joint Co-operative Industrial Society," and that its rules were certified by the Registrar of Friendly Societies in January 1862. Under the 15 & 16 Vict. c. 31. and 17 & 18 Vict. c. 25, which were then in force, such societies were to sue and to be sued by their officers appointed for that purpose, or by their trustees.

By the 25 & 26 Vict. c. 87, which was passed in August 1862, the above-mentioned statutes were repealed, without any reservation in favour of existing societies, which were to be at liberty to register under the new act and to become bodies corporate.

The goods were supplied to the society

(1) 15 Com. B. Rep. N.S. 19; s.c. 32 Law J. Rep. (N.S.) O.P. 282.

by the plaintiffs in November 1864; the society was registered under the 25 & 26 Vict. c. 87. in February 1865, for the purpose of being wound up, and this action was commenced in the following March.

Macnamara having obtained a rule to set aside the verdict and to enter it for the defendants, on the ground that they were not liable in their corporate capacity, citing *Dean v. Mellard* (1),—

Gates now shewed cause, contending that, as 15 & 16 Vict. c. 31. and 17 & 18 Vict. c. 25, which provided public officers to sue and be sued, were repealed by the 25 & 26 Vict. c. 87,—the 6th section of which enacts that "the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society, and that all legal proceedings then pending by or against any such trustee or other officer, on account of the society may be prosecuted by or against the society in its registered name without abatement,"—*à fortiori* new proceedings regarding pending claims might be brought against the society in its corporate capacity. Before the last statute, the action must have been against the public officer; and, if the certificate of registration vests in the society all the property before vested in the trustees, it also confers on the society all the rights and liabilities of the trustees. In *Toutill v. Douglas* (2), Cockburn, C.J. said that it was contemplated that a society formed under 15 & 16 Vict. c. 31, would acquire a new status under 25 & 26 Vict. c. 87, and that it was for the purpose of registration only under the new act that such a society could be said to be in existence. The intention of the act of 1862 must have been to make provision for bringing new actions, as well as for continuing old ones; and though *Dean v. Mellard* (1) was held to have been well brought against the members of the society individually, yet there is nothing in it to shew that the corporate body was not also liable to be sued.

Macnamara was not called upon to support the rule.

MARTIN, B.—This case is governed by *Dean v. Mellard* (1). There the Court held

(2) 33 Law J. Rep. (N.S.) Q.B. 66.

the action to have been well brought against the individual shareholders. Williams, J. remarked that the legislature has, in 25 & 26 Vict. c. 87, confined the indulgence given by section 6. "to actions which were pending at the time the certificate of registration was obtained; and that must mean actions which were commenced before the act of 1862 was passed." The construction put on section 6. by the plaintiffs' counsel may be reasonable, but *Dean v. Mellard* (1) prevents us from adopting it.

BRAMWELL, B.—I admit the force of the argument on the 6th section of the act, that if an action, already commenced against a trustee, may be continued against the new corporation, it is but reasonable that a new one might be commenced against the corporation; but *Dean v. Mellard* (1) is in point the other way; and it may be that the legislature meant to provide only for the continuance of old actions, without providing for the commencement of new ones.

CHANNELL, B.—I am also of opinion that the case is governed by *Dean v. Mellard* (1).

Rule absolute.

1865.
June 8.

{ BELDING AND ANOTHER, assignees of George King Randlesome, v. READ.

Debtor and Creditor—Bill of Sale—Assignment of after-acquired Property — Covenant to pay on Demand.

G. K., who was a trader, by a bill of sale, assigned to the defendant "all his household furniture, plate, linen, china, glass, all his stock, cattle, horses, farming implements, crops, book-debts, and all other his personal estate and effects whatsoever then being or hereafter to be upon or about his dwelling-house, farm and premises." The bill of sale also empowered the defendant, "in case the sum of 300l. and interest should not be paid on demand, to enter upon the premises which might be in the occupation of the debtor, and there distrain the goods and chattels there found for the sum of 300l. and interest." After the execution of the bill of sale, G. K. purchased goods from time to time in the

way of his trade, some of which were upon and about his premises on the 8th of January 1862, on which day a formal demand of the sum of 300l. was made on G. K.'s wife, and on non-payment of the same, on the same day, the defendant entered and seized all the furniture, goods, chattels and effects found upon the premises :—Held, that the demand on the wife was not a sufficient demand, and that the property acquired by G. K. after the execution of the bill of sale did not pass to the defendant.

This action was brought for converting the bankrupt's goods after his bankruptcy.

The cause came on for trial, before Cockburn, C.J., when it was agreed between the parties to state a SPECIAL CASE for the opinion of the Court.

The plaintiffs are the assignees of George King Randlesome, who before and at the time of his bankruptcy resided and carried on the business of a grocer and draper at Reedham, in Norfolk. In the month of January 1857 the bankrupt was carrying on the business of a cattle-dealer at Reedham, under the name of George King, and being indebted to the defendant to the amount of 300l., on the 24th of January, executed to the defendant, who required the same, a bill of sale under seal. By the bill of sale the bankrupt assigned unto the defendant all his household furniture, plate, linen, china, glass, all his stock, cattle, houses, farming implements, crops, book-debts, and all other his personal estate and effects whatsoever then being or hereafter to be upon or about his dwelling-house, farm and premises situate at Reedham, or elsewhere in the kingdom of Great Britain, upon trust to convert the same into money, and to pay thereout the costs of preparing and perfecting such bill of sale, the charges and expenses attending such conversion into money of the hereby assigned premises, and all other expenses attending the execution of the trusts thereby created, and then to pay or retain to himself, the defendant, the sum of 300l. and interest, and to pay the surplus, if any, to the bankrupt.

The bill of sale empowered the defendant or any person authorized by him, to enter upon any premises upon which any part of the goods and chattels thereby

assigned might happen to be, and to take possession of such goods and chattels upon the trusts aforesaid; and in case the said sum of 300*l.* and interest should not be paid upon demand, the bill of sale also empowered the defendant at any time hereafter, and from time to time, until the sum of 300*l.* and interest should be paid, to enter into and upon all and every the hereditaments and premises which might from time to time be in the occupation of the bankrupt, and there distrain the goods and chattels there found for the sum of 300*l.* and interest; and in case such sum and interest, together with the costs of taking and keeping such distress, should not be paid within one day of the making thereof, the defendant was empowered to sell such goods and chattels in order that by means of such distress and sale the sum of 300*l.*, and interest, and all costs of any distress or distresses, might be paid to the defendant. And the bankrupt did by the bill of sale authorize the defendant to plead such bill of sale as a leave and licence or a general release, in bar of any action which might be brought for breaking into or remaining in or upon such hereditaments and premises, or for distraining and selling the goods and chattels there found. And it was by the bill of sale declared that, until the defendant should think fit to take possession of the assigned premises, it should be lawful for the bankrupt to retain possession thereof.

The bill of sale was duly filed in the Queen's Bench office on the 9th of February 1857.

After the execution of the bill of sale the bankrupt continued to carry on his then trade of a cattle-dealer, and from time to time sold and disposed of his stock-in-trade as such dealer, and purchased other cattle in substitution thereof, but he was not possessed of any cattle on the 8th of January 1862.

In the month of April next after the execution of the bill of sale, the bankrupt commenced the trade of a grocer and general-shop dealer, at Reedham, and from time to time purchased goods in the way of his trade and sold some of the same, and so on from time to time until the 8th of January 1862, when he was in possession

of goods constituting his stock-in-trade as such grocer and general-shop keeper, and of the horse and gig hereinafter mentioned.

The whole of such stock-in-trade was purchased after the execution of the bill of sale.

On the 8th of January 1862 all the bankrupt's goods and chattels were taken possession of and dealt with by the defendant as hereinafter mentioned; and in respect of which acts of the defendant this action has been brought.

On or about the 8th of January 1862 Samuel Aldred, of Yarmouth, auctioneer, was authorized by the defendant to distrain the furniture, goods, chattels and effects of the bankrupt, in default of payment of the sum of 245*l.* 17*s.* 6*d.* due from him to the defendant under or by virtue of the bill of sale, dated the 24th of January 1857, executed by the bankrupt in favour of the defendant.

On the 8th of January 1862 Samuel Aldred proceeded to the dwelling-house and premises occupied by the bankrupt at Reedham, and where he resided, and upon inquiry, Samuel Aldred was informed that the bankrupt was from home. Samuel Aldred then stated to the wife of the bankrupt that he was authorized, as the fact was, to demand and receive payment of a sum of 245*l.* 17*s.* 6*d.*, due from her husband to the defendant, otherwise he should have to put into effect the provisions of the bill of sale; and he made a formal demand of the amount to the wife of the bankrupt, but the same remained unsatisfied, and Samuel Aldred, on the day and year last aforesaid, distrained the furniture, goods, chattels and effects found upon the said premises of the bankrupt pursuant to his instructions, and on the 14th day of the same month sold the same by public auction. The whole of such goods and chattels were at a value of 97*l.* 2*s.*, and such part of the last-mentioned goods and chattels as were purchased by the bankrupt after the giving of the bill of sale were of the value of 47*l.* 17*s.* 2*d.*

On the same 8th of January, the defendant entered certain livery-stables and premises at Yarmouth, not in the occupation of the bankrupt, and seized and took possession of a horse and gig of the bankrupt

standing there at livery, and sold the same on the 28th of January.

The horse and gig had been purchased by the bankrupt after the giving of the bill of sale, and they were of the value of 16*l*.

On the 13th of January the bankrupt was adjudicated a bankrupt on his own petition, and on the 14th of January notice of the filing of the petition was given to the auctioneer.

On the 28th of January 1862 the plaintiffs were duly appointed creditors' assignees of the estate and effects of the bankrupt.

The questions for the opinion of the Court are : first, whether the bill of sale was void under the Statute of Elizabeth, or under the Bankruptcy Acts ; if not void, whether, secondly, under such bill of sale the defendant could lawfully seize and sell all or any and which of the after-acquired goods and chattels of the bankrupt. If the bill of sale was void, the verdict is to stand for the plaintiffs for the sum of 113*l*. 2*s*. If the defendant could not lawfully seize and sell any of the after-acquired goods and chattels of the bankrupt, the verdict is to stand for the plaintiffs for the sum of 62*l*. 5*s*. 8*d*. If the defendant could lawfully seize and sell such only of the after-acquired goods and chattels of the bankrupt as were found in his premises, the verdict is to stand for the sum of 16*l*. If the defendant could lawfully seize and sell all the after-acquired goods and chattels of the bankrupt, the verdict is to be entered for the defendant.

O'Malley, for the plaintiffs, conceded that the deed was a valid deed ; but he contended that the defendant could not seize and sell the horse and gig, nor the stock-in-trade purchased by the bankrupt after the execution of the bill of sale. With regard to the former the power in the deed to seize and sell was confined to the goods on the premises of King ; and with regard to the latter, the property in the after-acquired property did not pass to the defendant ; that the deed gave the defendant a power to seize and sell after a demand made for the payment of the money lent ; that the demand on the wife was not a sufficient demand, and if there was no demand the power to seize and sell could not be exer-

cised—*Brighty v. Norton* (1), and *Toms v. Wilson* (2).

Keane (*A. K. Stephenson* with him) contended that although the after-acquired property did not pass at law, yet it was bound by contract, and that there was such a contract between the bankrupt and defendant as a Court of equity would enforce—*Holroyd v. Marshall* (3).

O'Malley was not heard in reply.

POLLOCK, C.B.—I am of opinion that our judgment ought to be for the plaintiffs. The bill of sale is not void under the Statute of Elizabeth, but although not void its operation is by no means that contended for by the defendant's counsel. The defendant acquired a right to the property which existed in specie at the time the bill of sale was executed, but not to the property acquired by him after the bill of sale was executed. I take it as having been long ago settled that a man cannot by deed, however solemn, assign that which is not in him ; in short, there cannot be a prophetic conveyance of any kind, and therefore the defendant did not acquire a right to the after-acquired property. It appears to me that the defendant could not lawfully seize and sell all the goods ; he could not seize and sell that which had been acquired by the bankrupt after the execution of the deed. I think that this view is not at all inconsistent with the principle laid down in *Holroyd v. Marshall* (3). The plaintiff having given up a portion of their claim, he is entitled to our judgment for 62*l*. 5*s*. 8*d*.

MARTIN, B.—I am also of the same opinion. The bill of sale comprises two species of securities, and they appear to be separately dealt with in the deed itself. In the first place, it conveys to the creditor all the household furniture, plate, linen, china, glass, all the stock, cattle, horses, farming implements, crops, debts, and all other the personal estate and effects of him the said George King now being, or hereafter to be, upon or about the dwelling-house, farm and premises. Now, in my opinion, the words "hereafter to be" are null ; but assuming them to be not null, and that the reasonable intention of the parties was,

(1) 32 Law J. Rep. (N.S.) Q.B. 38.

(2) 32 Law J. Rep. (N.S.) Q.B. 382.

that there was to be an assignment, which in law could not be, of goods subsequently acquired, then according to the principle laid down in *Holroyd v. Marshall* (3), Read would have no legal title to these goods; but he would have a mere equitable right to them; and it is perfectly clear, as it seems to me, that no bill for specific performance could be maintained for the purpose of compelling the conveyance of the goods subsequently acquired. The reasons are very clearly pointed out by the Lord Chancellor, that the equitable title to goods is confined to some specific goods, and not merely to undetermined goods.

In the next portion of the deed that Mr. Keane relied upon it is declared that Read (that is, the creditor), or any person authorized by him, with the aid of a peace officer, may enter on and take possession of all the chattels legally hereby assigned, and to eject and remove the bankrupt therefrom, and to enter and to continue in possession of any part of the goods and chattels hereby assigned which may happen to be in his possession, and for the purpose of taking possession, it shall be lawful to break open doors and locks without being liable to any action of trespass. I think, then, this clause relates to property which is properly at common law the subject-matter of assignment. It may be that it was never intended to give the creditors an absolute dominion over those goods, but it is proposed to give him a further power, and I think that is strictly a power to take possession of the goods assigned to him. The deed further states that he, King, shall, on demand so made for the same, pay unto Read the sum of 300*l.*, with interest thereon at the rate of 5*l.* per cent. per annum. I think no sufficient demand of payment was made. It seems to me there could not be properly a demand made by a demand made on the wife; there is nothing to shew that the husband was from home, and that there was no possibility of making a demand upon him. Now, then, what follows? "If the money shall not be paid on demand made, it shall be lawful for Read or any person authorized by him from time

to time until the said sum of 300*l.* shall be paid, to enter, by any lawful means he shall think proper, on the said premises in the occupation of King, and for that purpose break open the doors and there distrain the goods and chattels there found for the sum of 300*l.*" Now the word *distrain* is a word not properly applicable to this matter; the meaning obviously is that he shall go and take possession of what he sees for the purpose of getting a beneficial interest by sale to pay his debt; and it seems to me that the creditor had a power to enter upon the property of the bankrupt, the premises belonging to King, and then to take possession of any goods which might be found, and if he had executed this power properly he would have been entitled by virtue of this clause to have sold them and applied the proceeds in payment of his debt. But it seems to me, as I have already said, with respect to the nature of the subsequently acquired property, that state of things never arose which would give to him this power, because no demand was ever made. And with respect to the pony and gig, it was not upon the premises, and there was no power, for that reason. The case of *Holroyd v. Marshall* (3) has been cited, but I do not think that case is in point. As I read the judgments of Lord Chelmsford and the Lord Chancellor in *Holroyd v. Marshall* (3), they seem not to apply to the present case, where none of the property was of the character of fixed machinery or was ear-marked as belonging to the premises. For the reasons I have given it seems to me there was no beneficial interest in this property in Read, and that the case is not within the case of *Holroyd v. Marshall* (3), which I think, on reading the judgments of the Lord Chancellor and Lord Chelmsford, is very clearly distinguishable from the present case.

BRAMWELL, B.—I am of the same opinion. As to the pony and gig, they could not be taken under the general powers of the bill of sale, because they were not upon the premises. And as to the residue of the goods, they could not be taken under the general power because there was no demand. The demand which was proved was no more than a challenge; it was therefore no demand, and consequently there was no such

(3) 10 H.L. Cas. 191; *n.c.* 33 Law J. Rep. (N.S.) Chanc. 193.

power, and the defendant had no right to exercise the power given to him. It has been contended for the defendant that he can rely on the earlier clause that purports to convey all future property as well as the present, and he relies upon this to shew the assignees had no title to anything except that in which King was beneficially interested or entitled to, and then he says this clause conveying every thing takes away all the beneficial interest, that is to say, in all the after-acquired property. But I think this is not so, and that the interest in the goods subsequently acquired by the bankrupt did not pass to the defendant. The case of *Holroyd v. Marshall* (3), which was cited, does not seem to me to be an authority to shew that such property passed to the defendant, because what that case decided was, that where property not in one sense specific at the time of the deed, might become specific by its being brought into a certain described place and made a part of the machinery, that then such a covenant as this, or such a grant as this, would confer an equitable interest in the property though not in existence at the time the covenant was made. But the property which is the subject of the present inquiry has never, in a sense, become specific so as to be the subject of a decree for specific performance. It seems to me, therefore, that that case is no authority for the purpose of shewing that after-acquired property passed. And then, again, if we look at the whole of the deed it is clear that the intention of the parties is that a demand must be made before the property can be seized, so that the covenant is in effect to take possession of the "goods after demand," and a demand not having been made the result is that, looking at the whole deed together, the equitable interest intended to be conveyed by the deed in the after-acquired property had never vested in the defendant, because he had never done anything to entitle him to it. On both those grounds, it seems to me the plaintiffs are entitled to judgment.

CHANNELL, B.—I am of opinion that the plaintiffs are entitled to our judgment as to the sum of 62*l.* 5*s.* 8*d.*, being the amount of the goods acquired by the bankrupt after the bill of sale; and the

question seems to me, in substance, to be this, whether the property in the bankrupt in those goods had ever been divested? I think there cannot be any doubt that a bill of sale will pass the property in any goods which the vendor would have in his possession at the time he executed it. Although there may be one or two exceptions pointed out in *Shep. Touch.*, in which some goods may be excepted, yet, as a general rule, a bill of sale would operate in conveying any property the vendor had at the time of the bill of sale. It appears to me that the House of Lords, in the case of *Holroyd v. Marshall* (3), only carried out and adopted a well-known rule of equity, that what is contracted to be done was to be considered as done, and they describe in the result the distinction that exists in law between a contract to do a thing and the act of doing it. But then they were dealing with goods of a specific character, and goods which had been brought on the premises after the vendor had entered into the contract, and annexed them to the machinery. There, no doubt, the property would become the property of the vendee. The House of Lords only acted on the ordinary rule. Here the contract is operative to this extent, that it gave the vendee certain rights under it; if he had exercised those rights according to the powers in the deed, then he would have been entitled, if he had performed the powers, or acted upon the condition of the powers, to vest in himself the property in those goods by his intervention, though the property would not pass by the deed itself. I agree with the rest of the Court in thinking the demand, under the circumstances stated in this case, was not an act that vested the property in the vendee as if the demand had been properly made. That, I think, prevents any difficulty arising from the supposed application of *Holroyd v. Marshall* (3). I understand that case established a very sound principle, though not one that would at all govern the present inquiry.

Judgment for the plaintiffs for
62*l.* 5*s.* 8*d.*

[IN THE EXCHEQUER CHAMBER.]
(Error from the Court of Exchequer.)

1865. } HIDSON AND ANOTHER v.
Feb. 7. } BARCLAY.*

Debtor and Creditor—Composition-Deed—Bankruptcy Act, 1861—Reasonable Covenants.

By a composition-deed purporting to be made under the Bankruptcy Act, 1861, section 192, it was covenanted that "no creditor who shall have executed or otherwise assented to these presents shall negotiate any bills of exchange, or other negotiable instrument on which the debtor is liable, without having first indorsed thereon a memorandum of the execution of or other accession to these presents by such creditor."

A second covenant was in these terms: "And in consideration of the premises, it is hereby declared and agreed, (but each of the creditors who shall have executed or otherwise assented to or be bound by these presents, agreeing and declaring for himself and his partners, and his and their respective heirs, executors and administrators, and so far as relates to his and their respective acts and defaults,) that if the said trustees shall, within the time aforesaid, certify under their hands to the effect hereinbefore mentioned, the creditors of the debtor who shall have executed or assented to or be bound by these presents shall not, nor shall any of them, nor shall their respective heirs, executors, or administrators, or partners or assignees, at any time (except in respect of the covenant or agreements herein contained, or any of them, or in respect of the aforesaid promissory notes, or except so far as may be necessary in order to enforce any mortgage, lien or security, or any rights or remedies against any persons other than the debtor) commence or prosecute any action or suit at law or in equity, or other proceeding, or obtain any act or adjudication of bankruptcy against the debtor or his heirs, executors or administrators, or make or sue out any attachment or requisition of or upon him or them, or his or their property, credits or effects, for or on account of all or any part of the debts now due from the debtor to the

said creditors who shall have executed or otherwise assented to or be bound by these presents, or any of such creditors, or for or on account of all or any claim of such creditors provable under these presents, and that this present agreement may be pleaded to any action brought contrary to this agreement as if the same were an actual release." Held, by the Court of Exchequer Chamber, reversing the judgment of the Court of Exchequer, that the first covenant was valid, as it applied to and bound those creditors only who assented to it by executing or assenting to the deed, and did not bind non-assenting creditors.

Held, further, that the second covenant was a reasonable and proper covenant.

Error was brought by the defendant to reverse the judgment of the Court of Exchequer on a demurrer.

The declaration was on a bill of exchange with the ordinary money counts.

The defendant pleaded a composition-deed under section 192. of the Bankruptcy Act, 1861. The deed was set out in the plea. The defendant demurred to the plea on account of the insufficiency of the deed to bind him, a non-assenting creditor.

The material clauses in the deed are set out in the report below (1), and in the judgment of this Court.

The case was argued on the 2nd of December 1864, by—

Field and Murray, for the plaintiff in error, the defendant below, and by

Willes, for the defendants in error, the plaintiffs below.

Cur. adv. vult.

The judgment of the Court was now delivered by—

BLACKBURN, J. — This was a case in error from the Court of Exchequer, argued in the Court of Exchequer Chamber, during the sittings after last Michaelmas Term, before Chief Justice Erle, and my Brothers Crompton, Keating, Mellor and myself. I am about to deliver the judgment of the Court. The question in the cause is raised by a demurrer to a plea; it is, whether a composition-deed between the defendant and his creditors is a bar to this action by

* Decided in the Sittings after Hilary Term, coram Erle, C.J., Crompton, J., Blackburn, J., Keating, J. and Mellor, J.

a creditor who has not assented to that deed. It is averred in the plea, and admitted by the demurrer, that all the conditions in the 192nd section of the Bankruptcy Act have been complied with, and it was not disputed, either in the Court below or in the argument before us, that the deed was such a deed as would bar an action by any creditor bound by it. The deed is set out in the plea at length. It contains various covenants, which are numbered. By the fifth it is agreed that "No creditor who shall have executed or otherwise acceded to these presents, shall negotiate any bills of exchange, or other negotiable instrument, on which the debtor is liable, without having first indorsed thereon a memorandum of the execution of or other accession to these presents by such creditor." The eighth is in these terms: "And in consideration of the premises, it is hereby declared and agreed (but each of the creditors who shall have executed or otherwise acceded to or be bound by these presents, agreeing and declaring for himself and his partners, and his and their respective heirs, executors and administrators, and so far as relates to his and their respective acts and defaults), that if the said trustees shall, within the time aforesaid, certify under their hands to the effect hereinbefore mentioned, the creditors of the debtor who shall have executed or acceded to or be bound by these presents shall not, nor shall any of them, nor shall their respective heirs, executors or administrators, or partners or assignees, at any time (except in respect of the covenant or agreements herein contained, or any of them, or in respect of the aforesaid promissory notes, or except so far as may be necessary in order to enforce any mortgage, lien or security, or any rights or remedies against any persons other than the debtor), commence or prosecute any action or suit at law or in equity, or other proceeding, or obtain any act or adjudication of bankruptcy against the debtor or his heirs, executors or administrators, or make or sue out any attachment or requisition of or upon him or them, or his or their property, credits or effects, for or on account of all or any part of the debts now due from the debtor to the said creditors who shall have executed or otherwise acceded to or be bound by these presents, or any of such

creditors, or for or on account of all or any claim of such creditors provable under these presents, and that this present agreement may be pleaded to any action brought contrary to this agreement as if the same were an actual release." It was on these two covenants, and on these two only, that the judgment of the Court below in favour of the plaintiff proceeded.

On the argument before us some other objections were taken to the deed, as to which we expressed our opinion at the time in favour of the defendant, and which we need not now further notice. We also expressed our opinion during the argument that the objection to the deed on account of the eighth covenant was not well founded. A simple release by a creditor, given to a debtor, discharges all sureties and co-debtors, and it is, therefore, in general inexpedient to insert a simple release in a composition-deed. But a covenant not to sue the debtor, except in so far as may be necessary for the purpose of enforcing remedies against others, only bars the covenantor from suing for himself, but does not discharge sureties or co-contractors. It has the operation of a release so far as it is expedient in a composition-deed to release the debtor, and no further; and it is, therefore, as we think, a proper and reasonable provision to insert in a deed relating to the debts and liabilities of a debtor, and his release therefrom. We are not to be understood as in any way overruling the decision in *Dell v. King* (2), that a covenant not to sue, with a provision that the creditor infringing that covenant shall forfeit all benefit under the composition, goes too far. We decide the present point in favour of the defendant because we consider the eighth covenant in this deed as amounting to a simple covenant not to sue except so far as is necessary to prevent the discharge of third parties, and no more.

The Court below chiefly based their judgment upon the fifth covenant, and it was upon this point that we reserved our judgment. After consideration, we are of opinion that this objection to the deed also is not well founded. If the true construction of the instrument had

(2) 2 H. & C. 84; s.c. 33 Law J. Rep. (N.S.) Exch. 47.

been, that this provision applied to all the creditors, as well those dissenting from the deed, but bound by the force of the statute, as those who voluntarily executed or assented to it, we are by no means prepared to say that it would not have prevented the deed from binding those who dissented. If such were the true construction of it, the assenting creditors (who, it may be, were not the holders of any bill of exchange) would by this have imposed a peculiar burthen upon that class of non-assenting creditors who were holders of bills—see *Balden v. Pell* (3); and we are not to be understood as determining that a deed which is unequal in the sense that it imposes a peculiar burthen on the dissenting creditors, or any class of them, is valid. But we need not and do not determine any such point, for our judgment proceeds on the ground that this covenant does not apply to the dissenting creditors, who are bound only by the force of the Bankruptcy Act. The covenant is, in terms, expressed so as to shew that the intention was to make it bind only those who executed or otherwise assented to it, and not those who were bound by the deed by force of the Bankruptcy Act, though not assenting to it. The distinction is carefully made in the deed between the other covenants, which (like the eighth) are made to affect those who have executed or otherwise acceded to or are bound by the deed, and this covenant, which affects only those who have executed or otherwise acceded to the deed; and in this particular deed this construction is much fortified by the eleventh clause, which shews that it was intended by the parties acceding to the deed that they might be bound by provisions which did not bind the non-assenting creditors. The creditors who assent to a deed the terms of which, if the provisions of the Bankruptcy Act be properly pursued, bind all the creditors, might, by a separate deed executed at the same time, enter into a collateral arrangement with the debtor affecting themselves only. If by this separate arrangement they obtained any benefit not conferred on those who were bound by the statutable deed, it would be very

objectionable, and would probably afford a defence to the non-assenting creditors, who would otherwise have been bound by the statutable deed, on the ground that this collateral agreement for a benefit which they did not share was a fraud upon them. But if the provisions of this supplemental deed were all merely onerous on the creditors executing it, no objection of this kind would arise. The creditors who were not parties to the supplemental deed could not object to an arrangement which in no way affected them. Those who were parties to that arrangement could not object to the terms of the arrangement into which they had voluntarily entered. And we do not see that the arrangement is more objectionable because it is contained in the same instrument, instead of being in a separate one. In *Macnaught v. Russell* (4), where the question raised related to a deed under the old Bankruptcy Act, the Court of Exchequer in their considered judgment deal thus with the points we are now considering. They say, "It was, thirdly, objected that there was a provision set out relating to creditors not proceeding at law for their debts, which was unreasonable, and which a creditor ought not to be required to enter into. We were at first much struck with this objection, but upon consideration we think it is not fatal to the plea. *It is expressly confined to the creditors who are parties to the deed.* The plaintiffs are in no way bound by it; they become affected by reason of six-sevenths of the creditors having executed the deed, and we do not think it is of any material consequence to them that the six-sevenths who have signed have entered into a covenant which may impose a hardship upon them. This was a matter for their consideration, and the plaintiff is in no way injured by their voluntarily choosing to take that obligation upon them. The substantial matter so far as he is concerned is his getting the largest possible dividend upon his debt, which this covenant has rather a tendency to secure for him." In this reasoning we completely concur, and we think it applicable to the present case.

(3) 33 Law J. Rep. (N.S.) Q.B. 200.

(4) 1 Hurl. & N. 611; s.c. 26 Law J. Rep. (N.S.) Exch. 192.

The Court below in the present case base their judgment on the proposition that a deed is not good "unless it puts all the creditors on an equal footing." We think that the judgment in *Macnaught v. Russell* (4) points out the sound distinction, that this position does not extend to those cases in which the executing creditors voluntarily put themselves in a worse position than those whom they seek to bind.

It was further said in the judgment below, that the plaintiffs could not have executed or assented to this deed without incurring this obligation, which is true; and the Court (impliedly) repeat what had been before said by the same Court in *Dell v. King* (2), that a creditor has a right to have a deed presented to him for execution which, when executed by him, will put no burthen upon him to which he ought not to be subjected. To this we cannot assent. There is no provision in the statute, nor is there anything in the nature of the transaction to render it essential that the creditors who are to be bound by the deed should have had an opportunity to execute the deed at all. It may often happen that three-fourths of the creditors assent to the instrument before notice of it is given to some creditor, either because he is resident at a distance, or because his residence is not known, or it may be to one who is not asked to sign because it is thought he would certainly refuse; yet surely such a creditor would be bound as much as any other. If the debtor so frames his deed that those who assent to it will be worse off than those who stand out, he is less likely to get three-fourths of the creditors to assent; but if (for reasons of which they are the sole judges) three-fourths do voluntarily incur this peculiar burthen, and do assent, we do not see how one of the creditors who has chosen not to incur the burthen is injured, or why he should be less bound than a creditor who has never had notice of the deed at all. For these reasons we think that the judgment below in this case must be reversed.

Judgment reversed.

[IN THE EXCHEQUER CHAMBER.]
(Appeal from the Court of Exchequer.)

1865. } SCOTT v. THE LONDON DOCK
Feb. 7. } COMPANY.*

Negligence—Inference of Negligence from mere happening of Accident.

The plaintiff, a custom-house officer, while on the defendants' premises in the execution of his duty, was injured by some bags of sugar falling on him from a crane fixed over a doorway, under which he was passing:—Held, by the majority of the Court, Crompton, J., Byles, J., Blackburn, J. and Keating, J., that as the accident was such as did not in the ordinary course of things happen to those who have the management of machinery, and use proper care, it afforded reasonable evidence of negligence in the absence of any explanation by the defendants (dissentientibus Erle, C.J. and Mellor, J.).

This was an appeal by the defendants against the decision of the majority of the Court of Exchequer, making absolute a rule for a new trial in an action for an injury to the plaintiff.

The plaintiff, the only witness, stated in his evidence, that as he, in the exercise of his duty as a custom-house officer, was passing under a doorway on the defendants' premises, some bags of sugar fell on him from a crane which was fixed over the doorway. The defendants offered no explanation of the cause of the bags falling. Martin, B. directed a verdict for the defendants, on the ground that there was no evidence of negligence; the Court of Exchequer, however, (Martin, B. *dissentiente*, Pollock, C.B. *dubitante*), granted a new trial.

Field (Murphy with him), for the appellants, the defendants.—There was no evidence of negligence to maintain the action. The accident happened not in a public street, where the public have a right of way, but on the private premises of the defendants. No doubt the plaintiff was lawfully there, and the bags of sugar were dropped by the defendants' servants. If

* Decided in the Sittings after Hilary Term, coram Erle, C.J., Crompton, J., Byles, J., Blackburn, J., Keating, J. and Mellor, J.

the evidence is as consistent with the accident not being caused by the negligence of the defendants' servants as with its being caused by their negligence, there is no evidence for the jury. So if the evidence is as consistent with the fact that the plaintiff by his negligence was contributory to the accident as with his not being contributory to it, there is no evidence for the jury, even if there was some evidence of negligence on the part of the company's servants—*Cotton v. Wood* (1), *Hammack v. White* (2), *Cooke v. Waring* (3), *Cornman v. the Eastern Counties Railway Company* (4), *Wilkinson v. Fairrie* (5) and *Bolch v. Smith* (6).

[CROMPTON, J.—There is great difficulty in applying the rule of evidence being equally consistent with either view to cases of negligence. How can a Judge say whether the evidence is equally consistent with negligence or no negligence? BLACKBURN, J.—Does not the nature of the accident decide whether the fact of the accident is evidence of negligence? If a ship goes down at sea, and no one can tell whether it sunk by reason of a storm or by reason of the negligence of the crew, the evidence in that case would be equally consistent with either view. But if a ship goes out of harbour, and after it has got a very short distance sinks in a perfectly smooth sea, I think this would, as it has been held, be some evidence that the ship was not seaworthy.]

There must be affirmative evidence of negligence. The plaintiff ought to have explained and detailed the circumstances more. His evidence is ambiguous. He only says the bags fell on him. The bags may have been lowered in the ordinary way, or the sudden illness of a workman might

have caused the accident, or some one for whom the defendants were not responsible might have let the bags down.

[CROMPTON, J.—The plaintiff often can give little evidence how the accident was caused. The power of explanation generally lies with the defendant.]

The plaintiff was guilty of contributory negligence in not looking about him.

[CROMPTON, J.—Is it not a question for the jury whether he was negligent?]

Byrne v. Boadle (7), relied on by two of the Judges below, is distinguishable. There the barrel rolled out of the window and into a public highway. Here the bags are not shewn to have rolled out, and the place was not a highway, where the right of the public to pass in safety is paramount to the right of the individual to use his warehouse. If *Byrne v. Boadle* (7) is not distinguishable, it is contended that it is bad law.

Sir R. P. Collier (Solicitor General), *T. Jones* with him, for the respondent, the plaintiff.—In many cases of a complicated state of facts, it is impossible for the Judge to say whether the evidence for and against negligence is equal. The facts proved here are more consistent with negligence on the part of the defendants' servants than with the absence of it. In many cases, and in this case, the very happening of the accident is evidence of negligence. It must be considered what evidence the plaintiff can be reasonably expected to give. The rule of pleading, that the party who has peculiar means of knowledge must plead with greater particularity than the other, is founded on good sense, and may guide in determining the rule with respect to the evidence to be required. In *Christie v. Griggs* (8), where the coach overset, *Mansfield, C.J.* said that, on proof being given of the accident, the plaintiff had proved enough; and that it lay on the defendant to prove that the coach was well built, and the coachman a skilful driver. So also in *Skinner v. the London, Brighton and South Coast Railway Company* (9) it

(1) 8 Com. B. Rep. N.S. 568; s.c. 29 Law J. Rep. (N.S.) C.P. 338.

(2) 11 Ibid. 676; s.c. 31 Law J. Rep. (N.S.) C.P. 129.

(3) 2 H. & C. 332; s.c. 32 Law J. Rep. (N.S.) Exch. 262.

(4) 4 Hurl. & N. 181; s.c. 29 Law J. Rep. (N.S.) Exch. 94.

(5) 32 Law J. Rep. (N.S.) Exch. 73.

(6) 7 Hurl. & N. 736; s.c. 31 Law J. Rep. (N.S.) Exch. 201.

(7) 2 H. & C. 722; s.c. 33 Law J. Rep. (N.S.) Exch. 13.

(8) 2 Camp. 79.

(9) 5 Exch. Rep. 787; s.c. 19 Law J. Rep. (N.S.) Exch. 162.

was decided that a collision between two trains of the same company was *prima facie* evidence of negligence on the part of the company, and that it was not necessary for the plaintiff to prove what specific act of negligence caused the injury; and that if the accident arose from some inevitable or extraordinary cause, it lay on the defendants to prove it. Here the bags fall on the plaintiff; that is something out of the ordinary course of business. The dock company or their servants can tell, if they choose, how the bags fell: whether they rolled out of the warehouse; whether they were negligently fastened by a chain. The absence of explanation is matter for the jury. The case proved of bags suddenly and violently falling on a man from a warehouse is more consistent with the fact that they fell by negligence than that they fell without it. A machine is used for the very purpose of preventing the bags falling. (He was stopped by the Court.)

ERLE, C.J.—The majority of the Court have come to the following conclusion: that there must be reasonable evidence of negligence; that where the thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen to those who have the management of machinery and use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. We all assent to the principle laid down in the cases cited for the defendants, but the judgment turns upon the construction to be put on the Judge's notes. As my Brother Mellor and myself read them, we cannot find that reasonable evidence of the want of care which seems apparent to the rest of the Court. The judgment of the Court below is therefore affirmed, and the case must go down to a new trial, when the real effect of the evidence will in all probability be more correctly ascertained.

Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]
(Error from the Court of Exchequer.)

1865. }
Feb. 8. } HALL v. JOHNSON.*

Master and Servant—Fall of Roof of Mine—Injury by Negligence of Fellow Servant.

The plaintiff, a workman in a coal-mine of the defendants, received damage from the fall of a stone from the roof of the mine, which had lost its support by reason of the removal of the coal below in the ordinary course of working the mine. The defendants' underlooker, whose duty it was to superintend the mining operations, had negligently, though the danger had been pointed out to him, omitted to prop up the roof. The removal of the coal and the propping up of the roof ought, in the exercise of due and reasonable care, to be nearly contemporaneous operations:—Held, that as there was no evidence that the defendants had not exercised due care in the selection of their underlooker, nor in putting the mine into a proper condition before the miners were sent into it, they were not answerable for the injury caused to the plaintiff by the negligence of the underlooker, his fellow-labourer.

Error was brought in this case by the plaintiff on a bill of exceptions to the ruling of Blackburn, J.

The action was for an injury to the plaintiff: the declaration alleged that the defendants did not use reasonable care in preventing the roof of their mine falling in on the plaintiff, their servant.

The defendants were owners of a coal-mine. The plaintiff was a boy in their employment and worked in their mine, which had been opened and in regular work for five or six years. The nature of the mine required that as the coal was removed in the course of working, the roof of the mine should be propped up to prevent it falling in. The defendants did not personally superintend the working of the mine, but left it to a superior workman called an underlooker,

* Decided in the Sittings after Hilary Term, coram Erle, C.J., Crompton, J., Byles, J. and Blackburn, J.

whose duty it was to see to the proper propping up of the roof. The plaintiff, observing a stone in the roof of the mine likely to fall, pointed it out to the underlooker. The latter, however, told the plaintiff to go on with his work, and took no steps to secure the stone in the roof. On the following day as the plaintiff was engaged in his work the stone fell on him and seriously injured him. Blackburn, J. ruled that there was no evidence for the jury to support the plaintiff's claim against the defendants, no evidence having been given of any personal interference on the part of the defendants, or any knowledge by them of the state of the mine.

To this ruling the bill of exceptions was tendered.

T. Jones, for the plaintiff (Feb. 7).—The ruling of the learned Judge was wrong. There was evidence for the jury that the defendants were liable in law for the injury to the plaintiff. The defendants carry on a dangerous business, and engage persons to work in it. There is an inalienable duty cast by the law on persons carrying on dangerous works to take care that everything should be done to prevent extraordinary damage. It is clear that this injury was caused by the negligence of the underlooker, but the defendants cannot relieve themselves from liability by casting the duty of keeping the mine in safety on him. It may be conceded as a general rule that a master who takes due and reasonable care in selecting proper servants, is not liable for an injury that those servants by their negligence inflict on other fellow-servants; but if the occupation is hazardous, besides using reasonable care in selecting his workmen, he is under the further obligation of seeing that the place where the men work is in a reasonably safe and sound condition—*Patterson v. Wallace* (1), *Bryden v. Stewart* (2).

[ERLE, C.J.—There the master started the mine with an unsafe shaft.]

In *The Barton Hill Company v. Reid* (3) the owner of the mine was held liable to one of his workmen for an injury caused by the fall of the roof of the mine.

[CROMPTON, J.—How do you make it

negligence in the master if he does not know of the state of the roof?]

He is bound to inform himself of it. The negligence of the underlooker is, in a case like the present, the negligence of the master. If the defendants' liability as masters be limited to taking reasonable and proper care to keep the roof of their mine in a reasonable and proper condition, there is evidence of the defendants' liability here, for they did not take such proper care. The liabilities for injuries from the risks of the service are very different, and in the cases are carefully distinguished from the liabilities attaching on the master from risks arising out of the condition of the plant, machinery or mine—*Clarke v. Holmes* (4).

E. James (*Crompton Hutton* with him), for the defendants, was not called upon.

Cur. adv. vult.

The judgment of the Court was now (Feb. 8) delivered by—

ERLE, C.J.—In this case the plaintiff was a labourer in a mine, and he received damage by the fall of a stone from the roof of that mine. The evidence clearly is, that the underlooker employed by the defendants in that mine was guilty of negligence in not propping up the roof of the mine, and that the damage to the plaintiff was caused entirely by that negligence of the underlooker. The question for us is, whether, under these circumstances, the defendants are answerable for the negligence of the underlooker. There is no evidence at all to shew that the defendants had been guilty of any want of proper care in the selection of the underlooker, nor of any want of due care in respect of putting the mine into proper order for mining operations before the miners were sent down into it; on the contrary, it appears by the evidence that the mine had been worked in the ordinary course of proper mining for the last five or six years. In the course of the mining operations of taking the coal from the bed, the coal-roof would be continually in a state requiring props, for as the coal was withdrawn below, so was it needed that the roof should be propped above from time to time;

(1) 1 Macq. 748.

(2) 2 Ibid. 980.

(3) 3 Ibid. 267, 286.

(4) 7 Hurl. & N. 937.

those two operations would be going on contemporaneously. The injury to the plaintiff was caused by the underlooker delaying for one day to prop the roof where the coal had been withdrawn. The plaintiff had given him full notice that a prop to the roof was wanted. The underlooker therefore clearly was guilty of negligence. Upon these facts we think that the position is not tenable, that the defendant, the owner of the mine, is responsible for the negligence of the underlooker. We have come to the conclusion that the underlooker, who had to see to the mining operations in this part of the mine, and the plaintiff were fellow labourers. We take the principle to be established, from a series of decisions in this empire and in America (decisions collected with great skill and clearness by Mr. Manley Smith in his book on *Master and Servant*), that where a labourer is damaged by the negligence of a fellow-labourer, the master is not responsible. Whether it can properly be predicated that two persons stand in the relation of fellow-labourers, is at times a question of difficulty. My Brother Williams brought the idea into prominent relief by saying, that sometimes a person called a fellow-labourer should rather be considered to stand in the position of a deputy-master, and if an act of negligence causing injury to a workman was clearly brought home to one in the position of deputy-master, it might be a question whether the real master was not responsible for his negligence. We wish to reserve our opinion in respect of that question whenever the facts of the case shall give rise to it. On the present occasion we consider it to be past all doubt that the underlooker and the plaintiff were fellow-labourers, and we cannot look on the underlooker as in the position of a deputy-master whose negligence had made his principal responsible. On these grounds we think that the nonsuit by my Brother Blackburn was right, and that the judgment of the Court below must be affirmed.

The other JUDGES concurred.

Judgment affirmed.

1865. }
April 22, 24. } PAIN v. TERRY.

Practice—Motion for New Trial—Rule 50. of Hilary Term, 1853.

Where a country cause was tried at Westminster on the last day but one of Hilary Term, the Court held that an application by the defendant for a new trial, made on the 4th day of the ensuing Easter Term was too late, notwithstanding that the defendant's attorney resided at Sandwich in Kent, and that his London agent lost no time either in obtaining the necessary instructions from him or in acting upon the instructions when received.

This action was tried, before Bramwell, B. at Westminster, on the 30th of January 1865, and resulted in a verdict for the plaintiff for 55*l*.

Wordsworth, on the 22nd of April (1), moved for a new trial, on the ground that the verdict was against the evidence; but the Court held that the application was too late, and refused the rule.

He now (April 24) renewed his application, fortified with an affidavit of the defendant's London agent, which stated that immediately after the verdict on the 30th of January, the last day but one of Hilary Term, he wrote for instructions to the defendant's attorney, who resided at Sandwich in Kent, and who was not present at the trial, though the defendant himself was there. That the attorney replied on the 1st of February, that he had "that day received instructions to move for a new trial on the ground that the verdict was against evidence," and that the London agent accordingly instructed counsel forthwith either on the evening of the 2nd or the morning of the 3rd of February. Subsequently Bramwell, B. had made an order at chambers that all proceedings should be stayed till the 5th day of this term, subject to certain provisions as to payment into court, &c., which were duly complied with.

Wordsworth contended that it was absolutely impossible that the motion could have been made in Hilary Term, as the

(1) The 19th of April was the first day of Easter Term.

necessary instructions could not have been received in time; and that therefore this was a case where the Court might well use their discretion in allowing the motion at any time before judgment was signed. He quoted 2 *Archbold's Chitty's Practice*, 11th edit., 1522, and urged that this case was stronger than *Birt v. Barlow* (2), there cited; and that there should be some distinction made between town and country causes.

Per Curiam.—The application comes too late: and, though the rule might be modified so as to extend the time in cases of fraud, surprise or mistake, the circumstances stated in the affidavit are not sufficient to justify the Court in departing from the ordinary rule (3).

Rule refused.

1865.
June 10, 12.

THE TRUSTEES OF THE
LATE LORD EGLINTON,
appellants, AND THE COM-
MISSIONERS OF INLAND
REVENUE, *respondents*.

Stamp—24 & 25 Vict. c. 91. s. 25.—*Notarial Instrument*—21 & 22 Vict. c. 76.

A notarial instrument in the form of Schedule H. given by section 12. of the statute 21 & 22 Vict. c. 76. is correctly stamped with a one-shilling stamp.

This was a case stated by the Commissioners of Inland Revenue,—pursuant to an act passed in the fourteenth year of the reign of Her present Majesty Queen Victoria, intituled 'An Act to repeal certain stamp duties and to grant others in lieu thereof, and to amend the laws relating to the stamp duties,'—the same being required by

(2) 1 Dougl. 171.

(3) Rule 50. of Hilary Term, 1853, is as follows: "No motion for a new trial, or to enter verdict or nonsuit, motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause be tried in term, or after the expiration of the first four days of the ensuing term, when the cause is tried out of term, unless entered in a list of postponed motions by leave of the Court."—See *Reg. Gen. Law J. Rep.* 1853, p. xii.

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or on behalf of the testamentary trustees of the late Earl of Eglinton, for enabling them to appeal to Her Majesty's Court of Exchequer against the determination of the said Commissioners as to the stamp duty chargeable on the notarial instrument hereinafter mentioned, the said parties having declared themselves dissatisfied with such determination.

The Titles to Land Act (1858), 21 & 22 Vict. c. 76. s. 1, provides that on the conveyance of lands being recorded, it shall have the same effect as if it had been followed by an instrument of sasine duly expedé and recorded at the date of recording the conveyance.

Section 2. provides that where the conveyance shall be contained in a deed granted for other purposes, such as a marriage contract, &c., it shall be sufficient to record in the register of sasines a notarial instrument setting forth the portions of the deed containing the conveyance: the notarial instrument to be in the form of Schedule B. annexed to the act.

Section 12. provides for a disponent under a general conveyance, whether by deed *mortis causa* or *inter vivos*, or a party who has acquired right to such conveyance by service, assignation, &c. completing his title by a notarial instrument. A form of the notarial instrument is given in Schedule H. (1), and the recording of the notarial instrument is declared to be equivalent to a disposition followed by sasine recorded, except in the case of heritable securities, in which case it shall be equivalent to an assignation of the heritable security recorded.

(1) SCHEDULE (H.)

Notarial Instrument in favour of a General Disponent, or his Assignee, &c.

At there was by [or on behalf of] A.B. of Z., presented to me, Notary Public subscribing, a Disposition [or other Deed or Instrument], recorded in the [specify Register of Sasines and Date of recording], by which recorded Disposition [or other Deed or Instrument] C.D. of Y. was vest in all and whole [here describe the Lands]; as also there was presented to me a general Disposition [or other Deed, or an Extract of a Deed], granted by the said C.D., and bearing Date [here insert Date], by which general Disposition the said C.D. gave, granted, and disposed [or otherwise, as the Case may be,] to the said A.B., and his Heirs and Assignees [or otherwise, as the Case may

Section 14. provides for the title of an assignee, &c. to an unrecorded conveyance being completed by recording notarial instrument, Form, Schedule K.

And section 22. provides for the title of a trustee in sequestration, and liquidators of joint-stock companies completing their title to lands by recording notarial instrument, Form, Schedule M.

The Titles to Land Act, 1860, makes similar provision for completing the title of persons to burgage subjects, by recording similar notarial instruments as in the preceding act, 21 & 22 Vict. c. 76.

The notarial instrument in question is one prepared in terms of the 12th section of 21 & 22 Vict. c. 76.

The late Earl of Eglinton, who died on the 4th of October 1861, left a testamentary trust disposition and settlement, and codicils, whereby he disposed generally his whole heritable and movable property to trustees for certain purposes without special conveyances of the lands. The Earl was duly infeft in the lands specially described in the said notarial instrument conform to instrument of sasine in his favour duly recorded. The general trust disposition and settlement gave the trustees a right to the said lands, but in order to invest the trustees in the lands with the complete feudal title, the said notarial instrument was executed and recorded in the new general register of sasines, &c. The notarial instrument sets forth the instrument of sasine in favour of the Earl of Eglinton, by which the said Earl was vest in all and whole the lands of which a special description is given. It then sets forth the testamentary trust disposition and settlement, and codicils containing a general conveyance of all lands to the trustees. It concludes by stating that the trustees had

be, heritably and irredeemably [or in Liferent, or otherwise, as the Case may be], all and sundry the whole Heritable Estate of which he was [or might die] possessed. [If the Deed be granted under any Real Burden or Condition or Qualification, add here, "but always under the Burden of the Real Lien, &c.;" and if the Deed be granted in trust, or for specific Purposes, add, "but always in trust or for the Uses and Purposes mentioned in said Deed." If the Party expeding the Instrument be other than the original Disponent, add, "as also there was presented to me" (here specify the Title or Series of Titles by which the Party acquired Right, and the Nature and Extent of his Right.)]

taken "this instrument" in the hands of the notary public, and the notary signs it before witnesses. (A full copy of the instrument is given in the appendix.) The instrument was recorded at Edinburgh, upon the 29th of August 1862, in the new general register of sasines, &c. On such notarial instrument being recorded, the trustees are, in terms of the declaration of the statute, in the same position as if a disposition had been granted by the Earl of Eglinton, containing a conveyance in their favour of the lands, followed by an instrument of sasine duly expedite and recorded of the date of recording the notarial instrument.

In the General Stamp Act (1815), 55 Geo. 3. c. 184, Schedule, Part I., title "Seisin," the following entry occurs:

"Seisin—Instrument of seisin, given upon any charter, precept of clare constat, or precept from Chancery, or upon any wadset, heritable bond, disposition, apprising, adjudication, or otherwise, of any lands or heritable subjects in Scotland not of Burgage tenure	s. d.
2,160 words or upwards, then for every entire quantity of 1,080 over and above the first 1,080, a further progressive duty of	9 0

The act 13 & 14 Vict. c. 97 (1850), Schedule, repeated the above item verbatim, with the exception of the duty, which was reduced to 5s. The entry in this latter act remains in force.

In the act 55 Geo. 3. c. 184, Schedule, Part I., there is the following entry:

"Notarial Act—Any whatsoever not otherwise charged in this Schedule	s. d.
"And for every sheet or piece of paper, &c. upon which the same shall be written, after the first, a further progressive duty of	5 0

And also under head of "Protest," the following entries occur:—

"Protest—of any bill of exchange or promissory note for any sum of money not amounting to 20l.	s. d.
"Amounting to 20l., and not amounting to 100l.	1 0
"Amounting to 100l., and not amounting to 500l.	3 0
"Amounting to 500l.	5 0
"Amounting to 500l. and upwards	10 0
"Protest of any other kind	5 0
"And for every sheet or piece of paper, &c. upon which the same shall be written, after the first, a further progressive duty of	5 0

These duties remained until the act 24 & 25 Vict. c. 91. s. 25 (1861), which provides—

<p>"In lieu of the stamp duties now payable on protests and other notarial acts, there shall be paid the duties following; that is to say, protest of any bill of exchange or promissory note, when the stamp duty on the bill or note does not exceed one shilling</p> <p>"Protest of any other bill of exchange or promissory note and protest of any kind, and other notarial act whatsoever</p> <p>"And for every sheet or piece of paper, &c. upon which the same shall be written, after the first, a further progressive duty of</p>	<p>The same duty as on the bill or note.</p> <p>s. d. 1 0</p> <p>1 0"</p>
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In the instrument of seisin, the progressive duty is according to the number of words; in the notarial act, according to the number of sheets or pieces of paper.

The stamp duty on an instrument of seisin, when the act 8 & 9 Vict. c. 31. passed, was 9s. of leading duty, and 9s. of progressive duty, if 2,160 words and upwards.

The stamp duty on a notarial act, not otherwise charged, was 5s. of leading duty, and for every piece of paper on which it was written, after the first, 5s.

In 1860 the leading stamp duty for instrument of seisin was reduced to 5s. (13 & 14 Vict. c. 97), the same leading duty as notarial act not otherwise charged. The difference in progressive duty was still kept up.

The duty is imposed on notarial act not otherwise charged, but the Commissioners understand this to mean instrument of notarial act, which is the evidence of the act and not the act itself. The Commissioners also understand an instrument of sasine to be the evidence of a notarial act, and when specially charged to the leading duty of 9s. did not fall under the item of notarial act not otherwise charged. In these notarial instruments there can hardly be said to be a notarial act separate from the instruments, although notarial instruments are generally regarded as the evidence of some notarial act performed in reference to some facts, and embracing the evidence of the facts also.

The said trustees, by their agents, Messrs. Hunter, Blair & Cowan, writers to the

signet, Edinburgh, on the 9th of April 1863, presented to the Commissioners of Inland Revenue the said notarial instrument stamped with the duty of 1s., the duty imposed upon a notarial act, the instrument being written upon one piece of vellum, and containing less than 2,160 words, being of opinion that that was the duty to which the instrument was liable, for the following reasons :

1. Under the different acts referred to, specific duties are put on instruments of seisin, while on other notarial acts separate duties are put.

2. The notarial instrument in question is not an instrument of seisin, the distinguishing characteristic of which is, that seisin or possession of the lands is thereby given. The notarial instrument is simply a certificate under the hands of a notary that certain deeds therein recited contained certain clauses therein specified, but there is nothing whatever contained in it of the nature of delivery of seisin.

3. Notarial instruments are nothing more than forms prescribed by statute for bringing together the clauses in different deeds for the purposes of registration in a shorter form than if the deeds were themselves registered *ad longum*. Under the Titles to Land Act it is the registration of the deed or deeds of conveyance that has the effect of vesting the party, and the registration of selected clauses from the conveyances engrossed in an instrument under the hands of a notary has, by the statute, the like effect of vesting the party.

The trustees desired to have the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable, and paid to them the fee of 10s., in pursuance of the act of parliament in that behalf, and the Commissioners being of opinion that the instrument was chargeable under the said act of parliament with the duty of 5s., the stamp duty imposed on an instrument of sasine, the Commissioners assessed and charged the sum of 4s. as the further duty to which, in their judgment, the said instrument was liable.

Whereupon the said trustees paid to the Receiver General of Inland Revenue the said sum of 4s., as and for such further stamp duty, and the said instrument was

thereupon stamped with a stamp denoting the said further duty of 4s., so assessed as aforesaid, and also with the particular stamp provided by the said Commissioners under the said act of parliament, to denote and signify that the full amount of stamp duty with which such instrument was by law chargeable had been paid. But the said trustees having declared themselves dissatisfied with the determination of the said Commissioners in this behalf, and having deposited with them the sum of 40s. for costs and charges, pursuant to the said last-mentioned act, have required the said Commissioners to state specially and sign the case on which the question with respect to such stamp duty arose, together with their determination thereon, which the said Commissioners do hereby state and sign accordingly.

The question for the opinion of the Court is, whether the said notarial instrument be liable to the stamp duty of 5s. imposed upon an instrument of seisin by the act, 13 & 14 Vict. c. 97, Schedule, or to the stamp duty of 1s. imposed on other notarial act whatsoever, by the 25th section of the act, 24 & 25 Vict. c. 91, in which it is inserted, along with protest, "of any other bill of exchange or promissory note, and protest of any other kind."

J. Anderson (C. Gray Wotherspoon with him), for the appellants (June 10).—The determination of the Commissioners is wrong, because the notarial instrument in question is not either in name or in nature an instrument of sasine: the characteristic of an instrument of sasine was the fact of the delivery of possession or sasine it evidenced. In the year 1858, when the 21 & 22 Vict. c. 76. passed, sasine or delivery of the land was in theory requisite for the competition of a feudal title to land in Scotland. That fact of delivery was declared in an instrument called an instrument of sasine to have been made by the notary who signed it; and that declaration again was the statutory substitution introduced by 8 & 9 Vict. c. 35, instead of the ceremony of actual delivery, which was previously necessary. But an entire change was wrought in Scotch conveyancing by the 21 & 22 Vict. c. 76; by it sasine was declared unnecessary in cases where the title was completed under its

provisions, and registration of the grant or conveyance was substituted for sasine. It would be absurd, therefore, to contend that the notarial instrument here, which is the creature of this act, should be itself of that very kind which the act declared to be unnecessary. The instrument in question had, in fact, nothing whatever to do with sasine; it was but a piece of machinery or vehicle for purposes of registration. If the general conveyance to the late Lord Eglinton's trustees had contained an enumeration and description of the lands, simple registration of the conveyance would, by the terms of the 21 & 22 Vict. c. 76, have completed the title without any instrument of sasine. In such a case as that the lands and conveyance of them would be connected in the same document, and when registered the title would be complete. But the peculiarity of a general conveyance is, that all the grantor's lands are conveyed without their being specified; and the notarial instrument in question was, as its terms would shew, designed and intended to connect within itself the general conveyance with the specification of the particular lands. All that this notarial instrument evidenced was that the notary subscribing it had certain documents presented before him, viz., the late Lord Eglinton's title to certain specific lands, and the title of the trustees to all his lands. This notarial instrument therefore, as it were, grouped together the different titles so as to connect and distinguish the lands which by the general conveyance passed to the trustees, and on registration of the notarial instrument the act declared the title to the specific lands to be complete. This notarial instrument is therefore not an instrument of sasine; and if not, then it was only chargeable under the 24 & 25 Vict. c. 91. s. 25. with a duty of 1s. If, however, this view is ill-founded, a 1s. duty only was chargeable, because by the last act, when carefully construed, it will be found that the duty on an instrument of sasine is to be 1s. duty.

The Attorney General (J. Boyd Kinnear with him), for the respondents, contended that the notarial instrument operated as an instrument of sasine formerly did, for any notarial instrument which perfects the title

must for this purpose be deemed equivalent to an instrument of sasine—*Bell's Principles of the Law of Scotland*, ss. 770 and 771; it ought, therefore, to be subject to the same duty, which, it was submitted, on the construction of the Stamp Acts cited in the case, remained at 5s.

Anderson replied, and *The Attorney General* was afterwards heard.

Cur. adv. vult.

On the 12th of June their Lordships gave judgment as follows:

POLLOCK, C.B.—This was an appeal from a decision of the Commissioners of Inland Revenue against the trustees of the late Lord Eglinton. I believe we are all of opinion that the appeal ought to prevail. The question is, whether a certain instrument is liable to a stamp as an instrument of seisin or sasine; whether the liability is to a 5s. stamp or whether it is liable only to a 1s. stamp, as a notarial act. It appears to me on a careful consideration of the various statutes which relate to the matter, that they make the case tolerably clear. I own, in the first instance, that the meeting with cases of Scotch conveyance, and the strangeness of some of the terms used, and also the acts of parliament with which the Court is not generally familiar, might well raise some doubt, which induced the Attorney General to argue the case. But it appears to me, upon a very short and plain principle, that the appeal ought to prevail. Originally the practice was, in Scotland, as apparently it was in England, to have what, here, we call a delivery of seisin, and what, there, they call simply seisin, by going on the land and actually putting the party in to whom the land is to be conveyed, as it were in possession of the land, conveying it to him on the spot, or delivering to him something which is symbolical of his being put in possession of the land by taking a part of it in his hand. That seems to have been universally practised; and whatever might have been the benefit and advantage of that in a less civilized state of the community when estates were divided into large portions, as soon as ever the division of landed property into smaller parcels became common, it was manifest that that was a most inconvenient

circumstance, because, in very early times, there was substituted for that a process before a notary public, where the party attended and where the deed was executed, which is called the instrument of seisin, and then instead of being a ceremony performed on the land itself, it was performed in the presence of a notary in his office, and he certified to it; and that was not the only ceremony, for there was a certificate of it by the notary; and it was called an instrument of seisin, and it was registered. By the old Stamp Act, not the parent of all the others, but the most important act, which I believe was passed in the year 1815, the 53 Geo. 3. c. 184, under the title of seisin, the instrument of seisin is made liable to a stamp, I think, of 9s. By a subsequent statute, 13 & 14 Vict. c. 97, that is reduced to 5s., and then subsequently came the 21 & 22 Vict. c. 76, and that statute by the 1st section declares, that it shall not be necessary to have this instrument of seisin. That useless ceremony has gone out by degrees. First, instead of performing it on the land it was done before a notary, and then it was discovered that it was of no use to perform it before a notary. It merely created a useless expense and the very title of the act is, in effect, to simplify the process of transferring estates, and to reduce the expense of the transfer. I think that one of the modes of reducing the expenses was to render superfluous any instrument of seisin at all; and by the 1st section it is expressly enacted that it shall not be necessary to have any instrument of seisin at all; but that if the deed of conveyance be registered, the effect shall be absolutely the same as if there had been an instrument of seisin. Now, it is quite clear that, under that section, the registration of a deed of conveyance by no possibility could be charged with a stamp as an instrument of seisin. That seems to me to be as clear as anything can be. But, then, deeds might be long, many parts of them merely superfluous, many wholly unnecessary for the purpose of being registered; and therefore the 2nd section provides, that as it might be expensive and useless to register the whole deed, it should be sufficient if the effective part of it was registered without the whole, and all the multifarious arrange-

ments that might be made under it or that may be contemplated. Then the statute says that, that being the case, it shall be sufficient if as much of the deed is registered as is necessary to accomplish that which the 1st section provided for, if the whole were registered. If you registered the whole deed, there was the whole of the deed, and nothing more; but if you registered only a part, it was then necessary to have a sort of notarial act done by a notary public, in order that what was extracted should be faithfully extracted; and the registering of a faithful extract was what was really required to be done. Then there comes the claim of the Commissioners of Inland Revenue, and they say now, "we claim to have this extract stamped as an instrument of seisin." It is very difficult to know why. No doubt, it is something which operates by law in the same way as seisin formerly did; but it is not an instrument of seisin—it has nothing to do with seisin—and all it turns out to be is this: the act says, if you register the deed, no instrument of seisin shall be necessary at all; but the parties shall be in as it were, and have all the benefits as if there had been an instrument of seisin, which was registered. Then the 2nd section says, if a part is registered, the registering of the whole is unnecessary, provided you register it under the authority of a notary. How, then, can the notarial instrument be called an instrument of seisin? The very words of the original Stamp Act, which I well remember from very early association with it, the 53 Geo. 3. c. 184, no doubt, makes the instrument of seisin liable to a stamp; but that act does not make that which is a substitute for it liable to a stamp; and this is not even a substitute for the instrument of seisin—it is a substitute for the registration of the whole deed; and it is admitted the registration of the whole deed would not require a stamp. When you come to examine the case the fact turns out to be that this is not a substitute for the instrument of seisin; it is a substitute for the registering of the whole deed: and it is the register only of a part that requires a notarial act, to say that that part is a faithful extract from the deed itself. Under these circumstances, it appears to me very clear that the Crown

cannot claim any duty upon this instrument. No doubt, it is a notarial act; therefore liable to a stamp duty of 1s., which at present is all that can be claimed on the stamping of any notarial act. Upon these grounds, it appears to me that the appeal is well sustained, and that our judgment ought to be for the trustees of the late Earl of Eglinton.

MARTIN, B.—I am of the same opinion. The question in this case is, whether the document given in Schedule (H.) of the 21 & 22 Vict. c. 76. is an instrument of sasine within the Schedule to the statute 13 & 14 Vict. c. 97. That is the question we have to decide. Now the description of the instrument given in the Schedule of the last-mentioned act is this: "Instruments of sasine given upon any charter of *clare constat* or precept from Chancery, or upon any wadset, heritable bond, disposition, apprising, adjudication, or otherwise, of any lands or heritable subject in Scotland not of burgage tenure."

Now, in the argument of the Attorney General, he very clearly defined to us from *Bell's Commentaries* what the instrument of sasine was, and it seems, formerly, in Scotland, within the present reign indeed, that the old mode of transferring the absolute fee simple, as we call it, of the property, was by the actual giving seisin of the land by the transferor of the land going upon it and actually giving up possession to the transferee, in analogy and in conformity with the old system of conveyancing. But in Scotland, in consequence of a doubt, the Scotch law being mainly derived from the Civil law, it was not sufficient for the parties themselves to go and deliver seisin, but it was necessary it should be done in the presence of a notary public. It was a very common practice in the Civil law to require the register of the memorandum to be verified by a notary public being present, and the instrument of seisin was a formal statement by the notary public that in his presence seisin of the land was delivered by the transferor to the transferee. And that is what the instrument of seisin is. Now, I find there is an ancient charter, which will be found in the appendix to an old edition of *Blackstone's Commentaries*, vol. 2, in which the original

form is given; it is a very short document: it is as follows: "Memorandum—That on the day and year within written full and peaceful seisin of the within-specified acre, with the appurtenances, was given and delivered by the within-named William de Sagenho to the within-named John de Seybroke, in their own proper persons, according to the tenor and effect of the charter within written, in the presence of Nigel de Saleford, John de Seybroke and others." Now, the instrument of seisin in Scotland was nothing more than the document which I have just read. The memorandum I have just read was attested to be true by a notary public. That is what the instrument of seisin was. Now, the 8 & 9 Vict. c. 35. was passed, and was intituled, 'An Act to simplify the form and diminish the expense of obtaining enfeoffment of heritable property in Scotland,' and by the 1st section, after reciting that it was expedient to simplify the form and diminish the expense, it enacts how seisin shall be given in future; and it enacts that in seisin it shall not be necessary to proceed on the land in which the sasine is to be given, or to perform any act of enfeoffment therein, but sasine shall be effectually given therein, and enfeoffment obtained, by producing to the notary public the warrants of seisin and the relative rights which is now in use to be produced, the taking enfeoffment and by expediting and recording in the general register of sasines, or the particular register of sasines applicable to the lands contained in the warrant of enfeoffment in manner hereafter directed, an instrument of seisin, setting forth that seisin had been given in the said lands and subscribed by the said notary public and witnesses. So that when the Stamp Act to which I have referred passed, that was then the instrument of seisin, but by the 1st section of the 21 & 22 Vict. c. 76. it was enacted that actual seisin need not be delivered. It is in point of fact making the conveyance in Scotland analogous to our claims by bargain and sale and lease and release, which it is well known, by the application of the Statute of Uses, has that effect. Now I apprehend it is clear enough, as the Attorney General stated, that when the Stamp Act passed, the document or warrant of seisin was not

gotten rid of; and in all probability, when that Stamp Act was enacted, the stamp attached to it. But after that came the 21 & 22 Vict. c. 76, an act to further simplify the forms and to diminish the expense of completing titles in Scotland, and it gets rid of this instrument of seisin altogether; and instead of this instrument of seisin the 1st section enacts, that it shall be sufficient to record the conveyance, or to record the notarial act of enfeoffment given by the act of parliament in lieu of it. This arises upon the 12th section, which enacts, that "where a party shall have granted or shall grant a general conveyance of his lands, whether by deed *mortis causa* or *inter vivos*, it shall be competent to the depones under such conveyance, or to any other party who shall have acquired right to such conveyance, in whole or in part, by service, assignation, adjudication, or otherwise, to expedite and record a notarial instrument in or as nearly as may be in the Form of Schedule (H)." The statute goes on to enact, that it shall have the same force and effect "as if such deposition had been followed by an instrument of sasine of the said lands in his favour, duly expedite and recorded at the date of recording such notarial instrument"; so that, in point of fact, the 12th section gets rid of the instrument of seisin altogether, and substitutes a different document. It would be contrary to all principles of law, after the instrument of seisin had been got rid of altogether as useless that we should construe the act of parliament so as to impose upon that document the same stamp that had formerly been imposed upon the old instrument of seisin. I own, in my judgment, it is a clear case that the trustees of the late Earl of Eglinton were right in insisting that there was no duty of 5s. payable. The plain question we have had to consider has been whether the 5s. duty was payable and rightly demanded. I am of opinion that it was not.

BRAMWELL, B.—I have nothing to add. I agree with my Brother Martin that this is a very clear case.

CHANNELL, B. — I entirely agree now with the judgment that has been delivered by the Lord Chief Baron and my Brother Martin. I am not familiar with the

Scotch law, but certainly, in consequence of the argument in this case, I desired further time for consideration, not being quite satisfied on the point. I have had an opportunity of considering the case and of looking more carefully into the statutes. I am now quite satisfied that this instrument is properly stamped with a notarial

stamp. Being of that opinion, I agree that we shall give effect to the 21 & 22 Vict. c. 76. s. 12, which intended to do away with instruments of seisin, and instead thereof to introduce the use of the form of a notarial instrument, by holding that this is not an instrument of seisin.

Judgment for the appellants.

END OF TRINITY TERM, 1865.

INDEX

TO THE SUBJECTS OF THE

CASES AT COMMON LAW

IN THE

LAW JOURNAL REPORTS,

VOL. XLIII.—XXXIV. NEW SERIES.

[In the following Index, Q.B. refers to the QUEEN'S BENCH, C.P. to the COMMON PLEAS, EX. to the EXCHEQUER, and M.C. denotes that the case is reported in the MAGISTRATES' CASES.]

ACCORD AND SATISFACTION—Plea in bar. See Libel.

ACKNOWLEDGMENT OF DEED—The affidavit accompanying the acknowledgment by a married woman of a deed executed by her, made abroad, may be sworn before a notary public, having authority by the laws of his country to administer an oath. *In re Cooper*, C.P. 145

— Where the consideration-money for a married woman giving up her interest, in respect of which the acknowledgment is taken under 3 & 4 Will. 4. c. 74, is to be paid into her own hands, the Commissioners should distinctly ascertain from her that she wishes to pass her property without any provision being made for her. *In re Dorning*, C.P. 173

— The Court will not make an order enabling a married woman to convey, under 3 & 4 Will. 4. c. 74. s. 91, unless there has been a sale of the property which she is desirous of having the power to convey. *Re Graham*, C.P. 321

ACTION—Defendants employed a competent engineer and contractor to select a site for and to construct a reservoir on their land. During the construction, the contractor's people met with some old vertical shafts (of the existence of which defendants were ignorant), and they failed to exercise reasonable skill and care, with reference to these shafts, to provide for the pressure the reservoir was intended to bear. The water from the reservoir escaped down the shafts, through certain old coal-workings under defendants' land, and under land between that of defendants and that of plaintiff, into plaintiff's

colliery, which was thereby flooded. It was held by *Pollock, C.B.* and *Martin, B.*, that the damage not being the immediate result of defendants' act, there must be negligence to render them legally responsible to plaintiff; and that defendants, being ignorant of the existence of the circumstances requiring the exercise of unusual care on their part, were not guilty of negligence. But held, by *Bramwell, B.*, that plaintiff having the right to be free from water sent to him through any artificial course by defendants—whether directly or indirectly,—this action was maintainable on that right being infringed; and that defendants' knowledge or ignorance of the damage likely to result from their act was immaterial. *Fletcher v. Rylands*, Ex. 177

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APPEAL—Limitation of time for notice of appeal under General Inclosure Act, 8 & 9 Vict. c. 118. s. 63. *R. v. the Justices of Essex*, Q.B. 61; M.C. 41

ARBITRATION—If a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them, and protests against it, and the arbitrators nevertheless go into the question and receive evidence on it, and the party, still under protest, continues to attend before the arbitrators and cross-examines the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority by awarding on the matter. *Davies v. Price* (Ex. Ch.), Q.B. 8

— Where there was cause to believe that an arbitrator had failed to enlarge the time for making his award within the time provided by the order of reference, and he had refused to give any information as to whether the enlargement had been duly made or not, this Court, upon the application of one of the parties who wished to make the order of reference a rule of Court, ordered the arbitrator to attend before the Master to be examined upon the matter, in order that the order of reference might be made a rule of Court. *Roberts v. Evans*, Q.B. 7

— Where matters in difference have been referred to an arbitrator by Judge's order, and the arbitrator, after twice enlarging the time, has made his award, the order of reference may be made a rule of Court without an affidavit verifying the dates of the enlargements. *Roberts v. Evans*, Q.B. 73

— The authority of an umpire appointed under the Public Health Act, 1848, to make an award, endures only twenty-one days from the date of his appointment, unless he enlarge the time, which he may and ought to do during the twenty-one days, notwithstanding the arbitrator's time has not expired. The Court has no power under the Common Law Procedure Act, 1854, section 15, or otherwise, to enlarge the time in arbitrations under the Public Health Act. *Kellett v. the Local Board of Health of Tranmere; the Local Board of Health of Tranmere v. Kellett*, Q.B. 87

— The Court will not make absolute a rule *nisi* calling on a defendant to pay money pursuant to an award unless there has been personal service, or unless it be shewn that personal service cannot be effected because the party is keeping out of the way to avoid service. An acceptance by the attorney of the defendant of the service of the rule *nisi*, and a consent by him to the rule being made absolute, are not for this purpose equivalent to personal service. *Evans v. Prosser*, Q.B. 256

— Where two persons agree by deed to refer all matters in dispute which shall arise between them to two arbitrators to be chosen for

that purpose, one by one of the parties, and the other by the other of them, and on such disputes arising, in pursuance of such agreement the arbitrators are appointed by parol, the submission to arbitration is a parol submission, and cannot therefore be made a rule of Court. *Ex parte Glaysher*, Ex. 41

— A dispute arose between plaintiff and defendants, as to whether a certain carriage archway had been constructed in conformity with an agreement entered into between them; and an action having been brought, by an order of *Nisi Prius* the cause was referred to an arbitrator, who was empowered to direct, if he found for plaintiff, what should be done to make the carriage archway in conformity with the agreement. The arbitrator found for plaintiff, without awarding any damages, and directed certain alterations to be made in the archway. Plaintiff signed judgment for the amount of the damages claimed in the declaration; but it was held plaintiff was entitled only to nominal damages. *Brown v. the Somerset and Dorset Rail. Co.*, Ex. 152

— See *Costa*.

ARTICLED CLERK—Where an articulated clerk had served for nineteen months under his articles, and had then been compelled from illness and other causes to be absent for more than sixteen months, this Court permitted him to be discharged from the old articles, and to serve the same master under new ones, for such a period as with the time during which he had already served would make up the full period of five years. *Ex parte De Jivas*, Q.B. 7

— A clerk, under articles for five years, having served for two years and a half, was incapacitated from serving by ill health for more than a year; he then resumed service. Before the expiration of the five years, he applied to the Court that the interval during which he had been unable to serve might be allowed to count as actual service. The Court refused the application as premature. *Ex parte Rogers*, Q.B. 136

— An articulated clerk having served part only of the five years under his articles, after the expiration of the five years applied to the Court that he might be allowed to enter into fresh articles, and that the time actually served might be counted as part of the necessary time of service. The Court refused to make any order; overruling *Ex parte Smith* on this point. *Ex parte Keddie*, Q.B. 136

ASSIGNMENT—What passes. See Bill of Sale.

— When fraudulent and void as against creditors. See Debtor and Creditor.

ATTORNEY AND CLIENT—An action being brought to recover the price of a piano, plaintiff's attorney agreed to settle by the return of the piano and payment of costs; and it was held, in the absence of a distinct prohibition from his client,

he had authority to do so; and defendant was entitled to have all further proceedings stayed. *Pristwick (or Prestwick) v. Poley*, C.P. 189

ATTORNEY AND SOLICITOR—An attorney having been struck off the roll in Easter Term, 1859, for misappropriating to his own use money received from a client for a particular purpose, the Court, in Hilary Term, 1865, allowed his name to be restored to the roll, on affidavits of numerous attornies to his good character and conduct in the interval. *In re Robins*, Q.B. 121

— An attorney having been struck off the roll, in order to be called to the bar, was afterwards disbarred for professional misconduct; the decision of the Benchers being affirmed, on appeal, by the fifteen Judges. After the lapse of twenty years, an application was made on his behalf to be re-admitted an attorney; but the Court refused the application, on the ground that there were no affidavits of professional persons and others as to his good conduct and character in the interval. But subsequently, on a second application, it appeared that since his disbarment he had lived a very secluded life; and he had filed affidavits two months before the application, stating every place at which he had lived, and no affidavits were filed impeaching his character. The Court then dispensed with the affidavits usually required of professional and other persons as to his good conduct and character in the interval, and re-admitted him without a re-examination. *In re Pyke*, Q.B. 121, 220

— Plaintiff recovered judgment and took defendant on a *ca. sa.*; W, attorney of plaintiff's father, agreed with defendant, that on delivery of certain documents he would discharge defendant; the documents were delivered, and W. gave defendant an order of discharge, directed by plaintiff to his attorney; the sheriff refused to discharge, as the order was not directed to him; and it was held, defendant was entitled to his discharge, on condition that no actions were brought against the sheriff or any one else, and that plaintiff's attorney's remedies on the judgment should not be prejudiced. *Langley v. Headland*, C.P. 183

— See Articled Clerk. Attorney and Solicitor.

AUCTION—An auctioneer was instructed by the owner of premises to offer them for peremptory sale by public auction, at a named day and place. He issued handbills in which it was represented that the premises would be offered for sale by him in such manner. It was also stated in the handbills, that the premises would be offered for sale by direction of the mortgagee, but without disclosing the mortgagee's name; and there was a notice at the bottom, "For further particulars apply to Mr. Hustwick, solicitor, or the auctioneer." Hustwick was the solicitor of the vendor. Plaintiff attended the auction, and made the highest bid, except that Hustwick bid a larger sum and bought in the premises. Plaintiff brought an

action against the auctioneer; but it was held, that upon these facts there was no contract upon which the auctioneer was personally liable. *Mainprice v. Westley*, Q.B. 229

BAILMENT—A bailee is not estopped from disputing the title of his bailor, and setting up the *jus tertii*, where the bailment has been determined by what is equivalent to an eviction by title paramount. *Biddle v. Bond*, Q.B. 137

BANKRUPTCY—*Prima facie* a trader who, on the eve of bankruptcy, hands over to a creditor assets which ought to be rateably distributed among all his creditors, must be taken to have acted in fraud of the law. But if circumstances exist which tend to explain and give a different character to the transaction, and to shew that the debtor acted from a different motive, such circumstances ought to be left to the jury, and the proper direction in such a case is that, unless the jury come to the conclusion that the debtor had the intention of defeating the law, and preventing the due distribution of his assets, by preferring one creditor at the expense of the rest, the transaction stands good in law. The whole question turns upon the intention of the trader in disposing of his goods to the particular creditor. *Bills v. Smith*, Q.B. 68

— A debtor, by deed, in consideration of a bygone debt of 230*l.*, assigned to defendants certain property amounting to 160*l.* He had other property, consisting of an equity of redemption valued at 150*l.*, and book debts to the amount of 50*l.*, of which 22*l.* were good. His debts amounted to 1,100*l.*, of which 800*l.* was due to defendants, and the residue to other creditors. At the time the deed was executed the debtor was insolvent, and defendants knew it, and they also knew that if they put the deed in force it would prevent the debtor from carrying on his trade. The deed was put in force by defendants, and the debtor's trade was stopped. It was held, the assignment was an act of bankruptcy, as defendants by putting the deed in force prevented the continuance of the trade, and thereby necessarily defeated and delayed creditors. *Young v. Fletcher*, Ex. 154

— The liability of a shareholder of a joint-stock company to pay future calls is not a liability to pay money on a contingency within section 178. of the Bankruptcy Law Consolidation Act, 1849, and consequently such shareholder's bankruptcy is no bar to an action for a call made subsequently to such bankruptcy. *The General Discount Co. (Lim.) v. Stokes*, C.P. 25

— A Commissioner in Bankruptcy made an order, under 12 & 13 Vict. c. 106. s. 125, in these terms: "That the household goods, furniture, &c. being in or about the messuage or dwelling-house and premises in the occupation of the said T. Taylor, in Cross Street, Middleton, and known as the Cross Keys, be sold and disposed of by the assignees for the benefit of the creditors of the said T. Taylor." It was held, per

Erle, C.J., and *semble per Byles, J.*, that the order was sufficiently specific. Also, *per Byles, J.*, that the order was not bad upon the face of it; and could not be held to be bad, unless it appeared from the evidence that a more specific order might have been made. *Fielding v. Lee*, C.P. 143

BANKRUPTCY (continued)—The Court of Bankruptcy is the Court referred to in section 198. of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), which provides that, after notice of the filing and registration of a deed of composition, process shall not issue against the person or property of the bankrupt "without leave of the Court." *Skellon v. Symonds*, C.P. 151

— To a declaration for breaches of covenants contained in a lease, in writing, of certain premises from plaintiffs to defendant, defendant pleaded his discharge in bankruptcy, a refusal by the creditors' assignee to accept the lease, his own execution of a surrender of the lease to plaintiffs, his tender of the deed of surrender, and offer to deliver up possession to them, without, however, alleging that the lease was lost or destroyed, or that he was prevented from giving it up. It was held, the plea was bad. *Colles v. Evanson*, C.P. 320

— "Possession, order or disposition." See *Frauds*, Statute of.

— Trust and Composition Deeds. See *Debtor and Creditor*.

BARON AND FEME—After a divorce *à vinculo matrimonii* a man is not liable to be sued, jointly with his former wife, for a tort committed by her during the coverture. *Capel v. Powell*, C.P. 168

— The protection of an order granted to a wife under the 21st section of 20 & 21 Vict. c. 85. is confined to the lawful earnings of lawful industry, and does not extend to earnings (or property purchased with earnings) acquired by her as keeper of a brothel. *Mason v. Mitchell*, Ex. 68

— A married woman, who had property settled upon her in the usual way to her separate use, in 1837 made a joint promissory note with her husband for 950*l.*, and delivered the same to his bankers as a security for his overdrawn account; from time to time the note was renewed until the death of the husband in 1855, the last renewal bearing date 1848. At the time of his death the debt due by the husband to the bankers was 2,340*l.* 16*s.* 4*d.*, which was reduced by the realization of certain other securities they held to 917*l.* 11*s.*, for which sum, on the 28th of August 1856, she, after her coverture had determined, made and delivered her promissory note. It was held, there was a good consideration for the last-mentioned note, as the note made in 1848, although made during coverture, was binding on her separate estate in equity, and that it was immaterial whether it was barred

by the Statute of Limitations or not. *Latouche v. Latouche*, Ex. 85

— See *Acknowledgment of Deed*. *Witness*.

BILL OF LADING—S. and F. owners of a ship, mortgaged her to the plaintiff, and also assigned to him all the freight to be earned by the ship. S. and F. retained possession of the ship, and sent her to Cuba, expecting to find there a return cargo; but none was ready. The captain of the vessel, therefore, determined to buy for his owners a return cargo for an English port, and he obtained a cargo of wood from T. & Co., who supplied it to him, and took a bill of lading for the wood from the captain, who, by the bill of lading, bound himself "to deliver it in the like good order in the said port, or in such other my manifest may appoint, to order —, who, on faithful delivery being shewn, shall pay me — for freight and conveyance." A black line was drawn through the space in the bill of lading usually filled up with the amount of the freight. T. & Co. sent to M. & Co., of Havanna, the bill of lading, and the invoice of the goods, stating them to be "shipped by order of M. & Co., of Havanna, and for account of risk of whom it may concern." M. & Co. paid T. & Co. for the goods, and drew bills for the price on an English merchant, who refused to accept them. The defendant thereupon accepted the bills for the honour of the drawer, and paid them when due. He also received the bills of lading indorsed in blank to T. & Co. S. & F. became bankrupt. The plaintiff took possession of the ship on its arrival in England and claimed freight for the cargo. The defendant sold the cargo, and paid the freight, under protest, to the dock company, with whom the cargo had been deposited. On an interpleader issue whether the plaintiff was entitled to claim freight, it was held he was so entitled, as the goods remained the property of T. & Co. under the bill of lading. *Gusson v. Tyrie* (Ex. Ch.), Q.B. 124

— Defendant by his bill of lading, signed at Odessa, undertook to convey a cargo from thence to the United Kingdom, to call at Cork or Falmouth for orders, for plaintiffs, merchants residing at Odessa. The ship was a Mecklenburg ship, and the bill of lading contained the following clause, "the act of God, the king's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of what nature and kind soever excepted, unto order and assigns, paying freight for the said goods and all other conditions as per charter-party." In the charter-party the exception was for "the act of God, enemies, fire, restraint of princes, and all and every dangers and accidents of the seas, rivers and navigation of what nature or kind soever during the said voyage." It was held, the words, "the king's enemies" in the bill of lading must be understood to include at least the enemies of the sovereign of the carrier, namely, the Duke of Mecklenburg. Also, that, if defendant required any further protection, he was not entitled to

rely on the words "restraint of princes" in the charter-party, for that these words were not incorporated in the bill of lading, by reason of the reference to the charter-party therein contained. *Russell v. Niemann*, C.P. 10

— See Charter-Party.

BILL OF SALE—Under the Bills of Sale Act (17 & 18 Vict. c. 36), ss. 2 and 3, it is not necessary that the vendee should state on the bill of sale the name of the person who really advances the money, unless there be some trust in favour of the vendor, although the circumstances be such that a Court of equity would hold the vendee to be a trustee only. *Robinson v. Collingwood*, C.P. 18

— B, who was yearly tenant of the dwelling-house which he occupied, being indebted to plaintiff, executed a bill of sale, by which he assigned to plaintiff "all the household goods, furniture, stock-in-trade and other household effects and all other goods, chattels and effects in or about the said dwelling-house," "and all other the personal estate whatsoever," of the said B, with power to plaintiff to sell the same in case of default in payment of the debt due to him from B, and to stand possessed of the monies to arise from such sale, upon trust to satisfy the expenses and debt, and to account for the surplus, if any, to the said B. It was held, that notwithstanding the general words used, B.'s term or interest in the said dwelling-house did not pass under such bill of sale to plaintiff. It was held, also, that even if the term did pass, plaintiff could not before entry maintain an action of trespass in respect of such dwelling-house. *Harrison v. Blackburn*, C.P. 109

— The filing of a copy of a bill of sale of personal chattels is valid and effectual under 17 & 18 Vict. c. 36, although the original bill of sale has been previously altered or destroyed. The property in the chattels will remain in the person to whom they were conveyed by the deed on its execution. *Green v. Attenborough* (Ex. Ch.), Ex. 88

— G. K., who was a trader, by a bill of sale, assigned to defendant "all his household furniture, plate, linen, china, glass, all his stock, cattle, horses, farming implements, crops, book-debts, and all other his personal estate and effects whatsoever then being or hereafter to be upon or about his dwelling-house, farm and premises." The bill of sale also empowered defendant, "in case the sum of 300*l.* and interest should not be paid on demand, to enter upon the premises which might be in the occupation of the debtor, and there distrain the goods and chattels there found for the sum of 300*l.* and interest." After the execution of the bill of sale, G. K. purchased goods from time to time in the way of his trade until the 8th of January 1862, on which day a formal demand of the sum of 300*l.* was made on G. K.'s wife, and on non-payment of the same on the same

day, the defendant entered and seized all the furniture, goods, chattels and effects found upon the premises. It was held, the demand on the wife was not a sufficient demand, and that the property acquired by G. K. after the execution of the bill of sale did not pass to defendant. *Belding v. Read*, Ex. 212

— See Cheque.

BILLS AND NOTES—In an action by an indorsee against the members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership and contrary to the partnership articles, the onus is cast on the plaintiff of shewing that he gave value. The case of *Musgrave v. Drake* commented upon. *Hogg v. Skeen*, C.P. 153

— An instrument in the form of a bill of exchange, addressed to and accepted by the defendant, but without the names of either a payee or drawer, is neither a bill of exchange nor a promissory note, but only an inchoate instrument. *M'Call v. Taylor*, C.P. 365

— Defendant, a British subject resident in Florence, signed two promissory notes there, as joint and several maker with his brother in London, to whom he sent them by post. His brother then also signed them, and delivered them in London to the payees. It was held, the cause of action arose when the notes were delivered to the payees in this country, and that defendant could therefore be sued here under section 18. of the Common Law Procedure Act, 1852. *Chapman v. Cottrell*, Ex. 186

BROKER—Bought and sold notes. See Contract.

BURIAL BOARD—The vestry of a parish, one for ecclesiastical purposes, but divided into two parts for the relief of the poor and other temporal purposes, appointed a burial board, which borrowed a large sum for the formation of a burial-ground, and by deed charged the future rates to be levied on part A, and also the future rates to be levied on part B. for the relief of the poor of the same parish or any part thereof, with the payment of the principal and interest. After a time a sum becoming due for an instalment of the loan and interest, the burial board apportioned the amount between the two parts in the proportion of the value of the property in each part as then rated to the relief of the poor, and demanded payment of the overseers of each part for its respective portion. It was held, the charge was duly imposed by the deed, and the apportionment made on a correct principle, and a mandamus was granted to compel payment. *R. v. the Overseers of Colehill* (Ex. Ch.), Q.B. 96

BURIAL FEES—Where, prior to 15 & 16 Vict. c. 85, a township, which was a parish within the meaning of the interpretation clause, was divided into ecclesiastical districts, with separate burial-grounds, and afterwards a burial-

ground was provided under the act for the whole township, it was held, that each incumbent of such districts was entitled to the burial fees in respect of the burial service performed by him in the burial-ground provided under the act to which he would have been entitled before the act if the body had been buried in the burial-ground attached to his district. *Day v. Peacock*; *Cobb v. the Same*; and *Binder v. the Same*, C.P. 225

CANAL COMPANY. See Nuisance.

CARRIERS BY RAILWAY—Defendants, a railway company, received certain cattle to be carried for plaintiff to B. station, and induced him to sign a ticket containing certain "special conditions," among others that defendants were not to be answerable for "any consequences arising from over-carriage, detention or delay in, or in relation to, the conveying or delivering of the said animals, however caused." The cattle were sent to another station, more distant than the B. station, where they remained for some hours until they were found by plaintiff, and in consequence of the delay, and from want of food and water, the cattle were injured. There was no consideration for the special contract by charging plaintiff a smaller rate of charge, or anything of the kind; and it was held, the cattle were injured within the meaning of 17 & 18 Vict. c. 31. s. 7, and also that the condition in the ticket was unreasonable within the meaning of that section. *Allday v. the Great Western Rail. Co.*, Q.B. 5

— Under section 7. of 17 & 18 Vict. c. 31,—which provides that no greater damages shall be recovered from a railway company for loss of or injury to a horse than 50*l.*, unless the person sending or delivering the same shall at the time of such delivery have declared it to be of a higher value, in which case it shall be lawful for the company to demand and receive reasonable per-centage upon the excess of the value so declared, and which shall be paid in addition to the ordinary rate of charge,—the knowledge of a company as to the value of a horse not derived from a declaration to that effect by the sender does not give the company any right to demand such increased rate of charge under the above section. To entitle the company to demand such increased rate, the declaration must be made with an intention by the sender of the horse that it should so operate. *Robinson v. the South-Western Rail. Co.*, C.P. 234

— An attorney, going by railway to attend a county court, took, in his portmanteau, documents and bank-notes for use in certain causes in which he was engaged as an attorney. The portmanteau was carried under the private act of the railway company without charge as passenger's "ordinary luggage"; it was missing at the end of the journey, and not recovered for some days. It was held, these articles were not "ordinary luggage" of the attorney as a passenger, and that the railway company were not liable in

damages for the consequences of the temporary loss of them. *Phelps v. the London and North-Western Rail. Co.*, C.P. 259

— Plaintiff took a ticket from defendants, a railway company, from C. to N; plaintiff, after waiting a long time, was told by a porter that the train was late in consequence of an accident, and the train eventually arrived an hour and a half late. The consequence was that plaintiff was late for the train at G, which would have carried him on to N. The train-bill was not put in, but only some correspondence in which defendants repudiated their liability on the ground that by the train-bills they gave notice they would not be liable for the trains not keeping time. It was held, there was no evidence of a cause of action. *Hurst v. the Great Western Rail. Co.*, C.P. 264

— A, a carrier, was in the habit of carrying goods for B; the ordinary course was to deliver the goods to B. immediately on their arrival at M, where B. carried on business. B. requested A. to employ C. as his agent, and afterwards, without notice to A, arranged with C. not to deliver in due course, but to give him notice of the arrival of the goods, and to keep them till he sent for them. C. on one occasion forgot to give notice pursuant to this arrangement, and B. brought his action against A. for such neglect. It was held, A. was not liable. *Butterworth v. Brownlow*, C.P. 266

— Effect as an estoppel of a declaration of the value of the thing carried. *M'Cance v. the London and North-Western Rail. Co.* (Ex. Ch.), Ex. 39

— Goods were delivered to P. & Co., agents at Worcester for the Great Western Railway, to be carried to Chester "*via* Stafford." The goods were conveyed over the line of the Great Western Railway from Worcester to Stafford, and thence to Chester over the London and North-Western Company's line, the Great Western Railway Company having no line between Stafford and Chester. The waggons of the Great Western Company travelled the whole journey P. & Co. were also agents for the London and North-Western Company, whom they favoured rather than the Great Western Company. It was held, that there was evidence of one contract with the Great Western Company to carry the whole journey from Worcester to Chester, and that they were therefore liable for any damage done to the goods during the journey. *Webber v. the Great Western Rail. Co.*, Ex. 170

CERTIORARI—A provisional order of a Secretary of State empowering a local board to put in force the Lands Clauses Consolidation Act, with respect to the purchase of land, has no validity until it has been confirmed by act of parliament, and cannot be brought up by *certiorari* in order that it may be quashed. *Frewen v. the Local Board of Health of Hastings*, Q.B. 159

— A prosecutor removing an indictment into the Court of Queen's Bench by *certiorari* is only liable to pay costs to defendant, if acquitted, by virtue of the recognizance to pay costs in such event as required by section 5. of 16 Vict. c. 30; and if the prosecutor has entered into a recognizance only to prosecute with effect, and to do and perform such order as the Court shall direct, he is not liable to costs, and the Court has no power, under section 6, to order costs to be taxed against the prosecutor. *R. v. the Inhabitants of East Stoke*, Q.B. 186; M.C. 190

— See Conviction.

CHARTER-PARTY — By a charter-party, made at Liverpool by the plaintiff, chartering his ship to the defendant for a voyage from Liverpool to Sydney, the defendant was to pay for the use of the vessel in respect of the voyage a lump sum in full, "on condition of her taking a cargo of not less than 1,000 tons of weight and measurement." The plaintiff placed the vessel at the disposal of the defendant, who loaded her with 525 tons weight and 330 tons measurement goods. The ship could not safely carry any more. There were left 150 tons vacant space. The ship sailed with this cargo. A cargo of 1,000 tons of weight and measurement is usually, and at Liverpool, loaded one-third weight goods and two-thirds measurement goods; but the ordinary cargo for the Sydney market reverses these proportions, being two-thirds weight and one-third measurement. The vessel was capable of carrying 1,000 tons of weight and measurement in the ordinary proportions of one-third weight and two-thirds measurement. In an action by the plaintiff for the freight, it was held that the defendant was liable; that the condition was not broken, since the charter-party meant that the ship was to be capable of taking an ordinary cargo of 1,000 tons weight and measurement at the port of loading, and not a Sydney cargo; and further, that even if the condition had meant a Sydney cargo, and had not been complied with, and was in terms a condition precedent to the right to the freight, still, as the defendant had received part of the consideration for the contract in having the ship placed at his disposal, and in having loaded her with his goods, with which she had sailed, he could no longer treat it as a condition precedent to defeat the claim to the freight wholly, but must avail himself of the breach of the condition in reduction of the amount claimed. *Puat v. Dowie* (Ex. Ch.), Q.B. 127

— A ship was chartered out and home at a lump sum, bills of lading to be signed by the shipowner or agent at any rate of freight without prejudice to the charter. At an outward port, the agent of the charterers advanced money to the master for the ship's use, on condition of the ship taking goods on the return voyage under bills of lading making the freight payable to them (the agents) or their assigns at the port of delivery. It was held, the master had no

authority to make such bills of lading, and that the shipowner retained his lien on the goods put on board for the freight. *Reynolds v. Jex*, Q.B. 251

— A charter-party stipulated that a certain steamer then at N, being tight, staunch, and in every way fitted for the voyage, should proceed to the usual place of loading at N, or as near thereunto as she could safely get (guaranteed for cargo in a certain month), there load, and then proceed to A. It contained the usual exception of dangers and accidents of seas, rivers and navigation during the voyage. It was held, the voyage commenced from her starting from her then berth for the loading place, and that the exception applied to that portion of the voyage. *Barker v. M'Andrew*, C.P. 191

— Defendant chartered a vessel, freight to be paid in bills at six months' date from date of sailing or in cash (less discount equal thereto), less, in either case, the cost of insurance, to be effected by charterers at ship's expense, and also 800*l.* to be paid on delivery of cargo. It was held, such advanced freight was not to be returned, and that defendant was liable to contribute to general average in respect thereof. *Trayes v. Worms*, C.P. 274

— A, of Alexandria, bought coals of B, of London, which were to be delivered at Alexandria, price to be paid on delivery of bill of lading, less balance of freight payable at Alexandria. B. chartered C's ship to carry the coal, "coal to be delivered on freight being paid,..... freight to be paid on unloading and right delivery of cargo, less advances, in cash, at current rate of exchange,..... half the freight to be advanced by freighter's acceptance at three months on signing bills of lading; owner to insure amount and deposit with charterer the policy and to guarantee the same." The bill of lading was signed. B. gave his acceptance for the half freight, the receipt of the half freight was indorsed on the bill of lading, and the bill of lading was indorsed in blank by B. and given to A. The average length of the voyage was two months; before the ship arrived B. became insolvent, and on arrival of the ship and before the acceptance was due, the master refused to deliver the cargo to A. unless the whole of the freight was paid or payment guaranteed. A guarantee was given by D. for A. under protest, and the cargo was delivered; D. then by A.'s direction refused to pay. An action was brought in the Consular Court against D, who then, by A.'s direction, paid under protest. A. repaid D. C. knew nothing of the arrangement between A. and B. It was held, that A. was entitled to recover the half freight from C. *Tamvaco v. Simpson*, C.P. 268

— See Bill of Lading.

CHEQUE—A cheque payable to bearer, and stamped with a penny stamp, was, on the 22nd of June, drawn by defendant and given by him to G.

It was at the time dated the 22nd of July. On that day G. indorsed it to W, who handed it to plaintiff, and received in return plaintiff's cheque for the same amount. Plaintiff took defendant's cheque without notice or knowledge that it had been post-dated. It was held, the cheque appearing to be correctly stamped according to its purport, and having been taken by plaintiff without notice that it was post-dated, and innocently, he was entitled to recover upon it against the defendant. *Austin v. Bunyard*, Q.B. 217

CHURCH-RATE—Power of Justices under a local act to enforce rate against a Quaker disputing the rate. Appeal to the Quarter Sessions. Jurisdiction of Justices to inquire into validity of rate. "Inhabitant." *Wilson v. the Churchwardens of the Parish of Sunderland-near-the-Sea*, C.P. 256; M.C. 90

COMMON—To a declaration in trespass defendant pleaded thirty years' enjoyment of right of common of pasture over the *locus in quo* for the cattle levant and couchant upon the toftstead belonging to him as appurtenant thereto. It was held, that the number of commonable cattle not being in question, it was not necessary for the support of the plea, that the cattle should actually be fed upon the produce of the toftstead; and that there is no distinction, in this respect, between a plea, founded on the Prescription Act, and a plea grounded on prescription properly so called. *Carr v. Lambert*, Ex. 66

COMPANY—Defendant authorized his name to be inserted as a director in the prospectus of a joint-stock company, limited. The prospectus was sent to defendant, who suggested alterations to it. The secretary gave orders to plaintiff to advertise the prospectus, which was done at an expense of 236*l*. The company was never registered; and it was held, in an action by plaintiff against defendant, to recover the expenses of the advertisements, that defendant, by consenting to act as a director, had not authorized the secretary of the company to pledge his credit, and that he was not liable. *Burbidge v. Morris*, Ex. 131

— See Contract.

COMPENSATION. See Lands Clauses Consolidation Act. Metropolis Local Management Act. Sewers.

COMPOSITION DEED. See Debtor and Creditor.

CONTRACT—Defendants, a public company, employed plaintiff, a broker, to dispose of their shares, on the terms that he should be paid 100*l*. down, and 400*l*. in addition, upon the allotment of the whole of the shares of the company. Plaintiff disposed of a considerable number of shares, when defendants wound up the company; and it was held, by the Court, which had power to draw inferences of fact, that plaintiff was prevented earning the 400*l*. by the act of the com-

pany, and was therefore entitled to recover a proportion of the 400*l*. *Inchbald v. the Western Neigherry Coffee, Tea and Cinchona Co. (Lim.)*, C.P. 15

— A declaration, after setting out an agreement by which the plaintiffs contracted with the defendants to do certain works for a certain sum to be paid them by the defendants on production by the plaintiffs of the certificate of the surveyor of the defendants that the works had been efficiently performed to his satisfaction, averred that, although all things had been done by the plaintiffs to entitle them to such certificate, yet the said surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do, and the defendants had not paid the money payable on such certificate. This was held, on demurrer, bad as not disclosing any cause of action against the defendants. *Clarke v. Watson*, C.P. 148

— In a contract to sell "500 bales of cotton to arrive in Liverpool per ship or ships from Calcutta," there was the following stipulation: "the cotton to be taken from the quay; customary allowances of tare and draft, and the invoice to be dated from date of delivery of last bale." It was held, the stipulation, "the cotton to be taken from the quay," was an independent stipulation for the seller's benefit, and not a condition precedent, which the purchaser had a right to insist on being performed. *Neill v. Whitworth*, C.P. 155

— Plaintiffs were owners of ship W. and one M. of ship G, which was insured in two companies, one of which was represented by defendants, the other by M. himself. The G. ran into the W, and was arrested in the Admiralty Court; an agreement was entered into by plaintiffs, M. and the insurers, that plaintiffs would release the ship, and the other parties would "pay the amount of damage which the ship W. had received from the collision," and that in case of dispute about "the amount of damages claimed by Heard Brothers (the plaintiffs) by reason of the collision," the matter should be referred. It was held, that "ship" in the first clause must be read "owner of ship," and that plaintiffs were entitled to recover for loss of profits as they would have done in the Admiralty Court. *Heard v. Holman*, C.P. 239

— By indenture of the 15th of May, plaintiff covenanted with defendant to procure a ship, to stow on board a certain telegraphic cable then lying at M. Wharf, to provision and rig the vessel, to provide and pay the crew and workmen, &c., to lay down the cable, and that he, plaintiff, would perform the several acts aforesaid and have the ship ready equipped for sea at the Nore on or before 15th of July, and would proceed forthwith to T. and lay down the cable; and if plaintiff made default in having the ship ready with the cable on board at the Nore by 15th of July, defendant might deduct and retain as liquidated damages 20*l*. a week. Defendant

covenanted, subject to his right to deduct and retain, as liquidated damages, to pay plaintiff 5,000*l.*, by instalments, that is to say, 1,000*l.*, part thereof, on or before the expiration of seven days after the arrival of the ship at M. Wharf; 2,000*l.*, further part, on or before twenty-one days after the arrival of the ship at the wharf; the remainder when the ship should put to sea from the Nore. And it was by the same indenture agreed and declared, that for the true performance of the covenants by plaintiff thereinbefore contained, and for securing the penalties which he might incur under these presents, plaintiff and two responsible sureties should, within ten days of the execution of these presents, give and execute to defendant, his executors and administrators, a bond in the penal sum of 5,000*l.*; and for the due performance of the covenants on the part of defendant thereinbefore contained, defendant and two responsible sureties should, within ten days from the execution of these presents, give and execute to plaintiff, his executors and administrators, a bond in the penal sum of 5,000*l.* It having been held, by the Court of Exchequer Chamber, that the giving of the bond with sureties by plaintiff to defendant was a condition precedent to his right to recover against defendant for not performing his part of the contract with relation to stowing the cable and paying the money, that decision was affirmed by the House of Lords on appeal; and it was also held that plaintiff was not released from his obligation to give a bond by reason of defendant not having given a bond. "Forthwith," held not to mean "immediately." *Roberts v. Brett*, (House of Lords) C.P. 241

— Plaintiff having instructed defendants, who were brokers, to purchase for him fifty bales of cotton, and paid to defendants 800*l.*, part of the purchase-money, they made a contract in their own names for the purchase of a much larger quantity, viz., 300 bales, on account of plaintiff and other principals; and it was held, in an action for money had and received, that plaintiff was entitled to recover back the money paid, as defendants had not made a contract on which plaintiff could sue as a principal. *Bostock v. Jardine*, Ex. 142

— A contract made by defendants, who were brokers, in their own name, for the purchase of iron for plaintiffs, was contained in bought and sold notes. The notes differed only in these particulars, that while the bought-note delivered by the brokers to plaintiffs had the words "Deposit 5*s.* per ton, brokerage 0 per cent.," the sold-note contained the words "Deposit (blank), brokerage half per cent." It was held, that parol evidence was admissible to shew an arrangement between the brokers and plaintiffs, by which they required the latter to pay a deposit of 5*s.* per ton, and that the apparent variances, so explained by the usage of the parties between the notes, was not material. *Kempson v. Boyle*, Ex. 191

— Avoidance of, by concealment amounting to fraudulent misrepresentation. See Guarantee.

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— of sale; when the property passes. See Frauds, Statute of. Mortgage of Goods. Sale of Goods.

— See Baron and Feme. Carriers by Railway. Damages. Evidence. Goods Bargained and Sold.

CONVERSION OF GOODS—Defendant had obtained a judgment in the county court against plaintiff. At the time the judgment was obtained he had in his possession goods belonging to plaintiff, which he had no right to retain. After judgment in the county court plaintiff demanded his goods, which defendant refused to deliver up. After the demand, defendant issued execution on the judgment in the county court, seized and sold the goods in his possession, and applied the proceeds in satisfaction of the debt. It was held, plaintiff was entitled to recover, in an action for the conversion, the full value of the goods, and that the jury ought not to take into consideration, in mitigation of damages, the fact that the goods had been subsequently applied in satisfaction of plaintiff's debt to defendant. *Edmundson v. Nuttall*, C.P. 102

CONVICTION—Upon an appeal to the Quarter Sessions against the conviction of the appellant, as a rogue and vagabond under 5 Geo. 4. c. 83, the Sessions have power to give costs against the prosecutor; and the Justices who have convicted the appellant, and who do not appear to support the conviction, are not the parties against whom an order for costs can be made. By 12 & 13 Vict. c. 45. s. 7, no objection on account of any omission or mistake in any order brought up upon a return to a writ of *certiorari* shall be allowed, unless such omission or mistake shall have been specified by the rule for issuing such *certiorari*.—*Scoble*, per *Mellor*, J., that the appellant could not upon a motion to quash the order, object that it was bad for not finding as a fact that the person against whom the order was made was the prosecutor, unless the omission so to find was specified in the rule. *R. v. Purdey*, Q.B. 48; M.C. 4

COPYHOLD—A custom in a manor that copyholders of inheritance may break the surface and dig and get clay, without stint, out of their copyhold tenements, for the purpose of making bricks, to be sold off the manor, is good in law (*dubitante Lord Wensleydale*). *Salisbury v. Gladstone* (House of Lords), C.P. 222

CORONER—If a coroner's inquest on a dead body be adjourned, and on the day appointed the Court be not opened and further adjourned, the proceedings drop and the Court is dissolved, and everything else done in the matter of the inquest, without commencing afresh, is *coram non iudice*; and this is the case even where the adjournment takes place only for the purpose of drawing up a formal inquisition after the jury have, in substance, agreed upon their verdict. *R. v. Payn*, Q.B. 59

COSTS—Where a cause is referred to arbitration, by consent of parties, after issue joined, the

costs of the cause to abide the event of the award; and the arbitrator finds all the issues for plaintiff, and awards that a sum not exceeding 20l. is due from defendant to plaintiff in respect of the breaches of contract alleged in the declaration, plaintiff "recovers" that sum within the meaning of 13 & 14 Vict. c. 61. s. 11, and is deprived of costs by that section. *Cowell v. Amman (Aberdare Colliery Co. (Lim.), Q.B.* 161

COSTS (continued)—Where the matter of an appeal at Quarter Sessions is referred to an arbitrator, under 12 & 13 Vict. c. 45. s. 13, and the order of reference is silent as to the costs of the arbitration, the subsequent sessions at which the award is entered as the judgment of the Court have no power to order either party to pay the costs of the reference. *R. v. the Justices of the West Riding, (The Sheffield United Gaslight Co. v. the Overseers of Sheffield,)* Q.B. 165; M.C. 142

— Defendant had two residences, one in London, which was within, and the other in the country, which was more than twenty miles from plaintiff's residence. At the time the action was brought, defendant was at his London house, but two days before he had written to plaintiff's attorney from his house in the country. It was held, the superior Court had concurrent jurisdiction with the County Court. *Pigram v. Knatchbull*, C.P. 257

— See Certiorari. Conviction. Highway. Injunction. Security for Costs.

COUNTY COURT—The high bailiff of a county court is liable, to the same extent as the sheriff, for the wrongful act of a person employed by one of his sub-bailiffs, to whom a warrant is delivered for execution. *Burton v. Le Gros*, Q.B. 91

— See Costs.

COUNTY RATE—Borough having separate Court of Quarter Sessions. Non-intromittant clause. Charter. 15 & 16 Vict. c. 81. *Were v. the Clerk of the Peace of Devon*, Q.B. 86; M.C. 47

COVENANT—for quiet enjoyment. See Lease.

— not to displace from employment. See Master and Servant. And see Game.

COVENANT TO REPAIR—Liability to repair buildings erected during the term. *Cornish v. Cleife*, Ex. 19

— See Landlord and Tenant.

CUSTOM—A claim, by custom, for all the freemen and citizens of a neighbouring city to run horse-races over certain land on Ascension Day in every year, is not a claim to an easement within the meaning of the 2nd section of the Prescription Act. *Mounsey v. Ismay*, Ex. 52.

DAMAGES—On a contract to sell cotton of a certain

quality at a certain price, to be delivered at a future time, the measure of damages for non-delivery is the difference between the contract price and the market price at the time limited for the delivery; and the buyer cannot recover for the loss of profit which he would have made by carrying out a re-sale at a higher price made in the interval between the contract and the time of delivery. *Williams v. Reynolds*, Q.B. 221

— In an action against a carrier for the loss of a parcel of goods, the measure of damages is, in general, the market value of the goods at the place and time at which they ought to have been delivered. If there is no market for the sale of such goods at the place, then the jury must ascertain their value by taking the price at the place of manufacture, together with the cost of carriage, and allowing a reasonable sum for importer's profit. *Price v. Baxendale* commented upon. *O'Hanlon v. the Great Western Rail. Co.*, Q.B. 154

— When costs of litigation are recoverable. *Ronneberg v. the Falkland Islands Co.*, C.P. 34

— Plaintiffs bought caustic soda of defendant, part to be shipped in June, part in July, and the rest in August. Defendant knew at the time of the sale that plaintiffs bought to sell again on the Continent, and that the soda was to be shipped from Hull, but not that it was for Russia, although he learned this also before the end of August. Defendant neglected to deliver any such soda during the time contracted for, but he delivered a portion in September and October. There was no market for caustic soda, and plaintiffs, who had contracted for the re-sale of the soda to H, in Russia, lost the profit on such re-sale in respect of the soda, which was not delivered at all, and, by reason of the approach of winter in the Baltic, were obliged to pay an increased rate of freight and insurance on the shipment of the soda, which was delivered in September and October. It was held, the damages which plaintiffs were entitled to recover for defendant's breach of contract were the loss of profit on the sale to H, and also the cost of such increased rate of freight and insurance, but not the damages plaintiffs paid H, in respect of a sub-sale made by him to a consumer of the article. *Borries v. Hutchinson*, C.P. 169

— In an action for an excessive distress the plaintiff is entitled to nominal damages, although he proves no actual damage. *Chandler v. Doulton*, Ex. 89

— Remoteness. See Negligence.

— See Arbitration. Conversion of Goods. Landlord and Tenant. Lease.

DEBTOR AND CREDITOR—To a declaration upon a bill of exchange, defendant pleaded a composition-deed executed by himself and three-fourths

in value of his creditors whose debts amounted to 10*l.* and upwards. By the deed, set out in the plea, defendant agreed to set apart half his income until a composition of 5*s.* in the pound should be paid to all the creditors respectively. The creditors who executed the deed agreed thereby to accept "these presents in full discharge and satisfaction of their respective debts, claims and demands" against defendant; and they, by the deed, released defendant from all their debts and claims against him, and agreed that the deed might "operate as a defence pleadable in bar to or be otherwise set up as a defence to any action," &c. The deed also contained a proviso that it should not operate to prevent any of the creditors from claiming or realizing any security held by them, or from suing any person, other than the said debtor, liable for payment of such security, nor in any way prejudice or affect the rights or remedies of any such creditors, except as against the said debtor (the defendant). The plea then alleged performance of the several requirements of section 192. of the Bankruptcy Act, 1861:—Held, that the plea disclosed a good defence to the action. *Keyes v. Elkins*, Q.B. 25

— A deed is valid within section 192. of the Bankruptcy Act, 1861, if it sufficiently shows that it was intended to be an arrangement between the debtor and the whole body of his creditors, and all had the option of coming in and signing it; such a deed is not unequal, although there is no compulsory clause directing the debtor to pay the composition; and it is not necessary to the validity of a composition-deed that there should be any *cessio bonorum*. *Clapham v. Atkinson* (Ex. Ch.), Q.B. 49

— A deed of composition by a debtor with his creditors under section 192. of the Bankruptcy Act, 1861, containing a release of the debtor, by each of the creditors, from all debts due from him to them respectively, cannot be pleaded in bar by a joint debtor to an action by a non-assenting creditor; for if it extends to joint debts so as to release a joint debtor, it is bad, and not binding on non-assenting creditors. *Andrew v. Macklin*, Q.B. 89

— A deed, under section 192, and in the form Schedule D. of 24 & 25 Vict. c. 134, by which the debtor assigned all his estate and effects to trustees for the benefit of creditors, if it contain no release, cannot be pleaded in bar to an action by a creditor who has assented to and underwritten the deed. *Jones v. Morris*, Q.B. 90

— A deed of inspectorship, purporting to be made under section 192. of the Bankruptcy Act, 1861, provided "that in case any dividend shall be declared before all the creditors shall have executed or assented to these presents, or before the amount of dividends payable on all their respective debts shall have been ascertained, the said inspectors shall retain sufficient sums for the purpose of paying a like rateable dividend to any creditor or creditors who shall not

have assented to or executed the same, or the amount of dividend payable on whose debts shall not have been ascertained, and shall afterwards pay or cause to be paid such dividend to such creditor or creditors, upon his or their request in writing," &c. And the dividends were made payable unconditionally, and no necessity was imposed upon assenting creditors of making a demand in writing for the payment of their dividends. It was held, that no such inequality was created by the above clause between the two classes of creditors, as would make the deed invalid. *Hernulewicz v. Jay*, Q.B. 201

— To a declaration for a debt due on a foreign contract entered into with plaintiff abroad, a plea of a composition-deed made and registered under the Bankruptcy Act, 1861, whilst plaintiff resided abroad, by which defendant covenanted to pay a certain composition in the pound to his creditors on a day since passed, must shew that defendant paid or tendered such composition to plaintiff, notwithstanding plaintiff was abroad when it became payable. The want of an averment in such plea of payment or tender of the composition was held to be not cured by an averment that defendant was always ready and willing to pay to plaintiff the said composition according to the provisions of the deed, and that all conditions having been performed and all things having happened necessary in that behalf, plaintiff became bound by the deed, as if he had executed the same. *Fessard v. Mugnier*, C.P. 126

— A composition-deed, made between defendant, a debtor, of the first part, certain trustees of the second part, and the creditors whose names were thereunto subscribed in the schedule of the third part, contained a clause, whereby the parties of the third part covenanted with defendant that they would not sue, &c. him, and that if they did, defendant should be discharged from all actions, suits, debts and demands of those by whom he was so sued, &c., and the deed be pleaded in bar. It was held, that if, on the true construction of the deed, this clause applied to non-assenting creditors, it was unreasonable, and that if it did not, there was no release by non-assenting creditors, and that in either view it was not pleadable in bar of an action by a non-assenting creditor. *Lyne v. Wyatt*, C.P. 179

— After action commenced and before judgment a deed of inspectorship, executed by defendant, was duly filed and registered, and a certificate thereof obtained; judgment was signed and defendant's goods taken under a *f. fa.* On an interpleader summons the sheriff was ordered to withdraw on the payment into court by the inspectors of a certain sum of money. Plaintiffs obtained a rule to shew cause why part of this money should not be paid to them in satisfaction of their judgment, on the ground that the deed ought to have been pleaded; and it was held, that without leave of the Court of Bankruptcy

they could not make their execution available, and that the inspectors were entitled to the money. *Whitmore v. Wakerley* distinguished. *Hartley v. Mare*, C.P. 187

DEBTOR AND CREDITOR (continued)—A clause in a deed of assignment, registered under the Bankruptcy Act, 1861, by which the trustee is empowered to require any creditor of the debtor to verify the nature and amount of his debt, with full particulars, by statutory declaration proved before the Commissioners of Bankruptcy, "or otherwise as the trustee may think fit," is unreasonable, and a deed with such a clause is not binding on a non-assenting creditor. *Cole v. Turner*, C.P. 198

— By composition-deed made between an insolvent, defendants as sureties, plaintiff as trustee, and the body of creditors, defendants covenanted to pay to plaintiff certain instalments; and it was provided that, as between them and the creditors, defendants should be deemed principal debtors, also that on non-payment of the instalments, adjudication of bankruptcy against the insolvent, or any different arrangement by him with his creditors, the release, the deed, and all its clauses and provisions should be at an end and void. After payment of the first instalment the insolvent was adjudicated bankrupt on his own petition. In an action by plaintiff against defendants for the second instalment, it was held, that "void" meant "voidable" at election, and that defendants were liable. *Hughes v. Palmer*, C.P. 279

— By a deed of composition registered under the Bankruptcy Act, 1861, the creditors agreed to accept payment of their debts by certain instalments, and they covenanted, "while the said instalments were duly and regularly paid by the debtor, not to sue the said debtor or enforce any judgment or other proceeding against him or his estates." It was held, such deed could not, in the absence of any express stipulation to that effect, be pleaded as a bar to an action brought by a creditor before the instalments were payable. *Ray v. Jones*, C.P. 306

— A debtor arrested on a *ca. sa.*, after executing a good deed of arrangement under section 192. of the Bankruptcy Act, 1861, is, according to section 198, entitled to his discharge from custody on the deed being duly registered. *Baerelman v. Langlands*, Ex. 3

— It is not essential to the validity of a deed of composition under the Bankruptcy Act, 1861, that it should contain a schedule of creditors. A deed of composition may be valid, although the only effect of non-payment of the composition-money be to remit the creditors to their original demand. If a valid deed of composition be executed and registered as required by the Bankruptcy Act, a writ of *f. fa.* issued by a non-assenting creditor after notice of the deed will be set aside. *Stone v. Jellicoe*, Ex. 11

— W. B. on the 3rd of December 1862, in pur-

suance of a resolution passed, on the 25th of November 1862, at a meeting of his creditors, executed an assignment of the whole of his property to plaintiffs, as trustees, to pay and discharge rateably all the debts due and owing from W. B. to his creditors (being such persons as would have been entitled to rank as creditors in bankruptcy if the said W. B. had been adjudged bankrupt upon a petition for that purpose filed on the 25th of November 1862). It was held, that the deed was not void and fraudulent as against creditors within 13 Elis. c. 5. *Evans v. Jones*, Ex. 25

— By a composition-deed between a debtor of the one part, and the several creditors who signed the deed respectively of the other part, after reciting that the debtor was unable to pay his debts in full, the latter covenanted with the several persons parties thereto of the second part, to pay to all his present creditors a composition of 5s. in the pound on their respective debts. It was held, that the deed was not valid, since the non-assenting creditors were not in an equally advantageous position with the executing creditors, for the deed gave to each individual creditor who had executed the deed the right of action for the composition of his individual debt, while a non-assenting creditor had no power of suing either personally or by means of any one as trustee on his behalf. *Benham v. Broadhurst* (Ex. Ch.), Ex. 61

— To a declaration by indorsee against drawer and indorser of a bill of exchange, defendant pleaded a plea setting out a composition-deed, whereby a majority in number and three-fourths in value of his creditors, in consideration of the payment of the composition agreed upon before the 10th of April then next, agreed to accept a composition of 2s. 6d. in the pound in discharge of their respective debts, so far as they were able to do so without the consent or permission of, and without prejudice to the rights of third parties or sureties, but no further. The plea also alleged compliance with the requisitions of the 192nd section of the Bankruptcy Act, 1861, and a tender to plaintiff of the composition in respect of his debt. On demurrer, it was held that this deed, although containing no actual release in terms, was good under the Bankruptcy Act, 1861, so as to bind plaintiff, as if he had executed it; and the plea alleging a tender of the composition shewed a good defence to the action. *Garrod v. Simpson*, Ex. 70

— A deed of composition and inspection entered into by defendants and their creditors, and purporting to be made under section 192. of the Bankruptcy Act, 1861, shewed that there were joint and separate creditors and joint and separate estates of the compounding debtors, and that both classes of creditors were to receive a uniform composition of 18s. in the pound; and it was held, that although the deed placed the joint and separate creditors on the same footing, it was a valid deed under sections 192. and 197. of the Bankruptcy Act, 1861. *Quarr*—whether

the deed would have been valid if it had been a deed of assignment, and for a distribution of the debtor's estate. A plea of arrangement by deed, under section 192. of the Bankruptcy Act, 1861, between defendants and their creditors, shewing that there were joint and separate creditors and joint and separate estates, averred that "a majority in number representing three-fourths in value of the said creditors of defendants, and each of them, &c. executed the indenture." It was held, it was sufficiently averred in the plea, that the requisite majority of each class of creditors had assented to the deed, so as to make the deed binding on non-assenting creditors. A deed of composition and inspection contained a covenant on the part of the creditors not to sue within a time limited, viz. before the 20th of May 1865, accompanied by the following stipulation: "That these presents shall and may be pleaded and allowed in any court of law or equity as a bar, or in discharge of all and every action or actions, suit or suits, or other proceedings, judgments and executions which shall or may be brought, commenced, prosecuted, or taken against the debtors, or either of them, or their, or either of their, goods or estates by the said several creditors, or any of them . . . contrary to the true intent and meaning of these presents. It was held, that although a covenant not to sue for a limited time cannot be pleaded in bar, yet such a covenant, accompanied by an express provision that during the limited time it may be so pleaded, can be pleaded in bar. The affidavit required by the fifth condition of section 192. to be delivered to the chief Registrar, stating a majority in number representing three-fourths in value of the creditors of the debtors . . . have in writing assented to or approved of such deed, and also stating the amount in value of the property and credits of the debtor comprised in such deed, need not distinguish the joint from the separate debts of the debtors. *Walker v. Nevill*, Ex. 73

— A defendant who did not plead a composition-deed, under the Bankruptcy Act, 1861, when he had the opportunity, will not be allowed afterwards to avail himself of it for the purpose of defeating execution. *Whitmore v. Wakerley*, Ex. 83

— A composition-deed, made between defendant of the first part and the undersigned J. F., one of the creditors of defendant, and also all the other undersigned creditors of defendant of the second part, recited, that defendant was unable to pay his several creditors the full sum of 20*l.* in the pound, but was able and willing to pay each and all of them, on signing the deed, the composition of 5*s.* in the pound; and that defendant had applied to the several parties of the second part to receive and take the composition of 5*s.* in the pound, payable on signing the deed, in full satisfaction and discharge of their several respective debts, which the parties of the second part had agreed to accept in full satisfaction and discharge, proceeded in consideration thereof to release the debts:—Held, that

the deed was invalid, and not binding on the non-assenting creditors, as by the terms of the deed the composition was to be paid only to the creditors who signed, and therefore those who assented were in a better position than those who dissented. *Martin v. Gribble*, Ex. 108

— A deed of composition was made between certain persons, whose names and seals were subscribed and affixed in the schedule thereunder written, being creditors in their own right solely, or in co-partnership with others, of the debtor, of the first part; the debtor of the second part; and two sureties for securing the composition of the third part; and in which the parties of the second and third parts covenanted with the parties of the first part, and with all the other creditors of the debtor, to pay them a composition of 10*s.* in the pound on their respective debts. It was held, that as the non-assenting creditors were not parties to the deed, but only covenantees, they could not sue for the composition, and had not an equal advantage with the assenting and executing creditors, and that, therefore, the deed was not valid. *The Chesterfield and Midland Silkstone Colliery Co. (Limited) v. Hawkins*, Ex. 121

— A composition-deed was made between certain persons, whose names were subscribed and seals affixed in the schedule thereunder written, on behalf of themselves and all and every other the creditors of defendant of the first part, and defendant of the second part, which, after reciting that defendant was indebted to the said persons parties thereto of the first part in the several sums set opposite to their respective names in the said schedule thereunder written, and was also indebted to other persons in divers sums of money, and being unable to discharge his said debts in full, had agreed to pay a composition of 5*s.* in the pound, such payment or composition to be made and paid to all and every the creditors of defendant, whether executing the deed or not, to be paid and payable on the 22nd of September 1865, and to be in full discharge of all and every the debts due and owing at the time of the executing of the said deed, provided that the said parties of the first part thereby did accept the said composition and release the debts. It was held, the non-assenting creditors were not bound, as the release was absolute, and the deed did not provide any means by which these creditors could obtain their composition. *Gurris v. Ropera*, Ex. 128

— A trust-deed was in the form given in Schedule D. of the Bankruptcy Act, 1861, and was registered, &c., pursuant to section 192. of that act, but was not assented to by the prescribed majority of creditors. It was held, that such deed was valid to pass the property. *Symons v. George* (Ex. Ch.), Ex. 187

— A deed was executed by a debtor for the benefit of his creditors under the Bankruptcy Act, 1861. The deed did not contain a clause of release. It was held, affirming the judgment

of the Court of Exchequer (Ex. 60), that such a deed cannot be pleaded in bar to an action. *Clarke v. Williams* (Ex. Ch.), Ex. 189

DEBTOR AND CREDITOR (*continued*)—A deed of composition made between J. B. (the debtor) of the first part, J. K. and B. B. (two sureties for securing the composition) of the second part, and the several other persons whose names are hereto subscribed and seals affixed, of the third part, after reciting that the parties of the second and third parts, creditors of J. B., had agreed to accept a composition of 8s. in the pound, on having the same secured by the joint and several promissory notes of J. B., J. K. and B. B., payable in two equal instalments on the 20th of August and the 20th of September, and that J. B., J. K. and B. B. had made and delivered to each of the parties of the third part, their joint and several promissory notes, contained the following covenant and release: J. B., J. K. and B. B. do and each of them doth covenant with the parties of the third part, and with each and every of them, that they, J. B., J. K. and B. B., or one of them, shall pay the several promissory notes as they shall respectively become due, and shall also make and deliver to all the other creditors of the said J. B. like joint and several promissory notes, payable at the several times, and in manner aforesaid, for the like composition of 8s. in the pound upon their respective debts, and shall pay such composition to each of the last-mentioned creditors at the several times and in manner aforesaid, and the several parties of the third part and J. K. and B. B. do and each of them doth covenant with J. B. that they and each of them have accepted and will accept the said promissory notes by way of composition and payment of 8s. in the pound upon the amount of their several debts in full discharge of their debts, and that upon the payment of the said promissory notes they and each of them will execute to J. B. a general release and discharge from their debts. Three-fourths in value of J. B.'s creditors had in writing assented to and approved of the deed, but the only parties who had executed the deed were the debtor and the two sureties. It was held, that as the assenting creditors had not executed the deed, and the non-assenting creditors were not parties to it, neither class of creditors could sue on the deed, and that both classes were on an equality, and that the deed was valid. *Scott v. Berry*, Ex. 193

— By a composition-deed purporting to be made under the Bankruptcy Act, 1861, section 192, it was covenanted that "no creditor who shall have executed or otherwise assented to these presents shall negotiate any bills of exchange, or other negotiable instrument on which the debtor is liable, without having first indorsed thereon a memorandum of the execution of or other accession to these presents by such creditor." A second covenant was in these terms: "And in consideration of the premises, it is hereby declared and agreed, (but each of the creditors who shall have executed

or otherwise acceded to or be bound by these presents, agreeing and declaring for himself and his partners, and his and their respective heirs, executors and administrators, and so far as relates to his and their respective acts and defaults,) that if the said trustees shall, within the time aforesaid, certify under their hands to the effect hereinbefore mentioned, the creditors of the debtor who shall have executed or acceded to or be bound by these presents shall not, nor shall any of them, nor shall their respective heirs, executors, or administrators, or partners or assignees, at any time (except in respect of the covenant or agreements herein contained, or any of them, or in respect of the aforesaid promissory notes, or except so far as may be necessary in order to enforce any mortgage, lien or security, or any rights or remedies against any persons other than the debtor) commence or prosecute any action or suit at law or in equity, or other proceeding, or obtain any act or adjudication of bankruptcy against the debtor or his heirs, executors or administrators, or make or sue out any attachment or requisition of or upon him or them, or his or their property, credits or effects, for or on account of all or any part of the debts now due from the debtor to the said creditors who shall have executed or otherwise acceded to or be bound by these presents, or any of such creditors, or for or on account of all or any claim of such creditors proveable under these presents, and that this present agreement may be pleaded to any action brought contrary to this agreement as if the same were an actual release." It was held, by the Court of Exchequer Chamber, reversing the judgment of the Court of Exchequer, that the first covenant was valid, as it applied to and bound those creditors only who assented to it by executing or assenting to the deed, and did not bind non-assenting creditors. And, further, that the second covenant was a reasonable and proper covenant. *Hidson v. Barclay* (Ex. Ch.), Ex. 217

— See Sheriff.

DEED—To trespass for entering plaintiff's land, described as land on each side of a certain slip, defendant pleaded that before plaintiff was possessed of the land, in which &c., a certain railway company were the owners in fee of the said land and slip, and that they demised the land in which &c., "excepting and reserving thereout the said slip, and the dues payable for the use thereof, and excepting and reserving to the said company, their assigns, officers, servants and workmen, free access to and from the said slip, for the purpose of using and working the same or otherwise," and that the said company granted their licence to defendant to work and use such slip, and the plea justified the trespass as being committed in the exercise of such licence. This was held a good defence, as the reservation in the demise enabled the company to use the slip by themselves or their licensees, and the word "assigns" was not to be construed as limited to persons taking an estate in the land. *Micalfe v. Westaway*, C.P. 113

— Description of grantee in. See *Mortgage of Goods*.

— See *Merger*.

DEMAND—Sufficiency of. See *Bill of Sale*.

DETINUE—for title-deeds. See *Lessor and Lessee*.

DEVISE—Estates tail by implication. See *Will*.

DISORDERLY HOUSE—A local act, in similar terms to 25 Geo. 2. c. 36. s. 2, enacted, that no house, room, or other place, within the borough should be kept or used for public dancing, music, or other public entertainment of the like kind, without a licence; and it was held, the dancing need not be by the public; but that in order to bring an entertainment within the act the music and dancing must not be merely subsidiary, but must form a substantial part of the entertainment. *Guaglieni v. Matthews*, Q.B. 163; M.C. 116

DISTRESS. See *Landlord and Tenant*.

DIVORCE AND MATRIMONIAL CAUSES ACT—Protection Order. See *Baron and Feme*.

DOMICIL—Testatrix, an unmarried Englishwoman, in 1849 went to reside abroad at the house of her married sister at B, in Germany. She resided there, contributing towards the expenses of housekeeping, until 1863, in which year she died. Her property consisted of money invested in English securities, but she also possessed a valuable library, which she caused to be transported to B. She occasionally came over to England with her married sister to visit her friends, and while in England in May 1854 she made her will, describing herself as now on a visit to my sister C, bequeathing her property to trustees to pay the annual income to her sister for life for her separate use, without power of anticipation, with power of appointment to her sister by deed or will. The female defendant, as sole executrix, proved the will in the Probate Court. The testatrix told her sister that if she survived her she should continue to live in Germany, and that nothing would induce her to return to England, except on an occasional visit. She also named the churchyard where she wished to be buried, and where she was afterwards buried. It was held, that her acts and declarations did not shew a sufficient intention to change her domicile; and, assuming she intended to give up her English domicile, that until she acquired a new domicile, her English domicile continued; and that the Crown was entitled to legacy duty. And, also, on the authority of *Re Capdevielle and Wallop's Trusts*, that the Succession Duty Act (16 & 17 Vict. c. 51.) applies to all persons wherever domiciled. *The Attorney General v. Blucher*, Ex. 29

EASEMENT—Where the owners and occupiers of an ancient copyhold inclosure, and they alone,

had from time to time repaired the fence belonging to the inclosure between it and the common waste land of the manor, it was held, the proper inference for a jury to draw was that at the time the lord granted the exclusive possession of the land, he granted it subject to the obligation on the part of the grantees to keep it fenced as against the cattle of the lord and the other copyholders turned out on the wastes of the manor, and that the owner or occupier was therefore bound to keep up the fence as against adjoining occupiers after the wastes of the manor were inclosed under a modern Inclosure Act. *Barber v. Whiteley*, Q.B. 212

— G, the owner of certain land, sold it in lots, subject to conditions, by which, *inter alia*, the purchaser of lot 6, was required to covenant to build according to a certain elevation. Plaintiff, who was the purchaser of the adjoining lot 7, altered, with G's consent, an old building standing on such lot, by raising its wall several feet on the side next to lot 6. Defendant, who was the purchaser of lot 6, excavated the land, as required, to build according to the conditions, and in consequence of this plaintiff's building fell. It was held, that as the excavations were authorized by the conditions of sale, and were made therefore with the licence of G, the vendor, plaintiff could not sue for the injury he had sustained by his building being so deprived of the lateral support of the land in lot 6. *Semble*, that plaintiff, assuming he had the right to such support, lost it by raising the old wall and so increasing the superincumbent weight. *Murchie v. Black*, C.P. 337

— A. was the owner and occupier of a house of three stories which had an ancient window on each floor. He altered the windows in the two lower floors, leaving the window in the third floor unaltered. He also built two new stories to his house, with windows intended to be permanent. A. did not intend by making these alterations to abandon any privilege of his ancient windows. B, the owner of adjoining premises, could not obstruct the new windows in the upper floors without also obstructing the old windows, and he built on his own land a wall which had the effect of obstructing all A.'s windows. A. afterwards blocked up his new windows, and sued B. for continuing the obstruction of the wall, which the defendant refused to remove. It was held, that B. had not at any time the right to build a wall which would have the effect of obstructing the ancient lights in A.'s house, although the new windows could not otherwise have been obstructed. The right to an ancient light since the Prescription Act depends upon the statute, and does not rest on any presumption of a grant or fiction of a licence having been obtained from the adjoining proprietor. *Renshaw v. Bean and Hutchinson v. Copstake* overruled. *Tapling v. Jones* (House of Lords), C.P. 342

— Claim to, under 2 & 3 Will. 4. c. 71. s. 2. See *Custom*.

EJECTMENT—Forfeiture of lease. See Interrogatories.

EQUITABLE PLEA—P. borrowed a sum of money from a loan society of which he was a member, and defendants, who were not members of the society, joined him in a bond and promissory note for the amount. By the terms of the loan P. was to repay the money by weekly instalments. One of the society's rules directed the managing committee to inform the sureties when the instalments were four weeks in arrear, and empowered them to commence legal proceedings against the sureties. P. died in 1859, after having repaid a portion of the loan, but being at the time of his death more than four weeks in arrear. Defendants were not informed of this till an action was brought in 1862 on the bond and note. It was held, the rules of the society formed no part of defendants' contract so as to afford them any ground of equitable defence to the action. *Price v. Kirkham*, Ex. 35

ERROR—Error will lie on a special case stated in proceedings on an interlocutory issue. *Gusson v. Tyrre* (Ex. Ch.), Q.B. 124

ERROR IN FACT—Upon a judgment for defendant, plaintiff assigned as errors in fact, that defendant obtained a rule for a special jury, whereupon twenty-four special jurymen were duly struck, pursuant to 6 Geo. 4. c. 50, as the jurors to be returned for the trial of the issue; that eight of this special jury so struck were not summoned, and the names of the special jurors not having been called over in court, at or after ten o'clock, the hour named in the summons, only ten of the special jurors appeared and were sworn on the said jury. It was held, the errors so assigned were invalid, as they contradicted the record, which must be considered as containing a statement that all the requisites for having a sufficient jury had been observed, and that the Court sat at a time when, and was otherwise constituted so that it could properly exercise jurisdiction. Also, that these and like objections are not, for all purposes, admitted by demurring to the assignment of errors, but only so when properly assigned and lawfully assignable as ground of error. *Semble*—If plaintiff had sustained any real injustice by the errors complained of, his remedy was to have applied by motion to the Court, when the Court, in the exercise of its equitable jurisdiction, would have interfered, if necessary. *Irwin v. Grey*, C.P. 313

ESTOPPEL—Foreign judgment. See Marine Insurance.

— See Bailment. Carriers by Railway. Landlord and Tenant.

EVIDENCE—Plaintiff agreed in writing to purchase certain furniture of defendant, and by the agreement defendant was authorized to settle an action of *C. v. L.* In an action by plaintiff against defendant for not settling the action of

C. v. L., evidence was offered and received of a distinct oral agreement to settle that action, made on the same occasion as, and immediately before the written agreement; and the jury found that such an oral agreement was made. The evidence was held admissible, and on the finding of the jury plaintiff was held entitled to a verdict. *Lindley v. Lacey*, C.P. 7

— A statement by a servant, not made within the scope of his authority, is not admissible. *The Great Western Rail. Co. v. Willis*, C.P. 195

— of right of shooting. See Game.

— to explain written contract. See Contract.

— Presumption of liability to repair fences from facts of ancient inclosure. See Easement.

— Tender of, at trial. See Trespass for Mesne Profits.

— See Negligence.

EXECUTOR—To trover and trespass for taking goods of plaintiff as administrator, a plea that the claims arose by reason only of defendant being executor *de son tort* of the intestate before grant of administration to plaintiff, and that before such grant defendant fully administered all the estate which had come to his hands, is bad. *Elworthy v. Sandford*, Ex. 42.

EXTRADITION TREATY—Upon a requisition made by the United States for the extradition from this country of a person charged with committing forgery, if the offence committed did not amount to forgery by the law of England and of the United States (the two contracting parties to the Treaty of Extradition referred to in 6 & 7 Vict. c. 76. s. 1), the person charged is not liable to be given up by this country. *In re Windsor*, Q.B. 186; M.C. 163

FACTORY—Covering crinoline steel with cotton-thread. *Whympster v. Harney*, C.P. 200; M.C. 113

FEME COVERT. See Acknowledgment of Dead. Baron and Feme.

FISHERY. See Prescription Act.

FIXTURES—By a lease of land intended to be used for saltworks, the lessees covenanted that they would erect certain buildings and works, and that they would at the determination of the term "leave at the disposal of the lessors all the fixed materials of what nature or kind soever that should be in or about the said intended wrychhouses or saltworks, or anyways relating thereto, save and except all the salt-pans and other movable articles made use of at all or at any of the said wrychhouses or saltworks," which they the lessees were to take away for their own use and benefit. The interest of the lessees became afterwards vested in the defen-

dants, who took upon themselves the performance of the above covenant, and who also covenanted that they would yield up possession of the premises, with all erections, buildings and improvements, together with the cisterns, doors, &c., and "also all other fixtures and appurtenances of what kind or nature whatsoever which should be used in or about the buildings," but as to the salt-pans and other articles made use of at all or any of the said wychhouses, &c., and belonging to the defendants and their assigns, they should be at liberty to take and carry away from off the said premises, upon making good all such injury or damage as the said wychhouses, &c. might sustain in consequence of such removal, "with an option to the lessors of purchasing any part of the salt-pans or other movable articles." The defendants sunk a brine-shaft and erected an apparatus for working it, and underlet the premises on the 13th of December 1861. The plaintiffs, on the 23rd of June 1862, wrote a letter demanding possession, as the underletting gave them a right of re-entry on the land, and an action of ejectment was brought on the 7th of July 1862. Between the 18th of January and the 17th of March 1863, defendants sold and removed a number of fixtures, &c., and on the last-mentioned day they confessed judgment in the action of ejectment. It was held, that under the above covenants, defendants had a right to take away such fixtures as could properly be called tenant's fixtures, and they were entitled to a reasonable time after the receipt of the letter of the 23rd of June 1862, within which they might remove them. *Sumner v. Bromilow*, Q.B. 180

FOREIGN ATTACHMENT—Proceedings by foreign attachment in the Mayor's Court of the city of London, commenced after the death of the creditor of the garnishee, whose debt is attached, are null and void. In an action by an administratrix for a debt due to M, the intestate, defendants pleaded to the further maintenance that the debt sued for had been attached in the Mayor's Court, in a suit instituted by K. against the intestate, that a regular judgment had been obtained by K. in such court, and that execution had issued thereon against defendants as garnishees, and that after the commencement of this action defendants as garnishees paid the said debt to K. for the purpose of satisfying such judgment. Replication, that at the time of affirming the plaint in the Mayor's Court, M, the intestate, was dead. Rejoinder, that at the time of affirming the said plaint, no one had administered to the estate of M, the intestate, but that before execution was had by K. plaintiff took out letters of administration to the estate of K, and might, according to the practice of the Mayor's Court, and the custom of the city of London, have appeared to the said plaint and defended the same, or might have dissolved the said attachment and defended the said plaint. It was held, on demurrer, that plaintiff was not estopped as against defendants from shewing the nullity of the proceedings in the Mayor's Court, and defendants could not

avail themselves of the payment to K. as any defence to the action. *Quere*—whether the debt sued for by the administratrix was attached at all, inasmuch as there was no debt due to the intestate at the time of the attachment as the intestate was then dead. *Matthey v. Wiseman*, C.P. 216

FOREIGN JUDGMENT. See Marine Insurance.

FORGERY. See Extradition Treaty.

FRAUDS, STATUTE OF—To make a valid verbal contract for the sale of goods above the value of 10*l.* where nothing has been given to bind the bargain or by way of part payment binding upon the vendee, there must be an acceptance and actual receipt, and such acceptance must be made with the consent of the vendor; and until such acceptance, the property in the goods is not changed and the vendor may exercise his right to rescind the contract. And if, under such circumstances, the contract has been rescinded, no act on the part of the vendee, or of his assignees in case of his subsequent bankruptcy, can affect an acceptance so as to change the property in the goods. Goods purchased under such a contract and sent by the vendor to a railway station, consigned to the order of the vendee, are not, whilst lying at the station, waiting the order of the vendee, and before any order given or other act done by him constituting an acceptance of the goods, in his "possession, order or disposition," with the consent of the true owner, so as, upon his bankruptcy, to give his assignees any right to them under 12 & 13 Vict. c. 106. s. 125, notwithstanding the goods were no longer in *transitu*, and the right of stoppage therefore did not exist. *Smith v. Hudson*, Q.B. 145

— Defendants agreed by parol to purchase of plaintiff four specific stacks of cotton waste at 1*s.* 9*d.* per pound. They sent their own packer with their sacks and their own carts to fetch it; their packer packed the waste into eighty-one sacks, twenty-one of which were weighed and then loaded on defendants' cart and taken to defendants' premises; the rest of the sacks were not weighed. On arrival of the twenty-one sacks at defendants' premises they refused to accept any portion of the waste, on the ground that it was of inferior quality; and it was held, the property in the waste passed to defendants, and that there was sufficient evidence of an acceptance and receipt to satisfy the Statute of Frauds. *Kershaw v. Ogden*, Ex. 159

FREIGHT. See Bill of Lading. Charter-Party.

GAME—The 30th section of 1 & 2 Will. 4. c. 32, which makes it an offence to "commit a trespass by entering or being in the daytime upon any land in search of game," does not apply to a case where the game alleged to be searched for was dead at the time. *Kenyon v. Hart*, Q.B. 153; M.C. 87

— The tenant of P. shot game upon land which

was occupied by him as tenant. Before the commencement of the tenancy P. had granted the right of shooting over the land to G. The tenant having been summoned before Justices was convicted of killing game upon the evidence of G. that he had the exclusive right of shooting over the land; that he preserved the game there; that he had given no permission to the tenant to shoot; and that the tenant had killed game at the time in question. It was held, that upon this evidence the Justices ought not to have convicted the tenant, inasmuch as there was not sufficient evidence that the right of shooting was in G. without the production of the deed. *Barker v. Davis*, Q.B. 163; M.C. 140

GAME (continued)—The appellant was found with a net, and for the purpose of taking game, upon certain land, which had a hedge on either side, and a metalled road running through it. Between the road, on both sides of it, and the hedges the land was waste land varying in extent; and it was held, this land was not either open or inclosed within the meaning of 9 Geo. 4. c. 69. s. 1. *Vesey v. Hoskins*; *Harris v. Hoskins*, Q.B. 166; M.C. 97

— Aiding and abetting in trespass in pursuit of game. *Stacey v. Whitburn*, C.P. 248; M.C. 94

— A. let a farm to B. reserving the exclusive right of "hunting, shooting, fishing and sporting," and afterwards let to C. the exclusive right of "shooting and sporting over, and taking the game, rabbits and wildfowl upon" the farm, and covenanted with C. for his quiet enjoyment of such right without interruption from persons claiming through him. B. shot rabbits and grubbed up a large quantity of gorse, &c., whereupon C. brought an action against A. It was held, first, that B. had no right to shoot rabbits, and that his act therefore was a wrongful one, for which A. was not liable; secondly, that B. was entitled to grub up the gorse, &c. in the reasonable use of the land as a farm, and that there was no implied covenant with C. that this should not be done, and that A. was therefore not liable for such act of B. *Jeffries v. Evans*, C.P. 261

— Game started and killed on the land of another becomes the absolute property of the owner of the land, and not of the captor, even though it may be killed and carried away in one continuous act. *Quære*—whether there would be any difference if the game were started on the land of one person and killed on that of another. *Blades v. Higgs* (House of Lords), C.P. 286

GAMING—Persons tossing up halfpence and betting money on the number of heads and tails, are not guilty of an offence under the 5 Geo. 4. c. 83. s. 4, which makes liable to be convicted of being a rogue and vagabond "every person playing or betting in any highway, at or with any table or instrument of gaming, at any game or pretended game of chance." *Watson v. Martin*, Q.B. 74; M.C. 53

— Defendant was in the habit of resorting to a certain tree in Hyde Park for the purpose of making bets on horse races. He there received deposits on such bets from many persons, and from the plaintiff among others. It was held, by the Court of Exchequer Chamber, reversing the judgment of the Court of Common Pleas (page 46), that defendant was not a person from whom plaintiff could recover his deposit under section 5. of 16 & 17 Vict. c. 119, since the spot in Hyde Park which the defendant frequented was not a "place" within the meaning of the act. *Doggett v. Cattermole* (Ex. Ch.), C.P. 159

GAOL—A commitment by Justices for non-payment of poor-rates is in the nature of civil process, and the proper prison for a person so committed by the Justices of Middlesex is the prison in Whitecross Street. *R. v. the Governor of the Debtors' Prison for London and Middlesex, in Whitecross Street, in the City of London*, Q.B. 250; M.C. 193

GOODS BARGAINED AND SOLD—Effect of acceptance of lesser quantity of goods than ordered. *Morgan v. Gath*, Ex. 165

— See Sale of Goods.

GUARANTEE—The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97). s. 4,—which enacts that no promise for the debt or default of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, or for the debt or default of such a firm, shall be binding in respect of anything done after a change in any one or more of the persons constituting the firm, or the person trading under the name of the firm, unless the intention of the parties that such promise shall continue notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise,—is only an affirmation of the law of England previous to the statute. Three persons carried on the business of ship-builders under the name of "G. W. & W. J. Hall." No person of that name had been in the partnership for some time, and the plaintiff and defendant being both aware of the constitution of the partnership, the defendant gave the plaintiff the following guarantee:—"In consideration that you have at my instance and request consented to open an account with the firm of G. W. & W. J. Hall, ship-builders, I hereby guarantee the payment to you of the monies that at any time may become due not exceeding 5,000*l.*" It was held, the guarantee ceased on the death of one of the partners, as a contrary intention did not appear by express stipulation, or by necessary implication from the nature of the firm or otherwise. *Backhouse v. Hall*, Q.B. 141

— P. was employed by plaintiffs, who were coal-merchants, to sell their coals on commission, on the terms that he was to be answerable for the price of the coals sent out to customers on his order, and to pay for them monthly. T.

guaranteed the due performance by P. of his engagements to the amount of 300*l.* After some years, P. not paying for the coals supplied according to his agreement, and owing plaintiffs, on the coal account, above 1,300*l.*, plaintiffs required further security. P. having stated to the plaintiffs that defendant would become surety for him, plaintiffs prepared an agreement, which, after reciting the original agreement between P. and plaintiffs, the guarantie by T, and that P. had for some time been salesman to plaintiffs on the terms stated, and that in order to induce plaintiffs to continue the arrangement with P. defendant had agreed to guarantee, went on to provide that defendant should give a floating and continuing guarantie to plaintiffs for three years to secure the amount of any balance that might at any time during the three years be due from P. to plaintiffs. This agreement was sent to defendant by plaintiffs, and executed by defendant. It, however, did not recite that any debt was then due from P. to plaintiffs, nor did plaintiffs inform defendant of the fact. Defendant made no inquiry of plaintiffs. In an action against defendant on his guarantie, he pleaded that the guarantie was obtained from him by fraud of plaintiffs, and by the fraudulent concealment by plaintiffs of material facts. It was held, by the majority of the Court of Exchequer Chamber, that there was some evidence, taking the circumstances of the case and the recitals in the agreement together, from which a jury would be justified in saying that plaintiffs had been guilty of intentional fraudulent misrepresentation to induce the defendant to sign the agreement. *Lee v. Jones* (Ex. Ch.), C.P. 131

— Defendant covenanted with plaintiffs that, in consideration that the plaintiffs would give credit to one Taylor, he would be surety to the extent of 100*l.* for any sum which might from time to time be owing by Taylor. The deed provided that no indulgence, time, credit or forbearance given or shewn to, or security taken from, or composition with Taylor, should be any discharge of any liability under the deed, or should release defendant from observing the provisions thereof. Taylor entered into a deed of composition with his creditors under the Bankruptcy Act, 1861, which contained an unconditional release, which plaintiffs executed. It was held, on the authority of *Cowper v. Smith*, that the composition deed was no defence to plaintiffs' claim for 100*l.*, as by the terms of the guarantie the surety was not discharged by the release of the principal debtor. *The Union Bank of Manchester (Lim.) v. Beech*, Ex. 133

— See Principal and Surety.

HACKNEY CARRIAGE LICENCE—The possession of a revenue licence to let horses and carriages for hire, under 2 & 3 Will. 4. c. 120, does not supersede the necessity of the proprietor having a licence for his carriage to ply for hire under the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), sections 37. and 45. *Buckle v. Wrightson*, Q.B. 60; M.C. 43

HIGHWAY—Costs under 5 & 6 Will. 4. c. 50. s. 98. on indictment for non-repair on plea of guilty. *R. v. Inhabitants of Denton*, Q.B. 21; M.C. 13

— Where, on the trial of an indictment, ordered by Justices under 25 & 26 Vict. c. 61. s. 19. for the non-repair of an alleged highway, the road is found not to be a highway, the Court has no power to order costs. *R. v. the Parish of Buckland*, Q.B. 190; M.C. 178

— Repairs of turnpike-road out of parish highway-rate. *Brown v. Evans*, Q.B. 163; M.C. 101

— Jurisdiction of Justices under 5 & 6 Will. 4. c. 50. s. 95. on summons against parish for non-repair. *R. v. Johnson*, Q.B. 165; M.C. 85

— Order forming highway district must state the number of waywardens for each place. *R. v. the Justices of the West Riding of Yorkshire*, Q.B. 267; M.C. 227

— crossing over railway on a level. See Railways Clauses Consolidation Act.

HIGHWAY RATE—Exemption. Evidence of hamlet repairing its own highways. *Dawson v. the Surveyor of the Highways of Willoughby with Sloothby*, Q.B. 59; M.C. 37

INDUSTRIAL AND PROVIDENT SOCIETIES—An industrial society, formed before the passing of the Industrial and Provident Societies Act, 1862 (which provides for the incorporation of previously-existing societies on registration, and enacts that *legal proceedings then pending against a trustee or public officer may be prosecuted against the society in its registered name*, but omits to provide for *pending claims*), cannot, although subsequently registered under that act, be sued as a corporation in an action commenced after the passing of the act for a debt incurred previously thereto. So held on the authority of *Dean v. Mellard*. *Linton v. the Blakeney Joint Co-operative Industrial Soc.*, Ex. 211

INFANT—Power to contract for necessities. See Solicitor and Client.

INJUNCTION—Where plaintiff in an action for a nuisance, under section 82. of the Common Law Procedure Act, 1854, obtained an order for an injunction *ex parte*, which was silent as to costs, and the writ issued to restrain the nuisance, and also, under section 32. of the Common Law Procedure Act, 1860, for the payment of the costs, plaintiff will not be allowed to proceed to recover the costs of the injunction before the trial. *Grindley v. Booth*, Ex. 135

INSPECTION OF DOCUMENTS—The Court will allow defendant in an action for breach of promise of marriage (as in other cases of contract) to inspect and take copies of letters in plaintiff's possession written by defendant to plaintiff. *Stone v. Strange*, Ex. 72

INSURANCE AGAINST ACCIDENT—A policy for insuring payment of a sum of money in case the insured should be injured by accidental violence and die from the direct effect of such accident, was subject to the following condition: "this policy insures against all forms of cuts, stabs," &c., when accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to be insured," but it does not insure against death or disability arising from rheumatism, gout, *hernia*, erysipelas, or any other disease or cause arising within the system of the insured before or at the time or following such accidental injury. It was held, the insurers were liable under such policy where the insured died from *hernia* caused by external violence. *Fitton v. the Accidental Death Insur. Co.*, C.P. 28

INSURANCE AGAINST FIRE—A damage sustained by atmospheric concussion caused by an explosion of gunpowder at a distance, is not a damage insured against by a policy for the payment of such loss or damage as should be occasioned by fire to the property thereby insured. *Everett v. the London Assur. Co.*, C.P. 299

INSURANCE ON SHIPS. See Marine Insurance.

INTEREST—A letter of application for a loan "until a certain day," which does not shew an obligation to pay on the face of it, is not "an instrument by virtue of which the debt is payable at a certain time," within the meaning of 3 & 4 Will. 4. c. 42. s. 28. *Taylor v. Holt*, Ex. 1

INTERROGATORIES—In allowing a party to deliver interrogatories to the opposite party, the Court will take as a guide the rules and principles acted upon in the courts of equity as to bills of discovery, although it will not consider itself to be fettered by those rules. In an action of ejectment the Court will not compel the defendant to answer interrogatories where the answer would tend to shew that he had incurred a forfeiture of his lease by reason of his having underlet the premises. *Pye v. Butterfield*, Q.B. 17

— The Court will not allow interrogatories before declaration, at least where the plaintiff does not shew in his affidavit what his cause of action is. *Anonymous v. Parr*, Q.B. 95

— Discretion of Judge in allowing or rejecting interrogatories. *Phillips v. Levin*, Ex. 37

— Interrogatories will not be allowed in an action of libel if they tend to charge defendant with an indictable offence. *Baker v. Lane*, Ex. 57

— Interrogatories may be put to a plaintiff to ascertain the true measure of damage he has sustained, and so guide defendant as to the amount he may fairly pay into court. *Wright v. Goodlake*, Ex. 82

JOINT TENANTS. See Landlord and Tenant.

JURISDICTION—Power of Court over its procedure. See Payment into Court.

JURY—Neglect to summon and call in court special jurors. See Error in Fact.

JUSTICE OF THE PEACE—Jurisdiction of. Summary conviction without information. Irregularity. 24 & 25 Vict. c. 97. s. 52. *Turner v. the Postmaster-General*, Q.B. 37; M.C. 10

LANDLORD AND TENANT—One or two joint-tenants may demise his or their portions to another, so as to create the relationship of landlord and tenant between them, with a right to distrain in respect of rent in arrear. Thus, three co-executors may agree that one shall hold land, devised to them in trust, at a fixed rent, and if the rent falls into arrear, he may be distrained upon in respect of it. *Scoble*, also, that when he has taken possession and has paid rent, he would be estopped from denying their right to distrain. *Cowper v. Fletcher*, Q.B. 187

— Goods in the possession of a pawnbroker as security for money advanced cannot be distrained for rent. In an action by the pawnbroker to recover goods distrained under such circumstances, the pawnbroker is entitled to recover the full value of the goods. *Swire v. Leach*, C.P. 150

— Defendant was lessee of a house, and plaintiff one of the reversioners and lessors. Before the end of the lease the lessors agreed verbally with M. that he should have a lease, to commence at the end of that of defendant, the house to be pulled down by M. and new premises built by him. Defendant left the house out of repair at the end of the lease. M. afterwards entered, and some time after that the verbal agreement was put into writing, and the house pulled down. Plaintiff brought an action against defendant on a covenant in his lease for not keeping and yielding up the house in good repair; and it was held the jury were not compelled to give only nominal damages. *Rawlings v. Morgan*, C.P. 185

— Where a tenant is allowed to hold over after the expiration of his lease, it is a question of fact for the jury on what terms he continues to hold. Receipt of rent by remainderman no evidence of a holding over under the terms of the lease. *Oakley v. Monck*, Ex. 137

— See Covenant to Repair. Damages. Fixtures.

LANDS CLAUSES CONSOLIDATION ACT—Where lands have been taken, the claimant, in order to bring himself within section 68. of 8 Vict. c. 18, must give, in his notice for a jury, such reasonable information as to his interest as will enable the promoters to judge whether they will pay the whole claim, or what amount they ought to offer; and where the claimant is

occupier under a lease for years, it is not sufficient to state in the notice that he "holds under a lease." *Cameron v. the Charing Cross Rail. Co.* commented upon. *Healey v. the Thames Valley Rail. Co.*, Q.B. 52

— By the 216th and 217th sections of a local act for making a railway (containing similar provisions with those in the 127th section of the Lands Clauses Consolidation Act), lands acquired by the company under the provisions of the act, but which should not be required for the purposes thereof, were to be sold within ten years after the passing of the act, and if they were not so sold, they were to vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same. It was held, that this applied to all lands acquired under the provisions of the act, for the purpose of making the railway, and not used for that purpose, whether the land were actually in the possession of the company, or in the occupation of their tenants. In the year 1861 plaintiff brought an action to recover the possession of lands which, under the act, would become vested in him as the owner of adjoining land; in 1863, the company, in promoting another private act, got a clause inserted, to the effect that the respective periods limited for the sale of superfluous lands were to be extended for five years from the passing of the act. The vested interest of plaintiff, if he had any at all, had vested in him in the year 1854. It was held, the clause so inserted in the year 1863 had no operation upon the claim of plaintiff. Also, that the proper way to apportion the superfluous lands among the owners of the land adjoining thereto, was by drawing a line from the point where the boundaries of two adjoining owners meet, to the nearest point of the land actually used by the company. *Moody v. Corbett*, Q.B. 166

— If a railway company during the execution of their works under their special act place a bridge on a highway, up and down and over which bridge passengers must pass, instead of along the level highway, and so render the access to a public-house more difficult, and passengers are thereby deterred from going that way, and there is in consequence a loss of trade to the public-house, the tenant of the public-house cannot sustain a demand for compensation, under section 68. of the Lands Clauses Consolidation Act, 1845, on the ground that his land has been injuriously affected by the works; for no action would have lain against the company had they not been authorized by their special act; and even if an action might have been supported, still no compensation is claimable, since the damage, if any, is of a personal character, and not an injury to the land. So held in the Exchequer Chamber (reversing the judgment of the Court of Queen's Bench) by *Erle, C.J.*, *Pollock, C.B.*, *Channell, B.* and *Pigott, B.*, *dissentientibus Byles, J.* and *Keating, J.* *Senior v. the Metropolitan Railway Company* and *Cameron v. the Charing Cross*

Railway Company overruled. *Rickets v. the Metropolitan Rail. Co.*, (Exch.) Q.B. 257

— A party who has a right of shooting over land by an agreement with the owner, not under seal, has not such an interest as to entitle him to compensation under section 68. of the Lands Clauses Consolidation Act, 1845, in respect of such land being taken by a railway company for the purposes of their railway. *Bird v. the Great Eastern Rail. Co.*, C.P. 366

— Compensation for damage by obstructing access to house. *Herring v. the Metropolitan Board of Works*, C.P. 372; M.C. 224

LEASE—Plaintiff being in occupation of premises under a lease from J. F. which would expire on the 4th of December 1864, obtained from J. F. a reversionary lease for twenty-one years and twenty-one days, to commence from the said 4th of December 1864, on payment of a premium. In November 1863 J. F. died, and it turned out he had no power to grant this reversionary lease. F. V. who was entitled to the premises on the death of J. F. refused to ratify the said lease, and the plaintiff was obliged to accept a lease from F. V. to commence on the 25th of December 1864, for seven years only, at a greater rent. Plaintiff brought an action against the executor of J. F. on a covenant for quiet enjoyment contained in the void lease; and it was held, first, that a plea that plaintiff had never entered into possession of the premises under such lease was bad; secondly, that on a plea that F. V. did not claim the premises from plaintiff or threaten to oust him from the possession thereof, plaintiff was entitled to judgment; thirdly, that plaintiff was not merely entitled to recover the premiums and expenses of the void lease; but was entitled to recover the difference between the expenses of the void lease and the lease granted by F. V. and also the difference between the respective values of such leases, but that in calculating such differences in value, the transaction was not to be considered in the nature of a compulsory sale, and that the expenses of counsel, &c. were not recoverable. *Lock v. Furze*, C.P. 201

— Declaration for breach of covenants contained in a farming lease, dated 24th of December 1851, and made between plaintiff of the first part, defendant of the second and Y. of the third part, whereby plaintiff and Y. (so far only as they legally could or might, according only to their respective estates and interests) demised to defendant a farm for a term of fourteen years from the 25th of March 1851. Plea, that at the time of execution of the deed plaintiff was possessed of the premises for the residue of a term of years in case plaintiff should so long live, and the reversion of the premises after the expiration of the estate of plaintiff then was vested in Y. and that the indenture was never executed by Y. as his deed, and that there never was any demise by plaintiff and Y. to defendant of the premises, and that there never was any consideration for

the execution of the indenture, or of defendant's part of the same. On demurrer, it was held the plea was bad, as it was expressly stated in the lease that plaintiff and Y. demised so far only as they legally could or might, according only to their respective estates and interest, and that therefore defendant had received the consideration for which he stipulated, viz. a lease for fourteen years, if plaintiff should so long live. *Hov v. Greek*, Ex. 4

LEASE (continued)—A lease for twenty-one years, expressed to be "determinable, nevertheless, in seven or fourteen years, if the said parties hereto shall so think fit," is determinable only by consent of both the parties, although it may have been their intention to give the option to either alone. *Fowell v. Franter*, Ex. 6

— To detain by an administrator for a title-deed whereby defendant demised land and premises to the intestate for an unexpired term of fourteen years, defendant pleaded that the deed was a farming lease, at a yearly rent, with various farming covenants, and that after the death of the intestate, and upon grant of administration, defendant, pursuant to the terms of the lease, re-entered for breach of covenants, and, thereupon, the title-deed became defendant's title-deed, and the lessee ceased to have any interest in it. It was held, this plea was no answer to the action, and that plaintiff was entitled to the deed. *Elworthy v. Sandford*, Ex. 42

— Reservation out of. See Deed.

— See Bankrupt. Covenant to Repair.

LEGACY DUTY—Under section 8. of 13 & 14 Vict. c. 97, the Court will grant an attachment absolute in the first instance, against a person withholding legacy duty, who has failed to shew cause why he should not pay the money to the Receiver General of Inland Revenue. *In re Eaton*, Ex. 87

— See Domicil.

LIBEL—Plaintiff charged, as a libel upon him, a notice published by defendants, a railway company, which stated that plaintiff had been convicted by Justices of an offence against defendants' by-laws and fined, with an alternative of three weeks' imprisonment; the alternative in the conviction was really fourteen days. It was held, it was a question for the jury whether the statement charged as libellous was or was not substantially true, and that the inaccuracy of the statement did not necessarily make it libellous. *Alexander v. North-Eastern Rail Co.*, Q.B. 152

— What amounts to defamatory matter, as being a disparagement to character. *Fray v. Fray*, C.P. 45

— To an action for libel defendant pleaded that,

after the commencement of the suit, plaintiff and defendant agreed to accept certain mutual apologies to be published by plaintiff and defendant respectively, in certain weekly journals belonging to plaintiff and defendant respectively, in full satisfaction and discharge of all causes and rights of action in the declaration mentioned, and all damages and costs sustained by plaintiff; and that in pursuance of the agreement defendant did publish his part of the mutual apologies in the weekly journal belonging to him, and that plaintiff did also in pursuance of the agreement publish his part of the apologies in the weekly journal belonging to him. It was held the plea was a bar to the action as an accord and satisfaction. *Boosey v. Wood*, Ex. 65

— See Interrogatories.

LIMITATIONS, STATUTE OF—If by the act of A. an injury is occasioned to the foundations of the house of B, of which B. has not at the time any knowledge, but which afterwards exhibits itself by creating actual mischief to B.'s house, B. is not prevented by the Statute of Limitations from maintaining an action for damages, though more than six years have elapsed since the doing of the act which was in reality (though unknown at the time) the origin of the mischief, for the cause of action really accrued when the actual damage first exhibited itself. *Backhouse v. Bowmi* (House of Lords), Q.B. 181

LOAN SOCIETY. See Equitable Plea.

LOCAL MARINE BOARD—A local marine board appointed under the Merchant Shipping Act, 1854, to inquire into a charge of alleged misconduct against the master or mate of a vessel, has a discretionary power as to granting summonses for witnesses for the defence: it is a proper course for such Court before granting the summonses to inquire who the witnesses are and what they are expected to prove, and to refuse the summons in respect of any witness who can only speak to matters clearly irrelevant. The witnesses summoned for the defence are witnesses of the Court, and their expense is to be borne not by the defendant but by the public. *R. v. Collingridge*, Q.B. 9

MARINE INSURANCE—By a policy of insurance a ship was insured from Liverpool to any port in the Pacific Ocean, "and during thirty days' stay in her last port of discharge." In another part of the policy there was the usual printed clause, by which she was to be insured "until she hath moored at anchor twenty-four hours in good safety." She arrived at M, her port of discharge, at 7 p.m. on the 25th of May, and anchored there, and at 3.45 a.m. on the 24th of June she was driven ashore and lost. It was held the loss was covered by the policy, as the thirty days had not expired when it occurred. *The Mercantile Marine Insur. Co. v. Titherington*, Q.B. 11

— Sufficiency of declaration of risk with know-

ledge of loss at time of granting the policy. *Gledstanes v. the Corporation of the Royal Exchange Assurance*, Q.B. 30

— The "seaworthiness" of which, in the absence of express stipulation, there is an implied warranty in every voyage policy, is a relative term depending on the nature of the ship as well as of the voyage insured for. Therefore, on a policy "on a voyage from the Tyne to Odessa," it being shewn that the vessel was an iron steamer of very light draught of water, constructed for river navigation only, that this was disclosed to the underwriters before the policy was effected and the dimensions of the vessel then stated to them, and that (though it was impossible to make her fit to encounter the ordinary perils of ocean navigation) the ship had been made as seaworthy as her size and construction would admit, the underwriters were held liable on her being lost by the perils insured against. *Clapham v. Langton* (Ex. Ch.), Q.B. 46

— To a declaration on a policy of insurance upon freight on a voyage from R. to Liverpool, averring a total loss by perils of the sea, defendant pleaded, fourthly, that the cargo consisted of timber and wood, that R. is a port in British North America, that the voyage commenced after 1st of September and before 1st of May, and the master stowed a portion of the cargo on deck contrary to 16 & 17 Vict. c. 107. ss. 170-2, and sailed without the certificate required by that statute, and that plaintiff was the owner of the ship. Fifth plea, the same as the fourth, with a further averment that plaintiff intended that the vessel should sail so loaded, and made the policy for the express purpose of protecting the adventure. At the trial the following facts appeared: the whole of the cargo that was on freight was properly stowed below deck, but the master placed some spars on deck to be carried to Liverpool for the owner, having no instructions from the owner to do so. The vessel was not made unseaworthy by the mode of loading, nor did the owner know of it till after the policy was made and the ship had sailed. It was held, first, that these spars were within the meaning of the Customs Act, 16 & 17 Vict. c. 107. s. 71; secondly, that the fifth plea was good, but not proved; thirdly, that no authority from the owner to the master could be implied to do that which was unlawful, though the act might be otherwise within the ordinary scope of the master's authority, and though it might be done for the benefit of the owner; that the master, therefore, in stowing the cargo on deck contrary to the statute, could not be taken to be acting by the authority of the owner, nor was the owner bound by the knowledge of the master; and that consequently, on the authority of *Cunard v. Hyde*, the fourth plea was bad, and the plaintiff entitled to recover on the policy. *Wilson v. Rankin*, Q.B. 62

— If a ship is submerged with cargo on board and cannot be got out without raising the ship,

the cost of raising is general average, to which the cargo must contribute. In such a case, in order to ascertain whether a ship is a constructive total loss, the sum to be contributed by the cargo as general average must be taken into consideration; and if, after deducting that sum, the remaining cost of raising, together with the cost of repairs of the ship, is less than her value when repaired, the ship is not a total loss. So held by *Blackburn, J.*, *Shree, J.* dissenting on the latter points. *Kemp v. Halliday*, Q.B. 233

— A policy of insurance for twelve months on ship and cargo, the ship being intended for the barter trade on the coast of Africa, contained a stipulation that "outward cargo should be considered homeward interest twenty-four hours after arrival at the first port or place of trade." By a subsequent clause the policy was declared to be "on the ship valued at 2,000*l.*, cargo valued at 8,000*l.*" There was liberty given to the insured "to discharge, load, unload, reload, sell, barter, exchange and trade" any part of the cargo. The ship arrived at a place on the coast of Africa and there discharged a large part of her cargo, and after a stay of more than twenty-four hours proceeded towards other ports in order to take in other cargo; before arriving at her next port of destination she was totally lost. It was held, the insurers were not liable to pay the whole 8,000*l.*, but a proportion only; that the valuation in the policy was applicable to what was substantially a full cargo, whereas here there was not substantially a full cargo. It was held, also, that the proportion of the 8,000*l.* which the underwriters were liable to pay, was to be ascertained by finding the proportion which the goods on board at the time of the loss bore to a full cargo, and if this proportion could not be found, that then the underwriters would be liable as upon an open policy underwritten for 8,000*l.* *Tobin v. Harford* (Ex. Ch.), C.P. 37

— Declaration on a policy of insurance on goods from London to a port not alleged to be neutral, was in the usual form, and alleged a loss by a peril insured against. Defendant pleaded that the goods were contraband of war, and were shipped for the purpose of being sent to and imported into a belligerent port, and also that the ship was carrying goods and papers which rendered her liable to be seized, and that she was seized accordingly, which was the loss complained of; of all which defendant, at the time of signing the policy, was ignorant. It was held, that the plea was bad, as, upon the true interpretation of the first allegation, it was consistent therewith that the ship was on her voyage to a neutral port, in which case there was no breach of neutrality; and that the allegation that the ship was carrying goods and papers which rendered her liable to be seized was insufficient, because it was not shewn that the goods were plaintiff's goods, or that he was responsible for the state of the ship's papers. Defendant also pleaded, by way of estoppel, a judgment, by a foreign Court, of condemnation of the ship and cargo, in which it was found, as a ground of condemnation, that

the ship was laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea; and that she was not truly destined to the port of Matamoras, but to some other port, and in aid and for the use of persons then at war with the United States, and in violation of the law of nations; and that the ship's papers were simulated and false as to her real destination. It was held, this judgment did not conclusively find that the ship had not sailed for Matamoras, or that she had deviated from her voyage, but only that the ultimate destination of the ship, or goods, or both, was some other port than Matamoras, and that upon this interpretation of the judgment the facts conclusively found were insufficient. And it was held, also, per *Erle, C.J.* and *Byles, J.*, that such a judgment could not be pleaded as an estoppel. *Hobbs v. Henning*, C.P. 117

MARINE INSURANCE (*continued*)—Where a stranded vessel was in danger of falling to pieces, and the captain sold her cargo, consisting of timber, because the expense of forwarding it to its destination would have exceeded its value there, when so forwarded, the assured was held entitled to recover against the underwriter on a policy on such cargo, for a total loss without having given notice of abandonment. *Farnworth v. Hyde*, C.P. 207

— By a policy of insurance on a vessel against capture and detention the insurers contracted "to pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." The vessel having been detained under an embargo within the meaning of the policy, it was held, that when the thirty days after receipt of official news of such embargo had expired, the assured was entitled to recover for a total loss, although before action, but subsequently to such thirty days, the embargo was taken off and the vessel was restored to the assured. *Fowler v. the English and Scottish Marine Insurance Co. (Lim.)*, C.P. 253

— See Charter-Party. Payment into Court.

MARKET—Meaning in Market and Fairs Clauses Act, 1847, of seller's "own shop." *Pope v. Whalley*, Q.B. 89; M.C. 76

MARRIAGE SETTLEMENT—Costs of. See Solicitor and Client.

MASTER AND SERVANT—S, the agent of an insurance company, being indebted to the company, and being pressed for payment, it was arranged that plaintiff should pay the money to the company, and that the company should appoint him and S. as joint agents, with the same rates of payment and remuneration as before. A deed was executed, containing a covenant that in case the company should at any time thereafter "displace" S. from his appointment as agent, then that they should and would forthwith repay to plaintiff the money so paid by him.

Subsequently, the company transferred the whole of their business and liabilities to another company, and refused to pay plaintiff the money so advanced by him; and in an action to recover the amount it was held, there was an implied covenant on the part of the company that they would not do anything of their own voluntary act, by which it should be impossible for them to keep S. in their employ any longer, and therefore they were liable in the action. *Stirling v. Maitland*, Q.B. 1

— A master cannot maintain an action *per quod servitium amittit* against a railway company for an injury to his servant whilst a passenger on the company's railway, caused by a neglect of their duty to safely carry the servant according to their contract with him as such passenger, unless the master was a party to such contract. *Alton v. the Midland Rail. Co.*, C.P. 292

— Some bales of cotton, sent by defendant to a warehouse and packed there carelessly by his servants under the direction of the warehouse-keeper, afterwards fell on plaintiff, a servant of the owner of the warehouse, who was passing by in the course of his duty; and it was held, that defendant was not responsible. *Randelson v. Murray* impugned. *Murphy v. Caralli*, Ex. 14

— A workman cannot recover damages from his employers for injury sustained by him while at work in their mill, and resulting from the building having been originally negligently constructed, unless personal negligence be proved against his employers themselves (or against some person acting by their orders), either in having given directions how the building should be constructed, or in having knowingly entrusted the execution of the work to an incompetent person. *Brown v. the Accrington Cotton-Spinning and Manufacturing Co. (Lim.)*, Ex. 208

— Plaintiff, a workman in a coal-mine of defendants, received damage from the fall of a stone from the roof of the mine, which had lost its support by reason of the removal of the coal below in the ordinary course of working the mine. Defendants' underlooker, whose duty it was to superintend the mining operations, had negligently, though the danger had been pointed out to him, omitted to prop up the roof. The removal of the coal and the propping up of the roof ought, in the exercise of due and reasonable care, to be nearly contemporaneous operations. It was held, that as there was no evidence that defendants had not exercised due care in the selection of their underlooker, nor in putting the mine into a proper condition before the miners were sent into it, they were not answerable for the injury caused to plaintiff by the negligence of the underlooker, his fellow-labourer. *Hall v. Johnson* (Ex. Ch.), Ex. 222

— See Negligence.

MAYOR'S COURT OF LONDON. See Foreign Attachment.

MERCANTILE LAW AMENDMENT ACT. See Guarantee.

MERCHANT SHIPPING ACTS, 1862— By 25 & 26 Vict. c. 63. s. 67, a shipowner is empowered to land goods imported in his ship from foreign parts subject to the condition, that "if before the goods are landed the owner thereof has made entry for the landing and warehousing thereof at any particular wharf other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice do so at his own risk and expense." It was held, the owner of the goods when he makes an offer to take delivery of them must be in a condition to receive the same if the offer be then accepted in order to entitle him to the benefit of such condition. And, further, that when such offer is made, the shipowner, if he then fails not only to make delivery of the goods, but also to give such owner of the goods information of the time at which they can be delivered, is bound to give the twenty-four hours' notice above specified before he lands the goods, although he was never asked to give such information. *Beresford v. Montgomerie*, C.P. 41

— The 29th section of 17 & 18 Vict. c. 104. does not authorize the making of rules which, abolishing the distinction between paddle-wheels and screws, in estimating the deduction to be made for space occupied by boilers and machinery, substitute one uniform allowance for all classes of steam vessels, together with a new mode of ascertaining by admeasurement such allowance. *The City of Dublin Steam-Packet Co. v. Thompson*, C.P. 316

— See Local Marine Board.

MERGER—Plaintiffs lent M. 650*l.* on security of mortgage of certain property, with a covenant by M. to repay the 650*l.* with interest at 5*l.* per cent., on 22nd of June 1864; and as the mortgage was not a sufficient security for more than 500*l.* the loan was made on further security of the promissory note of M. and two sureties for 150*l.* payable on demand, with interest at 4*l.* 10*s.* per cent. The promissory note, which it was agreed between plaintiffs and M. should be a collateral security to the mortgage-deed, was made and given to plaintiffs on the 7th of December 1863, when 150*l.*, part of the loan, was advanced to M.; but the mortgage-deed was not executed until the 22nd of December 1863. The

deed contained no reference to the note, and the sureties who signed the note were not parties to the deed. It was held, the debt secured by the note did not merge in the deed, and that, though the remedy on the covenant could not be enforced before the 22nd of June 1864, time was not given to M. so as to discharge the sureties on the note. *Boaler v. Mayor*, C.P. 230

METROPOLIS LOCAL MANAGEMENT ACT—The 57 Geo. 3. c. xxix. contains (amongst other things) powers for the suppression of nuisances, within a certain district of the metropolis, and by section 68, the keeping of pigs within forty yards of any street is prohibited, whether the same be a nuisance or not. By 25 & 26 Vict. c. 102. s. 73, the powers of improving and regulating streets, and for the "suppression" of nuisances contained in the 57 Geo. 3. c. xxix. are applied to a larger district. It was held, *dubitate Keating, J.*, that section 68. of 57 Geo. 3. c. xxix., being a power of prevention and not of suppression, did not apply to the larger district. *The Vestry of Chelsea v. King*, C.P. 47; M.C. 9

— See Sewers.

METROPOLITAN BUILDINGS ACT—The lessee of a house for a long term of years, who has underlet it in different portions to different tenants, and who is in receipt of the rents from such underlettings, is the "owner" of the party-wall of such house within the meaning of the Metropolitan Buildings Act (18 & 19 Vict. c. 122), notwithstanding the underlettings create a greater interest in the under-tenants than that of a yearly tenancy, and he is liable as such owner to pay the adjoining owner a proportion of the expenses incurred by the latter in repairing the wall in obedience to the requisition of the Commissioners of Sewers made under that act. *Hunt v. Harris*, C.P. 249

MINES—Damage by working. See Limitations, Statute of.

MONEY HAD AND RECEIVED—K. had chartered a vessel of defendant at the hire of 30*l.* per week, payable every four weeks in advance, with liberty for defendant in case of non-payment to retake the ship. A month's payment of 120*l.* in advance being due, K. applied to plaintiff to assist him, and plaintiff gave K. a cheque for 60*l.* payable to defendant or order, on the terms that K. should inform defendant that the cheque was given on the consideration of defendant's allowing the vessel to proceed on a certain voyage. K. paid the cheque to defendant, but did not tell him of plaintiff's conditions. As the whole of the 120*l.* was not paid, defendant stopped and retook the vessel. The cheque being presented at plaintiff's bankers, on the part of defendant, was duly cashed. It was held, that as defendant had received plaintiff's cheque, which was a negotiable security, without notice of any conditions, and for a valuable consideration, the debt due to him from K. plaintiff was not entitled to recover from defendant any por-

tion of the proceeds. *Watson v. Russell* (Ex. Ch.), Q.B. 93

— See Contract. Gaming.

MONEY PAID. See Charter-Party.

MORTGAGE — B, in consideration of a sum of money lent to him by defendants, who carried on business under the name of "The City Investment and Advance Company," assigned by deed certain goods of his to the said company to hold as their own proper goods; nevertheless, by way of mortgage for securing the repayment of the said loan, with full power to the mortgagees to sell the goods, and out of the proceeds to reimburse themselves the said loan and costs of sale, and to pay the residue, if any, to B. It was held, the property in the goods passed by such deed to the mortgagees, and that plaintiff, who claimed the same goods under a subsequent assignment to him from B, could not maintain an action against them for selling the goods without taking reasonable care to obtain the best prices for them. Also, that defendants need not be described in the deed by their christian names or surnames, and that the conveyance of the property to the said company as above mentioned operated as a conveyance to defendants on its being ascertained that they were the persons described under the name of such company. *Maughan v. Sharpe*, C.P. 19

— See Merger.

NEGLIGENCE—Defendant, the owner of a house in the metropolis, employed a contractor to make a drain from his house to the main sewer, under the powers of the Metropolis Local Management Act. The contractor made the drain, but filled up the ground so negligently where it crossed a public footway, that it subsided and left a hole, into which plaintiff fell and was injured. It was held, by the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench (see page 17), that defendant was liable for the injury; that as the statutable power for making the drain also imposed on defendant the duty of filling up the cutting across the footway properly, he was not excused by reason of his having employed to perform the work a contractor who omitted to do his duty. *Gray v. Pullen* (Ex. Ch.), Q.B. 265

— Declaration that defendant knowing that certain of his dogs were accustomed to hunt for and pursue game, and that plaintiff preserved game in a certain wood, so negligently controlled and restrained his said dogs near to the said wood, that they entered the said wood and hunted and destroyed the game therein. It was proved defendant had a dog of a peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account, and that that vice was known to defendant, who, notwithstanding, allowed the dog to be at large in the neighbourhood of plaintiff's wood, and that the dog consequently entered the wood

and did the damage complained of. It was held, the declaration was proved in an actionable sense, and was also good after verdict. *Quare*—whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another. *Read v. Edwards*, C.P. 31

— Defendants' railway crossed a carriage road on a level; there were locked carriage gates and swing gates for foot passengers, the trains were frequent, the crossing was on a curve, and a bridge near to it over the line obstructed the view in that direction. Two trains passed about the same time, and whilst plaintiff's attention was directed to one the other knocked him down. It was held, that, although there might be no statutory provisions for the safety of such a foot-passenger, yet under the circumstances there was evidence of negligence to go to the jury, and the Judge was not bound to nonsuit. *Bilbee v. the London, Brighton and South Coast Rail. Co.*, C.P. 182

— Through the defect of a gate which defendant was bound to repair, defendant's horse got out of defendant's farm into an occupation road and strayed into plaintiff's field, where it kicked plaintiff's horse; and it was held, defendant was liable for the trespass by his horse, and that it was not necessary for the maintenance of the action to prove defendant's horse was vicious and that defendant was aware thereof. Also, that the damage plaintiff had sustained by the injury to his horse was not too remote, but was sufficiently the consequence of defendant's neglect to be recoverable in such action. *Lee v. Riley*, C.P. 212

— Defendants contracted with the Lords of the Admiralty for the erection of docks and works in Plymouth harbour, and for that purpose sunk piles in the navigable part of the channel. After the completion of the works, and after a reasonable time for the removal of the piles, defendants sold the piles to J, who undertook to remove them by a certain date, or sooner if required by the Lords of the Admiralty. The Admiralty subsequently required J. not to draw the piles, and J, acting under those orders, cut the piles off on a level with the bed of the channel. The soil was subsequently washed from around the stumps, and plaintiff's vessel struck against them and was injured. In the position in which the piles existed at the time defendants delivered them up to J, the damage could not have been done without plaintiff's gross negligence. It was held, there was no cause of action against defendants. *Bartlett v. Baker*, Ex. 8

— The level crossing between the platforms at a railway station, which formed part of the "way out" for passengers arriving at the south platform, was blocked for more than ten minutes by the train in which plaintiff arrived there. Under such circumstances, it was usual for the arriving passengers—and the railway company did not object to the practice—to walk alongside

and round the end of the train in order to cross the line. Plaintiff in so doing, in the dark, stumbled over a hamper which had been taken out of the train, and placed at the side of the line, some distance from the platform, and was injured. It was held there was evidence of negligence on the part of the railway company. *Nicholson v. the Lancashire and Yorkshire Rail. Co.*, Ex. 84

— Plaintiff, a custom-house officer, while on defendants' premises in the execution of his duty, was injured by some bags of sugar falling on him from a crane fixed over a doorway, under which he was passing. It was held, by the majority of the Court, *Crompton, J., Byles, J., Blackburn, J. and Keating, J.*, that as the accident was such as did not in the ordinary course of things happen to those who have the management of machinery, and use proper care, it afforded reasonable evidence of negligence in the absence of any explanation by the defendants (*dissentientibus Erle, C.J. and Mellor, J.*). *Scott v. the London Dock Co.* (Ex. Ch.), Ex. 220

— See Action. Master and Servant. Railways Consolidation Act.

NEW TRIAL—Where a country cause was tried at Westminster on the last day but one of Hilary Term, the Court held that an application by defendant for a new trial, made on the 4th day of the ensuing Easter Term was too late, notwithstanding that defendant's attorney resided at Sandwich in Kent, and that his London agent lost no time either in obtaining the necessary instructions from him or in acting upon the instructions when received. *Pain v. Terry*, Ex. 224

NOTICE OF ACTION—A notice of action signed by B, the plaintiff, under 9 & 10 Vict. c. 95. s. 188, was, "It is my intention at the end of one calendar month from the date hereof to commence an action against you" (the high bailiff) "in the Court of Queen's Bench, to recover compensation in damages for a trespass and excessive levy committed by you and your officers on the 8rd of December 1863, by selling and disposing of certain goods upon the premises, No. 80, Derbyshire Street, &c., to satisfy debt and expenses under an order recovered against me in the S. county court." It was held the notice was sufficient. *Burton v. Le Gros*, Q.B. 91

NUISANCE—A canal company were empowered by an act of parliament to take the water of certain brooks and use it for the purposes of their canal; the water in one of the brooks at the time the act passed was pure, but it afterwards became polluted by drains, &c. before it reached the canal, and it was then penned back in the canal and became a public nuisance. It was held the company were liable to be indicted for the nuisance, as there was nothing in the act compelling them to take the water, or authorizing them to use it so as to create a nuisance. *The King v.*

Pease distinguished. *R. v. the Company of Proprietors of the Bradford Navigation*, Q.B. 191

— Firing rockets to frighten grouse. *Ibbotson v. Peat*, Ex. 118

— See Metropolis Local Management Act. Venue.

PARLIAMENT—borough vote: non-payment of poor-rate: assistant overseer joining in making rate]—A poor-rate allowed by two magistrates was made by the majority of the parish officers, but such majority was obtained by an assistant overseer joining in making the rate. This assistant overseer had been appointed by the vestry to perform all the duties incident to the office of overseer, except the collection of rates. It was held that this rate was so far presumably valid that its non-payment by a party claiming a borough franchise was a disqualification to his being on the register of voters. *Baker v. Locke*, C.P. 49

— borough vote: payment of proportionate part of poor-rate by incoming tenant]—A person is not disqualified by 2 Will. 4. c. 45. s. 27. from being on a borough register of voters because he has not paid some arrear of a poor-rate in respect of which he was not rated, and which had never been demanded of him, but which had been made on the qualifying premises prior to his occupation, and which by 17 Geo. 2. c. 38. s. 12. the incoming tenant is liable to pay in proportion to the time he occupied. *Flatcher v. Boodle*, C.P. 77

— borough vote: "building": occupation as tenant]—A, a market-gardener, who claimed to vote for the borough of K, occupied as tenant land of the yearly value of 20*l.* within the borough. When he first took the land there was no building upon it, but he erected a wooden structure with boarded sides, and a thatched roof supported by wooden posts let into the ground; there was a door to the structure fastened by a padlock, and it was used for storing potatoes. The revising barrister found that this structure was a "building" within the meaning of 2 & 3 Will. 4. c. 45. s. 27, and that A. occupied it as tenant, and was entitled to be registered as a voter; and it was held, upon the principle laid down in *Watson v. Cotton*, that there was nothing in the description as given by the barrister to warrant the Court in disturbing his decision. *Quere*—whether a pigstye is a "building" within the meaning of the Reform Act. *Powell v. Farmer*, C.P. 71

— borough vote: "building": occupation as tenant]—The claimant for a vote in the borough of K. occupied, as tenant, land of the yearly value of more than 10*l.* within the borough. When he first took the land there was no building upon it. In 1862 an electioneering agent, having no interest of any sort in the land, caused a shed to be erected made of boards nailed to posts, and the claimant had used the shed, by keeping therein some of his agricultural

tion of the proceeds. *Watson v. Russell* (Ex. Ch.), Q.B. 93

— See Contract. Gaming.

MONEY PAID. See Charter-Party.

MORTGAGE — B, in consideration of a sum of money lent to him by defendants, who carried on business under the name of "The City Investment and Advance Company," assigned by deed certain goods of his to the said company to hold as their own proper goods; nevertheless, by way of mortgage for securing the repayment of the said loan, with full power to the mortgagees to sell the goods, and out of the proceeds to reimburse themselves the said loan and costs of sale, and to pay the residue, if any, to B. It was held, the property in the goods passed by such deed to the mortgagees, and that plaintiff, who claimed the same goods under a subsequent assignment to him from B, could not maintain an action against them for selling the goods without taking reasonable care to obtain the best prices for them. Also, that defendants need not be described in the deed by their christian names or surnames, and that the conveyance of the property to the said company as above mentioned operated as a conveyance to defendants on its being ascertained that they were the persons described under the name of such company. *Maughan v. Sharpe*, C.P. 19

— See Merger.

NEGLIGENCE — Defendant, the owner of a house in the metropolis, employed a contractor to make a drain from his house to the main sewer, under the powers of the Metropolis Local Management Act. The contractor made the drain, but filled up the ground so negligently where it crossed a public footway, that it subsided and left a hole, into which plaintiff fell and was injured. It was held, by the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench (see page 17), that defendant was liable for the injury; that as the statutable power for making the drain also imposed on defendant the duty of filling up the cutting across the footway properly, he was not excused by reason of his having employed to perform the work a contractor who omitted to do his duty. *Gray v. Pullen* (Ex. Ch.), Q.B. 265

— Declaration that defendant knowing that certain of his dogs were accustomed to hunt for and pursue game, and that plaintiff preserved game in a certain wood, so negligently controlled and restrained his said dogs near to the said wood, that they entered the said wood and hunted and destroyed the game therein. It was proved defendant had a dog of a peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account, and that that vice was known to defendant, who, notwithstanding, allowed the dog to be at large in the neighbourhood of plaintiff's wood, and that the dog consequently entered the wood

and did the damage complained of. It was held, the declaration was proved in an actionable sense, and was also good after verdict. *Quare*—whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another. *Read v. Edwards*, C.P. 31

— Defendants' railway crossed a carriage road on a level; there were locked carriage gates and swing gates for foot passengers, the trains were frequent, the crossing was on a curve, and a bridge near to it over the line obstructed the view in that direction. Two trains passed about the same time, and whilst plaintiff's attention was directed to one the other knocked him down. It was held, that, although there might be no statutory provisions for the safety of such a foot-passenger, yet under the circumstances there was evidence of negligence to go to the jury, and the Judge was not bound to nonsuit. *Bilbee v. the London, Brighton and South Coast Rail. Co.*, C.P. 182

— Through the defect of a gate which defendant was bound to repair, defendant's horse got out of defendant's farm into an occupation road and strayed into plaintiff's field, where it kicked plaintiff's horse; and it was held, defendant was liable for the trespass by his horse, and that it was not necessary for the maintenance of the action to prove defendant's horse was vicious and that defendant was aware thereof. Also, that the damage plaintiff had sustained by the injury to his horse was not too remote, but was sufficiently the consequence of defendant's neglect to be recoverable in such action. *Lee v. Riley*, C.P. 212

— Defendants contracted with the Lords of the Admiralty for the erection of docks and works in Plymouth harbour, and for that purpose sunk piles in the navigable part of the channel. After the completion of the works, and after a reasonable time for the removal of the piles, defendants sold the piles to J, who undertook to remove them by a certain date, or sooner if required by the Lords of the Admiralty. The Admiralty subsequently required J. not to draw the piles, and J, acting under those orders, cut the piles off on a level with the bed of the channel. The soil was subsequently washed from around the stumps, and plaintiff's vessel struck against them and was injured. In the position in which the piles existed at the time defendants delivered them up to J, the damage could not have been done without plaintiff's gross negligence. It was held, there was no cause of action against defendants. *Bartlett v. Baker*, Ex. 8

— The level crossing between the platforms at a railway station, which formed part of the "way out" for passengers arriving at the south platform, was blocked for more than ten minutes by the train in which plaintiff arrived there. Under such circumstances, it was usual for the arriving passengers—and the railway company did not object to the practice—to walk alongside

and round the end of the train in order to cross the line. Plaintiff in so doing, in the dark, stumbled over a hamper which had been taken out of the train, and placed at the side of the line, some distance from the platform, and was injured. It was held there was evidence of negligence on the part of the railway company. *Nicholson v. the Lancashire and Yorkshire Rail. Co.*, Ex. 84

— Plaintiff, a custom-house officer, while on defendants' premises in the execution of his duty, was injured by some bags of sugar falling on him from a crane fixed over a doorway, under which he was passing. It was held, by the majority of the Court, *Crompton, J., Byles, J., Blackburn, J. and Keating, J.*, that as the accident was such as did not in the ordinary course of things happen to those who have the management of machinery, and use proper care, it afforded reasonable evidence of negligence in the absence of any explanation by the defendants (*dissentientibus Erle, C.J. and Mellor, J.*). *Scott v. the London Dock Co.* (Ex. Ch.), Ex. 220

— See Action. Master and Servant. Railways Clauses Consolidation Act.

NEW TRIAL—Where a country cause was tried at Westminster on the last day but one of Hilary Term, the Court held that an application by defendant for a new trial, made on the 4th day of the ensuing Easter Term was too late, notwithstanding that defendant's attorney resided at Sandwich in Kent, and that his London agent lost no time either in obtaining the necessary instructions from him or in acting upon the instructions when received. *Pain v. Terry*, Ex. 224

NOTICE OF ACTION—A notice of action signed by B, the plaintiff, under 9 & 10 Vict. c. 95. s. 138, was, "It is my intention at the end of one calendar month from the date hereof to commence an action against you" (the high bailiff), "in the Court of Queen's Bench, to recover compensation in damages for a trespass and excessive levy committed by you and your officers on the 3rd of December 1863, by selling and disposing of certain goods upon the premises, No. 80, Derbyshire Street, &c., to satisfy debt and expenses under an order recovered against me in the S. county court." It was held the notice was sufficient. *Burton v. Le Gros*, Q.B. 91

NUISANCE—A canal company were empowered by an act of parliament to take the water of certain brooks and use it for the purposes of their canal; the water in one of the brooks at the time the act passed was pure, but it afterwards became polluted by drains, &c. before it reached the canal, and it was then penned back in the canal and became a public nuisance. It was held the company were liable to be indicted for the nuisance, as there was nothing in the act compelling them to take the water, or authorizing them to use it so as to create a nuisance. *The King v.*

Pease distinguished. *R. v. the Company of Proprietors of the Bradford Navigation*, Q.B. 191

— Firing rockets to frighten grouse. *Ibbotson v. Peat*, Ex. 118

— See Metropolis Local Management Act. Venue.

PARLIAMENT—borough vote: non-payment of poor-rate: assistant overseer joining in making rate—A poor-rate allowed by two magistrates was made by the majority of the parish officers, but such majority was obtained by an assistant overseer joining in making the rate. This assistant overseer had been appointed by the vestry to perform all the duties incident to the office of overseer, except the collection of rates. It was held that this rate was so far presumably valid that its non-payment by a party claiming a borough franchise was a disqualification to his being on the register of voters. *Baker v. Locke*, C.P. 49

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implements. There was no evidence that the landlord had any knowledge of the shed having been placed on the land. It was held, first, that though, as a fact, the revising barrister had found otherwise, this shed was not a "building" within the meaning of 2 & 3 Will. 4. c. 45. s. 27, not being used either for residuary or for commercial purposes; and, secondly, that the claimant did not occupy it in the capacity of tenant; for there was nothing to shew that it had become parcel of the freehold so as to vest in the landlord subject to the interest of the tenant during the term. *Powell v. Boraston*, C.P. 73

PARLIAMENT (continued)—borough vote: occupation for twelve months: full age—If a claimant for a borough vote has occupied the premises for which he claims for twelve months previous to the last day of July in the year in which he claims, and is of full age previous to the day of registration, it is sufficient, though he was not of full age during the whole year of occupation. *Powell v. Bradley*, C.P. 67

— **borough vote: break of residence by imprisonment**—G, who claimed to have his name retained upon the register of voters for the borough of K, had been imprisoned for six months in a gaol more than seven miles from the borough, for an assault, without the option of paying a fine. The six months expired on the 25th of August in the year for which he claimed to be entitled to be so registered; and it was held, that as G. by his own criminal act had debarred himself of the power of residing within the borough, he had not the necessary qualification. *Powell v. Guest*, C.P. 69

— **borough vote: freemen by birth**—In a borough in which freemen by birth were entitled to vote before the passing of the Reform Act, the right is preserved by section 32, not only to those whose fathers were entitled to their freedom previously to the 31st of March 1831, but to the lineal descendants of all persons entitled to their freedom before that day. *Gaydon v. Pencraft*, C.P. 53

— **borough vote: notice of objection**—In the borough of D. there were two townships, S. and E., and there was a separate list of voters for each township. The notice of objection described the objector as "on the list of voters for the borough of D. and township of E."; and it was held, the notice sufficiently indicated on which of the two lists the voter's name was to be found. *Oram v. Cole*, C.P. 52

— **power of barrister to re-hear**—A. and B. were appointed to revise the list of voters for the county of L. At a court held by A. the name of a voter was duly objected to, and the voter not being present, his name was struck off. The Court was adjourned, and on the following day the voter came before B, who was then presiding, and explained the cause of his absence, and prayed for a re-hearing. B. consented to re-hear the case, and eventually

restored the voter's name to the list. Upon an appeal to this Court, the case not stating whether the objector was present or not, it was held the decision of the revising barrister could not be supported. *Blain v. the Overseers of Pilkington*, C.P. 55

— **incomplete appeal: consent to waive formal objections**—At an adjourned Court held by the revising barrister for a borough, on the 29th of October, he decided in favour of one of several objections taken to certain votes, and expunged the voters' names from the list; but, on application by such voters for a case, he consented to grant one if a point of law could be raised, provided the case were shewn to the objector's attorney, in order that he might raise in it the points which had been decided against the objector. The directions in sections 42, 43, 44. of 6 & 7 Vict. c. 18. as to giving notice in writing of appeal, reading statement in writing in open court, signing the same then and there by the barrister, and appointing respondent to consolidated appeal, were not complied with, but both parties agreed at such court to waive all objections in point of form, and that the objector should appear as respondent, and the appeals be consolidated. There was no further adjournment of the Court, but the barrister directed the parties to come to him at his chambers, which were out of the borough. A case was afterwards prepared, and given to the objector on the 9th of November, but as he was then unable to shew it to his attorney, he refused to sign it, and returned it unsigned on the 5th of November; the barrister signed at his chambers, making the objector respondent, and it was transmitted on the same day to the Masters of the Court, that being the last day for doing so; a copy of the case and notice of appeal were served on the same day on the objector, who refused to be bound thereby. It was held, that there was not a completed appeal, and the Court therefore made absolute a rule to strike the case out of the list of appeals. *Scott v. Durant*, C.P. 81

— **borough vote: proof of service by the post of notice of objection**—Service of notice of objection, addressed to a borough voter, and sent by the post, pursuant to section 100. of 6 & 7 Vict. c. 18, is proved by producing a duly stamped notice signed by the objector, although it be headed with the word "copy"; such heading not vitiating the document as a duplicate, if in all other respects it corresponds with the notice left with the postmaster. *Bence v. Booth*, C.P. 99

— **county vote: inmate of hospital: freehold interest in land**—An hospital was founded, and lands were devised to trustees upon trust to permit the rectors of two parishes to make certain fixed payments out of the profits to the inmates to the hospital. The inmates had each a separate room, and were removable for misbehaviour; and there was a surplus income after making the specified payments not disposed of

by the deed which created the trusts. It was held, that the inmates of the hospital were not entitled to the surplus, and had not any equitable freehold interest in the lands of the charity, and were, therefore, not entitled to a county vote. *Steele v. Bosworth*, C.P. 57

— *county vote: freehold for life: eleemosynary institution: practice: decision of Court when not final*—An hospital was founded for certain bedesmen, who are appointed for life, and who inhabit separate rooms into which the hospital is divided, and each of which is of the annual value of 4*l*. The hospital was founded before 29 Eliz. c. 5, which enables hospitals for the poor to be incorporated, and it is governed by rules made before that act which refer to fees and their heirs, but none are known, and the warden and bedesmen manage the property without anybody interfering with them, and when a portion of it was lately sold for a railway they signed the conveyance and received the proceeds, which they expended in erecting buildings on the land for their own benefit. The rules give power to remove a bedesman for certain offences, but no instance has ever occurred of a bedesman having been removed during his life. It was held, that each bedesman had an equitable freehold estate in his room, which entitled him to be registered as a freeholder. *Simpson v. Wilkinson* affirmed; and the case distinguished from those of *Heartley v. Banks* and *Freeman v. Gainsford*. The decision of this Court on appeal, though made final by 6 & 7 Vict. c. 18. s. 66, does not prevent the revising barrister from entering into a case in all respects similar to the one so decided, but affecting a different register and a different voter. *Roberts v. Percival*, C.P. 84

— *county vote: shares in a bridge: Commissioners appointed by statute for public purposes*—By an act of Geo. 1. Commissioners were appointed for building a bridge across the Thames from Fulham to Putney, after compensating the proprietors of the then existing ferries, and a pontage or toll was granted and vested in the Commissioners, to be applied as directed by the act; and by a subsequent act of Geo. 2, for more effectually enabling the Commissioners to complete such work, they were empowered to convey in perpetuity the tolls and income of the said bridge or ferries to such persons as would undertake to erect and maintain the bridge. The Commissioners accordingly contracted with certain persons, who subscribed the necessary funds and became the shareholders of the bridge to build and maintain the bridge and compensate the proprietors of the said ferries; and afterwards, the bridge having been built, the Commissioners, by a deed which recited the above acts of Geo. 1. and Geo. 2. and their powers thereunder, conveyed the said bridge and tolls and all such ground adjacent and belonging to the said ferries and every other matter which they were empowered to convey, by virtue of the said acts, to certain trustees in fee in trust to permit the said shareholders to receive the said tolls and

income, and have the sole management thereof. It was held, the Commissioners had no power to convey the land belonging to the bridge, which had become vested in them by virtue of the said acts, and that the said shareholders having knowledge of the Commissioners' title under the said acts, acquired nothing more under the said deed than the Commissioners could lawfully convey, namely, the tolls and income; and, consequently, none of the shareholders had, as such, any freehold estate which could qualify him for a county vote. *Tepper v. Nichols*, C.P. 61

— *county vote: interest in land: freehold shares in a music hall*—Shareholders of a freehold music hall, who were thereby qualified to be on the register of county voters, vested the fee of the hall by deed in trustees, who were to manage the hall and pay to the shareholders proportionate sums out of the profits: and it was held, on the authority of *Bennett v. Blain*, that the shareholders had, after the execution of such deed, no direct interest in the land, but only a right to a share in the profits, and were therefore not entitled to vote as freeholders. *Freeman v. Gainsford*, C.P. 95

— *county vote: rentcharge by conveyance under Statute of Uses, 27 Hen. 8. c. 10. s. 1: possession in law*—Though the grantees of a rentcharge under a grant at common law is not entitled to be registered before he has been in the actual receipt of the rent (since until then he has only a possession in law, and not the actual possession required by 2 Will. 4. c. 45. s. 26), it is otherwise where the rentcharge is by a conveyance operating under the Statute of Uses; for then the person, to whose use the rentcharge is so limited is, by virtue of the Statute of Uses, at once in actual possession, and he may be entitled to be registered if the rent be of sufficient value, though he has not received any part of it. *Heelis v. Blain*, C.P. 88

— *county vote: occupation as tenant: annual rental under different holdings*—A person who occupies as sole tenant land for which he is liable to a yearly rent of less than 50*l*., and also, as tenant jointly with another, land at a yearly rent of less than 50*l*. for each joint tenant, is not, under 2 Will. 4. c. 45. s. 20. or 6 & 7 Vict. c. 18. s. 78, entitled to a county vote, though both tenancies are under the same landlord, and the share of the rent under the joint tenancy added to that under the sole tenancy exceeds 50*l*. a year. *Smith v. Foreman*, C.P. 98

PAROCHIAL ASSESSMENTS—Costs of new valuation under 25 & 26 Vict. c. 103. *R. v. Richmond*, Q.B. 180; M.C. 186

PARTIES. See Principal and Agent.

PARTIES TO ACTIONS. See Negligence.

PARTNERS—S. entered into an arrangement with F, whereby F. was to manage an underwriting business in the name of S, S. finding the funds.

Defendant guaranteed S. to a certain amount; and in consideration thereof S. agreed to pay him an annuity, which, on a given state of the profits, was to be increased to a yearly sum equal to one-fourth of the profits; defendant, however, not to be considered as a partner. S. afterwards married, and by the marriage settlement all the profits were assigned to defendant and D. on certain trusts, the first trust being to pay out of the profits the said annuity. It was held, that the defendant was liable as a partner on a policy underwritten in the name of S. *Bullen v. Sharp*, C.P. 174

— See Bills and Notes.

PARTY WALL. See Metropolitan Building Act.

PATENT—The executors of a patentee assigned the patent, and registered the assignment, but the probate was not registered until afterwards. It was held, the assignment was good, and that the title of the assignee was completed in accordance with 15 & 16 Vict. c. 83. s. 35. The Court, in making an order for an account under 15 & 16 Vict. c. 83. s. 42, will only direct an inquiry into the profits actually made by defendant, and will not direct a general inquiry into any other damages alleged to have been sustained by plaintiff in consequence of the infringement. The assignee of a patent is only entitled to an account of profits from the time that his title is complete, that is, when the assignment is completely registered. *Ellwood v. Christy*, C.P. 130

PAUPER LUNATIC—Right of appeal against order for maintenance under 16 & 17 Vict. c. 97. ss. 96, 108, 128. *The Kettering Union v. the Northampton General Lunatic Asylum*, Q.B. 264; M.C. 198

PAWNBROKER. See Landlord and Tenant.

PAYMENT INTO COURT—A declaration contained a count upon a policy of insurance upon a ship and cargo, and also the usual money counts. Defendants, as to the first count, pleaded that they had not broken their covenants, and they also paid into court, under the money counts, the amount of the premiums, and plaintiffs took the money out of court. The cause having been referred to arbitrators to fix the amount of the loss which they had done irrespective of the amount which had been paid into court, it was held, the Court had power to prevent injustice being done to defendants, and that plaintiffs were only entitled to judgment for the balance which remained after deducting the amount of premiums paid into court. *Carr v. the Royal Exchange Assur. Corp.*; *Carr v. Montefiore*, Q.B. 21

PILOT. See Ship and Shipping.

PLEADING—As a general rule counts in trover and detinue ought not to be allowed together, and the latter ought to be struck out; this is,

however, subject to exception if plaintiff satisfies the Judge that there is good reason for allowing both. *Mockford v. Taylor*, C.P. 352

— Averment of general performance. See Debtor and Creditor.

— Inconsistent counts. See Payment into Court.

— Variance. See Venue.

— See Equitable Plea. Libel.

POLICE DISTRICTS—The Quarter Sessions, under section 27. of 3 & 4 Vict. c. 88, have power to constitute a single parish a separate police district. *Ex parte Knowling*, Q.B. 120; M.C. 68

POOR LAW—Grounds of appeal, when to be delivered. Right of adjournment. Discretion of Justices. Practice of adjourned Sessions. Statutes 4 & 5 Will. 4. c. 76. ss. 79. and 81. and 11 & 12 Vict. c. 31. *R. v. the Justices of Sussex*, Q.B. 120; M.C. 69

— Irremovability. Constructive residence. *R. v. Guardians of Stourbridge Union*, Q.B. 224; M.C. 179

POOR-RATE—Rateable value. Deductions allowed for sewers-rate. *R. v. Halldare*, Q.B. 24; M.C. 17

— Railway. Railway occupation. Easement. Running powers. *Midland Rail. Co. v. the Overseers of Badsworth*, Q.B. 61; M.C. 25

— Rateability of County Lunatic Asylum. *R. v. the Overseers of the Parish of Fulbourn*, Q.B. 152; M.C. 106

— Rateability of unused mill as warehouse. *Harter v. the Overseers of the Township of Salford*, Q.B. 255; M.C. 206

— Rateable value of tied public-houses and brewery. Small Tenements Act. *The Overseers of the Poor of the Parish of Sunderland-near-the-Sea v. the Guardians of the Sunderland Poor-Law Union*, C.P. 200; M.C. 121

— The occupation of property which is liable to be rated under the 1st section of the 43 Eliz. c. 2. is an occupation yielding or capable of yielding a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain the property in a state to command such rent, and it is not necessary that the occupation should be beneficial to the occupier, so that trustees, who are, in law, tenants and occupiers of valuable property upon trust for charitable purposes, such as hospitals or lunatic asylums, are rateable, notwithstanding that the buildings are actually occupied by paupers who are sick or insane. The only occupiers exempt from the

operation of the act are the Sovereign, because he is not named in the statute, and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself; and the only ground of exemption from the statute is that which is furnished by the above rule; and, consequently, when property yielding a rent above what is required for its maintenance is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the Government of the country, and are, therefore, to be deemed part of the use and service of the country. *Jones v. the Mersey Docks and Harbour Board. The Mersey Docks and Harbour Board v. Cameron* (House of Lords), C.P. 372; 35 Law J. Rep. (N.S.) M.C. 1

— See Parliament.

POWER—Leasing power in Estate Act. See Statute, Construction of.

PRACTICE—Though it is a matter of discretion whether a Judge at chambers will order an attorney to disclose the name and place of abode of his client, under the Common Law Procedure Act, 1858, s. 7, the motives of the party making the application ought not to be narrowly inquired into; and it is not sufficient to deprive the party of his right to such information, that he will thereby be enabled to enforce some other right against the party whose name and abode he seeks to obtain. *Cox v. Bockett*, C.P. 125

— The Court refused to interfere with an order made by a Judge (under the 40th section of the Common Law Procedure Act, 1852,) for consolidating two actions, in one of which the husband claimed damages for injury done to his house and trade, while in the other both the husband and wife claimed for injury to the wife, and the husband also claimed for consequential damage to himself. *Hemstead v. the Phoenix Gas Co.*, Ex. 108

— See New Trial. Pleading.

PREROGATIVE OF THE CROWN—Exemption from wharfage duties. *The Mayor, Aldermen and Burgesses of Weymouth v. Nugent*, Q.B. 121; M.C. 81

— See Poor-Rate.

PRESCRIPTION ACT—Rights in gross are not within the Prescription Act, 2 & 3 Will. 4. c. 71. *Shuttleworth v. Le Fleming*, C.P. 309

— See Common. Custom. Water and Water-course.

PRINCIPAL AND AGENT—The corporation of Oxford, to whom certain open land belonged, were in the habit of allowing annual races to be held upon part of it, under the management of a committee. Before the races, plaintiff, an auctioneer issued an advertisement—"Oxford

Races. The ground for booths, &c. will be let by auction by Mr. J. F. (the plaintiff), on Monday next. Conditions for letting standings for booths, &c. The highest bidder to be the taker, and he shall, immediately the lot is knocked down, give the number of feet required, and pay for the same immediately after the letting." Defendant was the highest bidder for a lot of the land, and took possession of and occupied it during the races, without having previously paid for it. Plaintiff having brought an action in his own name for the hire of the land, it was held, there was evidence on which the jury might find the contract was with plaintiff himself. *Fisher v. Marsh*, Q.B. 177

— Plaintiff placed goods in the hands of H. to sell in his own name, and defendants bought them of H. through C, their broker. Defendants did not know that the goods belonged to plaintiff, but C. did, from having been previously in the employ of H, but not from anything which was communicated to him while acting as defendants' broker in the transaction. It was held, reversing the judgment of the Court of Common Pleas, that defendants were affected by such knowledge of their broker, and were therefore not entitled to set off a debt due to them from H. against plaintiff's claim for the price of the goods. *Dresser v. Norwood* (Ex. Ch.), C.P. 48

— D, a merchant in London, was in the habit of shipping salt for exportation at the port of Liverpool. He usually employed plaintiff to purchase the salt, and plaintiff shipped it, taking receipts in his own name from the mate for each delivery, and when the cargo was complete, taking bills of lading in his own name, which he remitted to D, in exchange for D.'s acceptances for the price of the salt. Plaintiff was paid no commission, but he charged D. an advance on the price of the salt. On the present occasion D. had chartered a ship to load a full cargo of salt for Calcutta, and plaintiff had placed on board her, in accordance with instructions from D, 1,000 tons of salt which he had purchased for that purpose, and for which he had taken the mate's receipts in the usual course. When this quantity had been placed on board D. stopped payment, and plaintiff then ceased loading, and demanded bills of lading for the salt already on board in his own name. Defendant, the shipowner, refused to allow them to be given and filled up the ship, and sent her with the salt to Calcutta. The jury found that when plaintiff put the salt on board he did not intend to pass the property therein to D, but to retain it himself. It was held this was the proper question for the jury, and that on this finding and these facts there was a conversion of the salt by the defendant at Liverpool. *Falke v. Fletcher*, C.P. 146

— An agent who is intrusted to sell land for his principal at a commission, if he become the purchaser, is not entitled to any remuneration. *Salomons v. Pender*, Ex. 95

— See Contract. Set-off.

PRINCIPAL AND SURETY—Guarantie held to be continuing notwithstanding a mortgage-deed as collateral security. *Bingham v. Corbitt* (Ex. Ch.), Q.B. 37

— Discharge of the surety by giving time to the principal. Deed giving time so as to release the principal. *Bailey v. Edwards*, Q.B. 41

— Time given to principal debtor. See Merger. Guarantie.

— See Guarantie. Equitable Plea.

PRISONER—Discharge. See Attorney and Solicitor.

PRISONS—Classification of prisoners. Order of Quarter Sessions. Warrant. *R. v. Colvill*, Q.B. 165; M.C. 187

— See Gaol.

PRIVILEGED COMMUNICATION—In an action of slander, laying special damages, it was proved that plaintiff, a trustee of a charity, asked C, by whom he was employed as bailiff, to obtain signatures to a protest against his being turned out of the trusteeship. C. asked defendant for his signature, which defendant refused; and on being pressed to give his reasons, said that he would not keep a big rogue like plaintiff in the trust; and he explained the reasons for his opinion, which were that plaintiff had left the parish under discreditable circumstances, and without settling with his creditors, including defendant. He also added, that he was surprised that C. kept such a man on with his son. The whole of what was said about plaintiff's character was said with reference to the discussion whether it was proper that he should be continued as a trustee of the charity. In consequence of what defendant said, C. dismissed plaintiff from his employment. The jury found that defendant had not acted with malice. It was held that, assuming that the words were *bona fide* spoken with reference to the propriety of taking steps to retain plaintiff in the trusteeship, as they were pertinent to the question whether he was fit to be trusted or not they were to be regarded as a privileged communication, and therefore that defendant was entitled to have the verdict entered for him. *Coveles v. Potts*, Q.B. 247

PUBLIC HEALTH ACT, 1848—Powers of levelling streets. *Cary v. the Local Board of Health of Kingston-upon-Hull*, Q.B. 40; M.C. 7

— The Public Health Act, 1848 (11 & 12 Vict. c. 63.) s. 149, enacts that whenever the consent, sanction, approval, or authority of the Local Board of Health is required by the provisions of the act, the same shall (in the case of a non-corporate district) be in writing under their seal and the hands of five or more of them. It was held, this enactment applied to a general district rate made by the board, and that the want of the seal and signatures was fatal to the validity of the rate. *Semble*—that one general district rate may be made under section 89. to

include both past and future expenses, if the amount of each is distinguished in the estimate. *Quare*—what is the consequence of an insufficient compliance in the estimate with the requirements of section 98. *R. v. the Local Board of Health of Worktop*, Q.B. 256; M.C. 220

— See Arbitration. Sewers.

RAILWAY—Superfluous lands. See Lands Clauses Consolidation Act.

— See Negligence.

RAILWAY AND CANAL TRAFFIC ACT. See Carriers by Railway.

RAILWAYS CLAUSES CONSOLIDATION ACT—The effect of section 47. of the Railways Clauses Consolidation Act, 1845—which enacts, that if a railway crosses any turnpike or public carriage-road on a level, the company shall erect and maintain sufficient gates across the road on each side of the railway, and shall employ proper persons to open and shut the gates, which shall be kept constantly closed across the road, except during the time when horses, carriages, &c., passing along it, have to cross the railway, and the person having the care of the gates shall, under the penalty of 40s., cause them to be closed as soon as the horses, &c. have passed through,—is to make the road a highway only when the gates are opened by one of the company's servants; and if, there being no servant there, after waiting a reasonable time, a passenger open the gates, and attempt to pass through with his horse and carriage, and damage ensue to him from the gates swinging to, he is committing an illegal act, and the company are not liable for the damage. *Wyatt v. the Great Western Rail. Co.*, Q.B. 204

ROGUE AND VAGABOND. See Gaming.

SALE OF GOODS—A. bought coal of B. to be shipped in a ship chartered by A. payment in cash against bill of lading in the hands of B.'s agent. Before shipment A. sold to plaintiff, and at the time of both sales the coal was unascertained. The coal was shipped, and three bills of lading signed for delivery to A. or order; one only was stamped and retained by B, another was sent to A. Not being paid, B. sent the stamped bill of lading to defendant and the captain delivered the coal to him. It was held, plaintiff had no right of action against the defendant. *Moakes v. Nicholson*, C.P. 273

— Defendants entered into a contract with G. as follows: "21st of September 1864. Sold to G. the oak timber offered to him at the prices stated in his letter of the 12th of September, viz., trees of 60 feet and upwards at 2s. 8d. per foot; trees under 60 feet 2s. 5d. per foot, delivered to boats. The above to be 12 inches girth and upwards; and two coffin logs at 4s. per foot. Payment, 100l. by bill at one month, and balance by bill at four months from measurement." The timber had been brought by de-

defendants to certain wharves belonging to the Herefordshire Canal Company. On the 7th of October G.'s agent measured the timber, marked it and had it "squared," paying 5*l.* to the persons employed. On the 15th of October G. gave a 100*l.* bill at one month, which was paid, and two other bills, one for 100*l.* and the other for 75*l.* at four months. While these last bills were running G. became insolvent and made an assignment of his estate to plaintiffs as trustees for the benefit of creditors; defendants took possession of the timber and claimed to retain it as unpaid vendors. It was held, in an action by plaintiffs, the Court having power to draw inferences of fact, that there was a transfer of the possession of the timber to G, the vendee, and that the vendors had no lien for the price. *Cooper v. Bill*, Ex. 161

— When the property passes. See Mortgage.

— See Damages. Frauds, Statute of. Goods Bargained and Sold. Warranty of Title.

SALMON FISHERY ACT—"Fixed engine;" net fixed to the soil. *Thomas v. Jones*, Q.B. 60; M.C. 45

SECURITY FOR COSTS—Increase of security, when allowed. *R. v. the Southampton Harbour Commissioners*, Q.B. 164

SET-OFF—If a person buys goods of another whom he knows to be acting as agent, though he does not know who the principal is, he cannot set off a debt due to him from such agent in an action by the principal for the price of the goods. *Semmens v. Brinsley*, C.P. 161

SETTLEMENT. See Statute, Construction of.

SEWERS—A natural stream, supplied by natural and artificial drainage of cultivated soil, belonging to private individuals, was cleared out and partially widened and deepened by Commissioners acting under a private inclosure act, powers being given to them to do so at the expense of the proprietors. In its passage to the river, into which it ultimately flowed, it passed through a town, and received the drainage of two or three inhabited houses. *Semble*—That this stream was not a sewer, within the meaning of the Public Health Act, 1848; but even if it was, held that it came within the exception in section 43, and that it was not vested in the local board of health, and that they were not liable to cleanse and repair it. *R. v. the Local Board of Health of Godmanchester*, Q.B. 13

— Plaintiff was owner of land through which the P. river flowed, such land being beyond the district of the board of works for L. The board executed drainage works within their district, by means of which the sewage was carried into a stream which flowed into the P. river. The sewage had for many years been carried into the stream, but only so as to pollute the water in an inappreciable degree. The result of the new works of the board was to do substantial injury to plain-

tiff. It was held, by the Court of Queen's Bench, that under the 86th section of the "Metropolis Local Management Act, 1855," plaintiff had a right to obtain compensation for the damage done in the manner provided by the act, and, therefore, that the board were not liable in an action. But it was held by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, that the local board were not authorized by any provision of the Metropolis Local Management Act, 1855, to carry the sewage of the district by means of a new system of sewers into plaintiff's stream, and that plaintiff was entitled to maintain an action against them for the nuisance. *Cator v. the Lewisham Board of Works*, (Ex. Ch.). Q.B. 74

— Sewerage expense how raised: rateable value. *Pew v. the Metropolitan Board of Works*, Q.B. 160; M.C. 97

— By 11 & 12 Vict. c. 112. s. 38. power was given to the Metropolitan Commissioners of Sewers to construct sewers under any lands whatsoever, "making compensation for any damage done thereby," and by other clauses of that act the Commissioners were empowered to levy rates retrospectively, as well as prospectively, for the payment of such compensation. By the Metropolis Local Management Act (18 & 19 Vict. c. 120.) the powers of such Commissioners are put an end to, and the Metropolitan Board of Works is to stand in their place; and by section 148. the property vested in such Commissioners is transferred to the Board of Works, and all persons who owe money to the Commissioners are to pay the same to such board, and all monies recoverable from the Commissioners are to be recoverable from the board; and by section 181. "all mortgages, annuities, securities, and other debts and liabilities," which before the determination of the 11 & 12 Vict. c. 112. might be charged on or payable out of any rates authorized to be levied thereunder, are to continue in full force and be a charge on the districts in which such rates would have been authorized to be levied. It was held, that a liability of such Commissioners to make compensation for land taken by them for a construction of a sewer under the powers of the 11 & 12 Vict. c. 112, was transferred by the 18 & 19 Vict. c. 120. to the Metropolitan Board of Works, and was, therefore, recoverable from such board, although at the time of the determination of the powers of the Commissioners the existence of such liability was not known, and no claim was made for compensation until several years afterwards. *Re the Arbitration of Pettitward v. the Metropolitan Board of Works*, C.P. 301

— A vestry of a parish mentioned in Schedule (A.) to 18 & 19 Vict. c. 120, having resolved, under section 73, that the drainage of several houses into an old sewer was insufficient, and that such sewer should be discontinued, gave notice to the owners of such houses to make new drains into a new sewer, and upon default of the owners, the vestry made them themselves.

They then attempted to recover the expense from the house-owners (by summons against the occupier under section 96. of 25 & 26 Vict. c. 102.) before a Magistrate, on the ground that they were acting under section 73. The Magistrate decided that the facts brought the case within section 69, and refused to make any order. It was held, that there was nothing to shew that the drains were insufficient; that the vestry could not by their finding conclusively bring the case within section 73; that it was competent for the Magistrate to refuse his order on the ground that the case fell within section 69; and that his decision on this matter (which was partly a question of law and partly one of fact) was right, as the facts shewed that the new drains were rendered necessary by the draining into the new sewer, and not by the insufficiency of the old drains. *The Vestry of St. Marylebone v. Viret*, C.P. 312; M.C. 214

SHERIFF—Plaintiff having recovered judgment against D. for 22l. 5s. 10d., sued out a *ca. sa.*, and had him arrested by defendant the sheriff. B. had previously entered into a deed, which purported to be a deed of arrangement with his creditors under the Bankrupt Act, 1861, but which was in fact an invalid deed. It was nevertheless duly registered, and the Chief Registrar gave a certificate to that effect to B, with a notice that the certificate was available as a protection in bankruptcy. The sheriff allowed B. to go at large, and made a return that he was entitled to protection from arrest, and that he was not found in his bailiwick. An action being brought against the sheriff for making a false return, and also for an escape, it was held, by *Crompton, J., Mellor, J. and Shee, J.*, that, under the 198th section of the Bankruptcy Act, 1861, the certificate was an answer to the action; but it was held, by *Cockburn, C.J.*, that the deed being invalid, the sheriff was liable. *Lloyd v. Harrison*, Q.B. 97

SHIP AND SHIPPING—Powers of licensing pilots by Corporations of London and Leith Trinity Houses. *Hossack v. Gray*, Q.B. 256; M.C. 209

— A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either the one or the other, but he cannot after he has sued the one to judgment maintain another action against the other. *Priestly v. Fennie*, Ex. 172

— See Bill of Lading. Charter-Party. Merchant Shipping Act. Marine Insurance.

SLANDER. See Privileged Communication.

SOLICITOR AND CLIENT—On the occasion of settling personal property upon a marriage, it is the professional usage for the lady's solicitor to draw the settlement, and for the husband to pay for it, although the only property settled is the husband's. And where nothing has taken place to exclude such usage the husband is

legally liable, in the event of the marriage taking place, to pay the lady's solicitor his costs of the settlement if the retainer was by the lady, or else to indemnify whoever on her part properly incurred expense by retaining a solicitor to prepare such settlement. An infant, who has no property of her own to settle, may contract with a solicitor for the preparation of a marriage settlement by her intended husband, under which proper provision is made for her benefit, as such may be considered a necessary suitable to her estate and condition. *Helps v. Clayton*, C.P. 1

STAGE PLAY—Dramatic representation, with actors not bodily visible to the spectators. *Day v. Simpson*, C.P. 258; M.C. 149

STAMP—A notarial instrument in the form of Schedule H. given by section 12. of 21 & 22 Vict. c. 76. is correctly stamped with a one-shilling stamp. *Eglinton v. Inland Revenue*, Ex. 225

STATUTE, CONSTRUCTION OF—By a private Estate Act of 1720 (6 Geo. 1. c. 29.) a family settlement of certain lands was confirmed, with a restriction on alienation; and a power to grant leases "at the usual and accustomed rents, boons and services," was conferred on each tenant in tail when in possession under the limitations of such settlement. By section 1. of an act of 1803 (43 Geo. 3. c. 40.) a portion of these lands was vested in trustees for sale, "freed, released and discharged, and absolutely acquitted, exempted and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisos, limitations and agreements, in and by," *inter alia*, the said Estate Act of 1720 created and declared, except only such leases as had been theretofore made in pursuance of the powers contained in the said settlement and act, and the trustees were to re-invest the proceeds of the sale in the purchase of other lands to be settled to the same uses and subject to the same powers as the lands so sold. The 7th section of the act of 1803 enacted, that until sale the said lands should be held and enjoyed, and the rents, issues and profits thereof should be received by such person as would have been entitled thereto in case such act had not been made. It was held, the power of leasing given by the Estate Act of 1720 was destroyed as to the lands vested in the trustees for sale by the act of 1803, with the exception only of the leases which had been then made; and therefore a lease made in 1838, in conformity with such power, was void as against the heir, notwithstanding section 7. of the act of 1803, and the fact that the lands had never been sold. *The Earl of Shrewsbury v. Keightley*, C.P. 322

— By a private act of parliament certain lands were, in 1720, settled on those who should be Earls of Shrewsbury. In 1803 a portion of these estates, by another act, were vested in trustees for sale, freed from the

uses, &c. of the prior act, with a provision that till sale they should be held for the benefit of those who but for the act would be entitled. In 1843, by a third act, which provided for the sale of another portion of the above estates, it was also provided that those to whom the estates limited by the first act were successively limited when by virtue of the limitations they came into possession or were entitled to the profits of the lands which should for the time being stand limited and settled to such of the uses of the said first act as should then be subsisting or capable of effect, might lease them in a particular way. It was held, on the construction of the acts, that this power of leasing extended to lands vested in trustees under the second act and still unsold. *The Earl of Shrewsbury v. Beazley*, C.P. 328

STOPPAGE IN TRANSITU. See Sale of Goods.

SUCCESSION DUTY—Effect of tenant in tail in possession acquiring the fee and dying before payment of the instalments. *Attorney General v. Lilford*, Ex. 44

— Duty payable on succession to unproductive land, and mode of assessing and time of estimating the duty. *Attorney General v. the Earl of Sefton* (House of Lords), Ex. 98

— The 2nd section of the Succession Duty Act applies not merely to cases where the title accrues at death, but also to cases where the title has accrued before the act, but is made an interest in possession at once, or after an interval on a death occurring after the act. *Attorney General v. Gell*, Ex. 145

— See Domicil.

SUNDAY TRADING—Sale of fermented liquors within prohibited hours. "Traveller." *Fisher v. Howard*, Q.B. 61; M.C. 42

— Refreshment to travellers. *Taylor v. Humphries*, C.P. 101; M.C. 1

THEATRE. See Stage Play.

TIME—Computation of. See Marine Insurance.

TOLL—Steam ferry-boat. Soldiers. Mutiny Act, 1864. *Ward v. Gray*, Q.B. 164; M.C. 146

— A bridge erected and roads made by a company of proprietors, under the provisions of 36 Geo. 3. c. cxiv., on which the company are authorized to take toll, subject to exemptions provided for in the act, are a "turnpike-bridge" and "turnpike roads" within 2 & 3 Vict. c. 93. and of 3 & 4 Vict. c. 88. s. 1; and, therefore, the exemption from tolls granted by the last-mentioned act to police constables extends to such bridge and roads respectively. *Longland v. Andrews*, and *Longland v. Doling*, Ex. 90

TRESPASS. See Action. Game. Negligence.

TRESPASS FOR MESNE PROFIT—A county court order for giving up possession of premises, made against a person holding under the tenant, under 19 & 20 Vict. c. 108. s. 50, is not conclusive evidence of title in a subsequent action against him for mesne profits. The Court refused to go into the question of improper rejection of a document, on the ground that it did not appear by the Judge's notes that the document had been formally tendered in evidence at the trial. *Campbell v. Loader*, Ex. 50.

TROVER—Plaintiff when a young child resided with her aunt in the house of defendant's testator, where the aunt lived as housekeeper, and plaintiff was almost adopted into testator's family. The aunt was a married woman living apart from her husband, who had deserted her, and previously to her death she gave plaintiff some articles of jewelry and apparel; part of these plaintiff gave testator to keep for her, and the rest she placed in her own boxes in testator's house. Upon the aunt's death her husband once called and claimed her effects, but testator repudiated the husband's right, and the husband never afterwards claimed them or interfered further in the matter. When testator died, which happened whilst plaintiff was away at school, defendant as executor took possession of the articles which had been so given to plaintiff, and refused to restore them to her. It was held, plaintiff was in possession so as to be entitled to maintain an action against defendant for these articles; and that it was not competent to defendant to set up the right of the aunt's husband as an answer to the action. *Bourne v. Fosbrooke*, C.P. 164

— Wine, the property of plaintiff, being in the warehouse of defendant, a wharfinger, notice from the Lord Mayor's Court was served on defendant, attaching in his hands all the goods of H, from whom plaintiff had purchased the wine, and at the same time defendant was informed that the attachment had reference to the wine. Plaintiff demanded the wine from defendant's clerk, producing the delivery warrant which had been issued by defendant to B, a former owner, and indorsed by him to H, and by H. to plaintiff. Defendant's clerk said that there was a difficulty in consequence of the attachment, and referred plaintiff to defendant, whom he could not find. Plaintiff's attorney thereupon wrote, demanding the wine before eleven o'clock the next morning. Defendant's attorney replied, asking for time for inquiry; but a writ was issued before that answer was received. It was held, there was some evidence of a conversion; that the conduct and position of defendant was evidence from which the jury might infer whether or not he had been guilty of a conversion of the wine, and that before arriving at a conclusion it was proper for the jury to consider whether defendant had a *bond fide* doubt as to plaintiff's title to the wine, and whether a reasonable time for clearing up that doubt had elapsed before the action was commenced. *Pillot v. Wilkinson* (Ex. Ch.), Ex. 22

— Demand. See Bill of Sale.

— Property. See Game.

— See Principal and Agent.

TURNPIKE. See Highway. Toll.

USE AND OCCUPATION—Occupation under contract with agent. See Principal and Agent.

VARIANCE. See Contract. Venue.

VENDOR AND PURCHASER—In a deed of conveyance in fee from defendant to plaintiff of a house and premises then in the occupation of defendant, "together with all lights, liberties, privileges, easements and appurtenances to the premises belonging or in anywise appertaining or usually held and enjoyed therewith, or deemed or taken as part, parcel or member thereof," the defendant covenanted "that notwithstanding any act, deed, matter or thing whatsoever made, done or permitted by him, or any person claiming through him, he, the defendant, then had good title to convey the messuage and premises with the appurtenances." Some years before this conveyance defendant, being then owner in fee and occupier of the same house, &c., in the same condition, entered into a contract in writing with the owners of the adjoining premises that the cornice and spouts and three windows of defendant's house overlooking the adjoining premises were encroachments, and agreed to pay an annual sum of 5s. so long as he was permitted to use the said cornice, spouts and windows. Defendant had never acquired any easement in respect of the cornice, spouts or windows by twenty years' user. It was held (affirming the judgment of the Court of Queen's Bench), that there was no breach of covenant for title by defendant, for that he only conveyed the premises so far as he was possessed or could convey them, and that his qualified covenant for title limited his covenant to that which he actually had, or but for any act of his would have had, and that he had not and never would have acquired any easement in the windows, &c., inasmuch as the adjoining owners would have interfered to prevent him but for his acknowledgment. *Thackeray v. Wood* (Ex. Ch.), Q.B. 226

— Construction of conditions of sale as to right to recover interest on deposit and expenses of investigating title. *Gardom v. Lee*, Ex. 113

— Unpaid vendor's lien. See Sale of Goods.

— See Easement.

VENUE—An action for damage arising from a public nuisance on real property, as on a public highway, is a local action; and if there is no local description in the body of the declaration, the county in the margin must be taken as repeated in the declaration, and it is a material

allegation; and on a plea traversing the existence of the highway, proof that the highway is in another county is a fatal variance and ground of nonsuit. *Richards v. Locklin*, Q.B. 225

WAGER. See Gaming.

WARRANTY OF TITLE—On the sale of goods there is a warranty of title, if the seller, at the time of the sale, either by words or conduct, affirm the goods to be his. *Richhols v. Bannister*, C.P. 105

WATER AND WATERCOURSE—A plaintiff, who was the occupier of certain clay-works, had enjoyed as of right for twenty years, without interruption, a watercourse, called the clear-water leat, which brought water to such works. Part of this water had been collected from natural springs, from whence it had been brought over defendant's land by an artificial channel made by plaintiff's predecessor at the clay-works. The rest of the water had been obtained by plaintiff from a stream brought artificially to the surface by the operation of miners who had not permanently abandoned their right to the same. Plaintiff claimed also a prescriptive right by twenty years' uninterrupted user to another watercourse, called the foul-water leat. There was evidence at the trial that plaintiff's predecessor at the clay-works had leave from the tenant and owner of the land which had since become defendant's, to cut such watercourse from a brook down to the clay-works on the terms of paying a peppercorn rent, and that such tenant might stop it whenever there was a scarcity of water for his own purpose. It was held, that as to such foul-water leat there was evidence on which a jury might find that plaintiff's enjoyment thereof was not under a claim of right, but precarious, and that, therefore, a twenty years' user by the plaintiff under such circumstances, though without interruption, was not an enjoyment as of right within the Prescription Act, 2 & 3 Will. 4. c. 71. Held, also, that as to that part of the water in the clear-water leat which had an artificial origin from mining, plaintiff could not by twenty years' user acquire an easement therein under 2 & 3 Will. 4. c. 71, but that as to that part which had been collected from natural springs plaintiff had, as against defendant, acquired by user a right to its flow, notwithstanding that the land in which such supply was obtained was within the district of tin-bounds, and subject therefore to the contingent rights of the owners of such bounds, inasmuch as such owners have by custom a right to use all water in their district for mining operations. Held, further, that plaintiff as such occupier of the clay-works to which the water was brought, had a sufficient interest to enable him to maintain his claim to a prescriptive right to the flow of such water. *Gaved v. Martyn*, C.P. 353

WEIGHTS AND MEASURES—Weighing Machine. Incorrectness under 5 & 6 Will. 4. c. 63. s. 28. *Great Western Rail. Co. v. Baile*, Q.B. 61; M.C. 31

WILL—By his will testator devised the C. estate to the use of his eldest son J. for life, with remainder to his first and other sons in tail male, with remainder to his (testator's) second and third sons R. and J. and their issue male, with remainder to every other son of testator in tail male, with remainder to the first and other sons of his eldest son J. in tail general, with similar limitations in favour of the sons of testator's second and third and other sons, with remainder to the use of the first and other daughters of his eldest son J. in tail male, with similar limitations in favour of the daughters of testator's second and third sons, with remainder to the use of the first and other daughters of his eldest son J. in tail general, with similar limitations in favour of the daughters of testator's second and third sons, with remainder to the use of all and every testator's sons to be thereafter born successively in tail general, with remainder to the use of his eldest daughter E. for life, with remainders over. The will, by a shifting clause, directed that so often as the G. estates should come to any of his sons or daughters or their issue being in possession of the C. estate, then that the persons next in remainder, according to the limitations in the will, should be entitled to and come into possession of the C. estate for the estate and interest thereby limited to him or her respectively, and so from time to time as often as the event might happen, in such manner and as if the person so becoming possessed of the G. estates had died or was then dead without issue. Testator's eldest son J. came into possession of the G. estates, and by a decree of the Court of Chancery it was declared that testator's second son R. became entitled to the C. estate for life with remainder to his first and other sons in tail male, with such remainders over as in the will mentioned. R. dying without issue, was succeeded in the C. estate by testator's third son, who also died without issue. There being no other sons, testator's eldest daughter E. then claimed the C. estate in preference to the eldest son of J., and contended that the will was to be construed as if J. had died without issue. It was held, affirming the judgment of the Court of Exchequer Chamber, that the shifting clause did not operate to prevent the eldest son of J. from taking the C. estate under the limitation in remainder to his first and other sons in tail general in priority to testator's daughter E. *Quare*—as to the cor-

rectness of the decree in Chancery. *Jellicoe v. Gardiner* (House of Lords), C.P. 282

— C, by his will, gave his estate to his grandson T. C. for life, with remainder to "the first son of the body of the said T. C. severally and successively in tail male" of the name of C; and for want of such lawful issue of that name, either by his said grandson T. C. or his son J. C, then amongst his "daughters and their children" in fee. It was held, that estates tail were given to the first and other sons of T. C, and that the gift over to the daughters and their children was a gift to a class, and that a child of a daughter who died before the date of the will was not within the gift. *Semble*—that estates tail by implication were given to T. C. and J. C. after the estates tail of the sons of T. C. *Parker v. Tootal* (House of Lords), Ex. 198

WINDING UP OF COMPANIES—If a joint-stock company, registered under 7 & 8 Vict. c. 110, while it is in debt, obtains registration as a company with limited liability under 19 & 20 Vict. c. 47, and proceedings are afterwards taken to wind it up, the liquidators appointed under the last-mentioned act may make a call upon the old shareholders for a sum per share exceeding the amount of the sum remaining unpaid on such share, and for any sums per share that may be requisite to discharge the old debt, as if the company had been registered as one of unlimited liability. *Garnett and Moseley Gold Mining Co. v. Sutton* (Ex. Ch.), Q.B. 118

WITNESS—Upon the hearing of an information, under 5 Geo. 4. c. 83. s. 3, against a man for neglecting to maintain his wife, whereby she becomes chargeable, the wife is not a competent witness against her husband. *Reeve v. Wood*, Q.B. 24; M.C. 15

— See Local Marine Board.

WORDS—"Assigns," C.P. 113

— "Forthwith," C.P. 241

— "Injury," Q.B. 5

— "Levant and couchant," Ex. 66

— "Ordinary luggage," C.P. 259

— "Owner," C.P. 249

— "Sewer," Q.B. 13

— "Void," C.P. 279

Errata and Notanda, Law Journal, Vol. 34, 1865.

Court of Queen's Bench, page 7, column 1, line 2 from the top, *dele* "Arbitration."

Court of Common Pleas, page 263, column 2, lines 4 and 5 from the top, for "ordinarily known as hunting, shooting, is fishing and sporting," read *is ordinarily known as hunting, shooting, fishing and sporting*.—Also, page 270, column 2, line 30 from the top, for "Lewens" read *Lewers*.

Court of Exchequer, page 14, column 1, line 12 from the top, for "Dingwell v. Edwards," read *Clapham v. Atkinson*; and last line, for page "161" read *81*.

Magistrates' Cases, page 16, column 1, line 27 from the top, for "formal" read *personal*.

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